EUI DEPARTMENT OF LAW

The Concepts of a Legal Sanction and Sanction Regime

– A EU Blueprint for International Criminal and Financial Law and a Constitutional Challenge for the EU Financial Sectors

Peter Sand-Henriksen

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence - April 3, 2023

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Department of Law – LL.M. and Ph.D. Programmes

I Peter Sand-Henriksen certify that I am the author of the work 'The Concept of Sanctions – Constitutional Challenges and Multilevel Governance of EU Financial Sanctions and Sanctions Regimes' I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

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PREFACE

SUMMARY

This Thesis aims to define the concept of a legal 'sanction' and develop the sanction theory and principles that are connected with this definition. Part I of this Thesis therefore establishes the theoretical, constitutional and international architecture for sanctions, whereby the philosophical and traditional views on punishment from the old theoretical discussions of the justification for punishment is providing the broader context for the legal concept of sanctions; the case-law of European Court of Human Rights on Articles 6 and 7 and Article 4 of Protocol 7 to the European Convention of Human Rights (ECHR) is providing the main foundation for establishing the constitutional concept of sanctions by providing the architecture and principles for constructing a legal concept of sanctions; and the international standards and principles on sanctioning which the EU Member States has agreed to comply with under the Financial Sector Assessment Program, a task jointly charged on the International Monetary Fund and World Bank, is providing the international aspects on financial sanctions. The conclusions made in Part I will be applied in Part II of this Thesis, which will discuss the EU regimes of sanctions in the financial sector by first establishing the concept of 'sanction regimes' and determine its structures and principles. Second, the general requirements for the imposition of sanctions will then be established and discussed just as the constitutional framework will be applied in order to assess the classification of the EU financial law. Third, the specific types of EU financial sanctions will then be analysed and discussed by the application of the Engel-test and the principles establishing the constitutional concept of sanctions. Finally, the last Chapter will bring it all together and answer the research questions examined in this Thesis.

LIST OF ABBREVIATIONS

AIFMD	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010. OJ L 174, 1.7.2011, p. 1-73.
AMLD IV	Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. OJ L 141, 5.6.2015, p. 73-117.
AMLD-CRIM	Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. OJ L 284, 12.11.2018, p. 22-30.
BCBS	Basel Committee on Banking Supervision
BCP	Basel Core Principles for Effective Banking Supervision
BIS	Bank for International Settlements
BR	Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as bench-marks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014. OJ L 171, 29.6.2016, p. 1-65.
BRRD	Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council. OJ L 173, 12.6.2014, p. 190-348.
CFD	Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. OJ L 127, 29.4.2014, p. 39-50.
CJEU	Court of Justice of European Union
CRAR	Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies. OJ L 302, 17.11.2009, p. 1-31.
CRD	Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC. OJ L 176, 27.6.2013, p. 338-436.
CRR	Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012. OJ L 176, 27.6.2013, p. 1-337.
EBA	European Banking Authority
ECB	European Central Bank
ECBSR I	Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions. OJ L 318, 27.11.1998, p. 4-7 (ECB/2014/19).
ECHR	European Convention on Human Rights of 4 XI 1950 as amended by Protocols Nos. 11 and 14, and supplemented by Protocols Nos. 1, 4, 6, 7, and 13.
ECtHR	European Court of Human Rights
EFSR	European Financial Sanction Regime

EIOPA	European Insurance and Occupational Pensions Authority
EMIR	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. OJ L 201, 27.7.2012, p. 1-59.
ESMA	European Securities and Market Authority
ESR	European Sanction Regime
EUCFR	Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, p. 1-6.
EU Communication on Sanction Regimes / EUCSR	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Reinforcing sanctioning regimes in the financial services sector, COM(2010) 716 final, Brussels, 8.12.2010.
FATF	The Financial Action Task Force
FATF Recommendations	International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation.
FATF Methodology	Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems.
FSB	Financial Stability Board
FSAP	Financial Sector Assessment Program
FSSA	Financial System Stability Assessment
GFC	Global Financial Crisis (2007-09)
IASR	Commission staff working paper, Impact Assessment, accompanying document to Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Reinforcing sanctioning regimes in the financial services sector, SEC(2010) 1496 final, Brussels, 8.12.2010.
IFD	Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2014/59/EU and 2014/65/EU. OJ L 314, 5.12.2019, p. 64-114.
IFR	Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulation (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) 806/2014. OJ L 314, 5.12.2019, p. 1-63.
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
IOSCO CDESR	Paper by IOSCO from June 2015 on "Credible Deterrence In The Enforcement of Securities Regulation."
IOSCO Principles	Objectives and Principles of Securities Regulation
IOSCO Methodology	Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation
ISSB	International Standard Setting Bodies
MAD I	Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). OJ L 96, 12.4.2003, p. 16–25.
MAD-CRIM	Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse. OJ L 173, 12.6.2014, p. 179-189.
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. OJ L 173, 12.6.2014, p. 1-61.
MiFID I	Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. OJ L 145, 30.4.2004, p. 1–44.

MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. OJ L 173, 12.6.2014, p. 349-496.
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012. OJ L 173, 12.6.2014, p. 84-148.
NFSR	National Financial Sanction Regime
NSR	National Sanction Regime
PR	Regulation (EU) 2017/1129 of the European Parliament and of the Council of 2014 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. OJ L 168, 30.6.2017, p. 12-82.
SRB	Single Resolution Board
SRMR	Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and Resolution Fund and amending Regulation (EU) No 1093/2010. OJ L 225, 30.7.2014, p. 1-90.
SSMFR	Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17). OJ L 141, 14.5.2014, p. 1-50.
SSMR	Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. OJ L 287, 29.10.2013, p. 63-89.
TD	Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC. OJ L 390, 31.12.2004, p. 38–57.
TEU and TFEU	The Treaty on European Union and the Treaty on the Functioning of the European Union. Latest consolidated version is from 01/03/2020. OJ C 202, 7.6.2016, p. 1–388.
UCITS	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities. OJ L 302, 17.11.2009, p. 32-96.

THE CONCEPTS OF A LEGAL SANCTION AND SANCTION REGIME

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Thesis Overview

PART I

Theory of Punishment and the Constitutional and International Architecture for Sanctions

PART II

Theory and Reality of the EU Regimes of Sanctions in the Financial Sector

PART III

Conclusion

Chapter Overview

TABLE OF CONTENTS

> "The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability (not only brains and knowledge and judgment, but also Sitzfleisch) to organize dispersed, fragmentary, prolix, and rebarbative materials. These are tasks that lack the theoretical breadth or ambition of scholarship in more typically academic fields. Yet they are of inestimable importance to the legal system and of greater social value than much esoteric interdisciplinary legal scholarship."
>
> Richard Posner, 'In Memoriam: Bernard D. Meltzer (1914-2007)' [2007] University of Chicago Law Review 435, 437.

§ 1. INTRODUCTION AND METHODOLOGY

1. Thesis Statement

Let us get right into it: (1) when a legal person qualifies for holding an authorisation to operate as a credit institution, an investment firm, or any other types of professional or commercial activities, and its authorisation is withdrawn, whereby the legal person is permanently prohibited from exercising the professional or commercial activities performed by credit institutions and investment firms, is that 'withdrawal' a sanction, and what if the withdrawal directly leads to the liquidation of the legal person formerly holding the authorisation? (2) Is a temporary or permanent disqualification of a legal person for practicing commercial activities a sanction, and how is it different from (1)? (3) What about a prohibition on exercising professional activities imposed on a legal person, is that a sanction, and how is it different from (1) and (2)? Then, (4) is a judicial winding-up of legal person ordered by the courts, whereby the legal person gets liquidated and deprived of its entire property and thus cease to exist as a legal person, a sanction and how is it different from any of the others (1)-(3)?

If you can identify any of these as legal sanctions, can you tell me what is the difference between any of these sanctions (1)-(4) *in reality*? Can you also tell me which of the four that is *not* a sanction and why? While you are at it, can you also tell me which *two* that are criminal sanctions and why? Also, which of the four is an administrative sanction and a so-called "supervisory power" and for which reasons? And, what is the difference between a 'criminal sanction', an 'administrative sanction' and a 'supervisory power', and how is it possible that one of the four can be an administrative sanction and supervisory power at the same time?

It will be necessary to proceed with similar questions for you: (5) is a prohibition on exercising professional activity imposed on a *natural person* a sanction, and will your answer alter any of your answers and explanations given to the previous questions relating to the legal persons above? (6) How can the removal of a member of the management body, or the entire

management body of a company, not be a sanction? (7) Why is it then that a temporary or permanent ban imposed on a natural person that prohibits the person from having managerial responsibilities in a company, is a sanction, and how is it different from (5) and (6)?

I have a need to be honest. For a very long time, I could not identify which ones that were legal sanctions, and even less so provide any explanation that would justify my reasons. Even if I did provide an explanation and stated well-argued reasons, I would not be able to tell you which criteria that were *decisive* in any argument, and even less so *why it is necessary that these criteria needs to have a certain authority*. This was a painful experience, and therefore also a humbling one. But most painful and humbling in one very particular regard: if I, as a lawyer, is a servant of the law and *justice*, and the imposition of punishment is an act of justice in its very core, then I found it troublesome that I was not capable to identify a punishment, and even more so the reasons and criteria that would make me able to identify a punishment. Why? – Because it implies very well that I did not knew my *master*.

The first step towards knowing my master was to consult the formal black letters of the legislation, in particular the provisions of EU financial law. After the outbreak of the global financial crisis in 2007-09, the EU legislators have adopted an enormous amount of laws and rules governing the EU banking and securities sectors. These laws have conferred a vast number of different types of legal powers on the European and national supervisory and sanctioning authorities in the EU financial system and to be applied against natural and legal persons. The types of powers falls into the following legal categories: ‘investigatory powers’; ‘supervisory powers’; ‘supervisory measures’; ‘early intervention measures’; ‘measures’; ‘powers’; ‘penalties’; ‘sanctions’; ‘administrative measures’; ‘administrative penalties’; ‘administrative sanctions’; ‘administrative pecuniary penalties’; ‘administrative pecuniary sanctions’; ‘administrative non-pecuniary penalties’; ‘administrative non-pecuniary sanctions’; ‘administrative pecuniary sanctions’; ‘administrative fines’; ‘non-criminal fines’; ‘criminal fines’; and ‘non-pecuniary criminal sanctions’. Such a legal gallery of weapons and armour have looked very beautiful and even fascinating to me. The problem with all these legal categories of powers is that when they are examined, in particular from a comparison that goes across the most important legislative and legal acts of EU financial law (see methodology below) and across their criminal and administrative law classification, you will find a number of possible contradictions, inconsistencies and incoherencies with respect to the placement of the specific legal powers within these legal categories. The problem is amplified when the specific legal powers found within a criminal law act is almost fully identical with respect to the nature, purpose and severity of

certain specific legal powers found within administrative law acts. The examples above on the powers referred to in (1)-(7) is just one example. Let me provide a last obvious one: how can a fine both be a 'criminal fine', an 'administrative fine', and a 'non-criminal fine' and what is their difference? – In fact, what is a fine, and how should it be legally defined? And how is a fine any different from any of the pecuniary sanctions referred to within these legal categories? – This Thesis will offer a legal definition of a 'fine', including a legal conceptualisation of fines, but the characterisation of the problems at hand still needs further description.

Any legal system committed to criminal justice shares a commitment of not to punish the innocent, and only to punish the guilty. Within the EU legal order there is also a shared commitment to offer stronger procedural guarantees to a natural or legal person in criminal proceedings in comparison to administrative proceedings. In this regard, another problem is already implied, that is, if some of the administrative sanctions are identical to the criminal sanctions, then the natural or legal person risks to be imposed criminal sanctions in administrative proceedings without the stronger procedural guarantees. Even within the ranks of the administrative powers there may be a different level of procedural protection attached to the different categories of legal powers, which also may result in a lower procedural protection. The inconsistencies and incoherencies thus brings about a number of concerns relating to the procedural protection of the natural and legal persons and their capability to prove their innocence. Very distinguished legal scholars have therefore also for quite some time, and more or less directly so in remarks here and there, already raised their scepticism and concern about this legal weapon gallery, hence questioning their validity and whether the legal powers are rightfully categorised and classified, and whether the classification of sanctions would stay true to a full blown scrutiny on the basis of the European Convention on Human Rights ('ECHR') and the Charter of Fundamental Rights of the European Union ('EUCFR').[1] Such a full-blown and comprehensive scrutiny has been missing. This PhD-Thesis is fully devoted to this main tasks from primarily an EU constitutional and human and fundamental rights perspective.

[1] Rüdiger Veil, *European Capital Markets Law* (Second edition, Hart Publishing 2017) 140 and 175; Niamh Moloney, *EU Securities and Financial Markets Regulation* (Third edition, Oxford University Press 2014) 1104; Marco Ventoruzzo and Sebastian Mock, *Market Abuse Regulation: Commentary and Annotated Guide* (1st edition., Oxford University Press 2017) 484 and 489; Marco Lamandini, David Ramos Muñoz and Javier Solana, 'Depicting the Limits to the SSM's Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection' (Banca D'Italia 2015) Quaderni di Ricerca Giuridica 79 97; Ester Herlin-Karnell and Nicholas Ryder, *Market Manipulation and Insider Trading: Regulatory Challenges in the United States of America, the European Union and the United Kingdom* (Hart Publishing 2021) 32; Raffaele D'Ambrosio, 'Due Process and Safeguards of the Persons Subject to SSM Supervisory and Sanctioning Proceedings' 11–20. See also D'Ambrosio R, 'The Legal Review of SSM Administrative Sanctions', Chapter 19 in Zilioli C and Wojcik (eds), 'Judical Review in the European Banking Union' (Edward Elgar Publishing 2021).

The problems still needs further description. By an examination of the most important legislative and legal acts belonging to EU financial law we find another problem. None of the legal categories of powers provided under EU financial law have any legal definition and they are mainly providing certain lists in which a number of different legal powers and sanctions are placed. The inconsistencies and incoherencies are thus often discovered by comparing the specific legal powers placed within one list with the legal powers placed within another, both within one specific legislative act and across a number of different legislative acts. A lot of attention and discussion is therefore devoted to conceptual clarification and definitions.

Another problem exists which respect to the three legal requirements to sanctions of effectiveness, proportionality and dissuasiveness. These three legal requirements are general in more than one sense. They are prescribed for the legal classes and categories of criminal sanctions, administrative sanctions, and administrative measures. At the same time, the effectiveness and proportionality requirements are also applicable for all the other types of legal powers that do *not* legally qualify as a sanction or administrative measure. However, there are no provision-based definitions of any of these three legal concept and requirements under EU financial law, and we may ask how sanctions or any other type of legal powers then should be able to satisfy these requirements? – A lot of attention and discussion must therefore also be devoted for conceptual clarification and definition of these three legal concepts, because they may carry the keys to unlock the different nature and character of the legal powers.

The last problem, but most important of them all, is a simple one, and it carries the main research question of this Thesis. As the reading and interpretation of the black letters of the EU financial law provisions moves forward, and the inconsistencies and incoherencies are discovered, the different legal powers placed within the lists of different legal categories of powers centres around one key question which all the law provisions avoid: what is a sanction? – This Thesis will offer a legal definition of the concept of a sanction. The main research question therefore is: *"What is a legal sanction, and how should the concept be defined?"*

2. Thesis Outline, Methodology and Additional Research Questions

A. Outline of Chapter 2 to 4

By asking that main research question, then a full compendium of sources for a lifetime of research becomes relevant as the question of what justifies punishment, or moreover what justifies that the state may punish its subjects, is grounded in a long history of philosophical

discussion that is dating back more than thousand years. Chapter 2 on the "Theories on Punishment" therefore takes a deep dive into the literature with three important delimitations and reservations. First, while the philosophical literature are more focused on the *justification* for punishment, we are more focused on *what is* punishment. Second, because the philosophical and moral justifications for punishment also concerns issues that relates to objectives of punishment, including subject matters that relates to the three legal requirements of effectiveness, proportionality and dissuasiveness, our focus on the definition of punishment must therefore also include a view towards the objectives of punishment. Third, because the history on the topic is long, the amount of literature is also too overwhelming for an attempt to exhaust the literature and to do full justice to all writers on this subject matter. Chapter 2 thus cannot escape that it is, and needs to be, selective. However, the selection is primarily in accordance with the English literature on the topic and the most traditional positions within the field.

What might be considered a legal bias for the examination of the main research question is that the approach taken mainly offers a reading and interpretation from a criminal law-perspective. The reason is that the concept of a sanction is very closely related to the concept of a punishment, which Chapter 2 only will emphasise. The concept of a punishment is also the concept applied within the ECHR and the EUCFR, even where these documents refer to a 'penalty'. Chapter 3 is therefore interested in those provisions, where the European Court of Human Rights ('ECtHR') and European Court of Justice ('CJEU') have to decide on the meaning of a punishment and a penalty, and where the protection from the criminal law-guarantees is at stake for the defendants. Within the ECHR this narrows mostly down to Article 6 and 7, and Article 4 of Protocol 7 to the ECHR. Throughout the history of its case-law under these three Articles, the ECtHR has gradually had the chance to reflect on what is a punishment to activate the guarantees that is afforded in criminal proceedings. As the case-law has evolved, the ECtHR has developed an Engel-test, which is the main test the ECtHR applies to decide on these matters, and within the scope of the Engel-test, the ECtHR has consistently upheld that the notion of a punishment is an *autonomous* notion. That very same Engel-test has now also been applied by the CJEU in cases relating to the scope of Articles 6 TEU and 47-52 EUCFR. Therefore, to answer the main research question, we must first thoroughly describe and discuss the content of the Engel-test before we may attempt to define what the title of Chapter 3 refers to as "The Constitutional Conception of a Legal Sanction and Criminal Sanctions." The *authority* of the Engel-test is very important in another regard. Because this is the key test used by the ECtHR and CJEU to determine whether a defendant has been subject to a punishment

(criminal sanction) in order to trigger the criminal guarantees within the ECHR and ECHR, some of these cases before the CJEU also reveals that the CJEU is prepared to use the Engel-test and the ECtHR conception of a criminal sanction to revise its case-law within areas of EU administrative law that concerns the definition of a criminal sanction. This entails that the ECtHR's conception of a legal and criminal sanctions may be moving towards further consolidation and thereby provide the foundation of EU substantive criminal law. Chapter 3 will continue that discussion. The discussions in Chapter 3 also bear merits based upon other observations of which some concern necessary delimitations. Klip has observed in respect of the concept of a criminal sanction that the CJEU, "to date, [...], has not expressly spoken on the issue, although there have been cases where in which criminal nature of proceedings was relevant."[2] I share this observation. The CJEU does also not have any authoritative test of its own, which may be why the CJEU now shows willingness to apply the Engel-test more generally. However, there exists a large case-law within all the different sub-areas of EU administrative law where the CJEU has been consulted on issues relating to the appropriateness and proportionality of the actual sanctions imposed or measures applied. In that case-law, the CJEU does generally not have a need to question the label and classification of the sanctions applied and imposed by some administrative for the purpose of trigger any of the criminal guarantees. That case-law will also be consulted for questions to be addressed under the other research questions. However, there might be cases within all these different legal areas, where the CJEU in fact has spoken on the issue of what defines a legal sanction as a criminal sanction, but which has not formed part of the study in this Thesis. Nonetheless, within those cases relating to Articles 6 TEU and 47-52 EUCFR, the CJEU did not refer to any such case, except from the Bonda-case,[3] where the CJEU also applied the Engel-test to question its own previous case-law within the area of EU agricultural law. The discussion and views presented in Chapter 3 therefore points to the CJEU equating the definition of criminal sanction with the conception that follows from the ECtHR's case law and of which it has directly applied, adhered, referred to the Engel-test or to the cases of the ECtHR where it applied the Engel-test.

In Chapter 4 on the "International Standards and Principles on Sanctioning" we will discuss the international framework on financial sanctions provided in the 2012 Basel Core Principles for Effective Banking Supervision by the Basel Committee on Banking Supervision; the 2017 Objectives and Principles of Securities Regulation adopted by the International

[2] Andre Klip, *European Criminal Law: An Integrative Approach* (4th edition, Intersentia Ltd 2021) 239.
[3] Case C-489/10 – Bonda, ECLI:EU:C:2012:319.

Organisation of Securities Commissions; and the 2022 International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, the so-called 'FATF Recommendations' developed by the Financial Action Task Force. The discussion is focused at the conceptual views on the concept of sanctions and the international standards and principles governing the application of financial sanctions. Because these international standards and principles embed the concept of sanctions within a broader conceptual context of different legal powers and regulatory responses available to the supervisors, regulators and courts, it will become necessary to take a broader view on what from an international perspective might qualify as a legal sanction. In addition, the international standards and principles is used as a tool for conducting an assessment of national or regional financial systems and their financial and legal framework, including the EU financial system and legal framework, jointly by the International Monetary Fund ('IMF') and World Bank under the Financial Sector Assessment Program ('FSAP'). One so-called 'FSSA-report' of relevance for sanctions has been published by the IMF, which include a review of the legal powers available to the European Central Bank ('ECB'), including its sanctioning power. This report will become relevant for Chapter 5.

Accordingly, it follows that Chapters 2-4 are devoted to the main research question, which examines the question of what is a sanction from the perspective the philosophical literature and theories on punishment and its justification; from an EU constitutional and human and fundamental rights perspective, and international financial perspective. Part I of the Thesis is therefore titled: "Theory of Punishment and the Constitutional and International Architecture for Sanctions." The conclusions made in Part I will then be applied and adhered to in Part II on "Theory and Reality of the EU Regime of Sanctions in the Financial Sector," before we in Part III and Chapter 8 will provide the final conclusions on the topics and questions discussed in this Thesis, including the additional research questions examined in Chapters 5 to 7.

B. Methodology and Outline of Chapter 5 to 7

Before we outline Chapter 5 to 7 it is necessary to laid down the methodology and approaches taken by the Chapters of this Thesis, in particular for Chapter 5 to 7. The Thesis consists of the application of three fundamental methods: (1) The legal doctrinal method; (2) An integrated and functional approach to EU banking and securities law under the application of what Chapter 5 will define as the concept of a 'sanction regime'; and (3) the Engel-test.

Because we want to challenge the EU financial sanctions, the methodology and approaches taken by this Thesis is to a very large extent given. At the centre is (1) the legal doctrinal method, because it is involved in all the Chapter of this Thesis, and it is one of the two constitutive elements and methods applied under the Engel-test (3)(a). The second constitutive element and method applied under the Engel-test is what I will refer to as (3)(b) 'legal essentialism', because the Engel-test consists of reading and interpreting the formal provisions of the applicable laws, including, where relevant, the interpretations made by the national courts (3)(a) in order to go behind the appearances of the formal provisions and apply the Engel-criteria (3)(b), and what Chapter 3 will define as the two cumulative Öztürk-criteria applicable under the second Engel-criterion together with what also will be defined as the 'criminal classification factors for a regime of punishment'. Hence, one of the main purposes of this Thesis consists in determining and properly describe the methodology to be applied in order to challenge the EU financial sanctions. This task will be pursued in Chapter 3, and the Engel-test will be applied to parts of Chapter 6 and the entire Chapter 7 on the basis of the following observation from the Engel-test: the ECtHR generally distinguishes between 'disciplinary law' and 'criminal law', and therefore also 'disciplinary sanctions' and 'criminal sanctions'. The characterisation of these terms is part of Chapter 3, but it entails that EU financial law and the legislative and legal acts it classifies as acts of administrative and criminal law must be read according to those two essential and governing categories, hence an approach towards 'legal essentialism'. For Chapter 6 it further entails that we will need to determine whether EU financial law essentially is governed by disciplinary norms or criminal norms. For Chapter 7 it further entails that we will need to determine whether EU financial provides for disciplinary sanctions or criminal sanctions. It should already now be mentioned that these categories will put the *reality* of the administrative classification to a real test. It should also be pointed out here that it will be necessary, and appropriate, to split up the Engel-test according to the topics that also needs to be discussed in Chapter 6 and 7. Accordingly, when Chapter 6 is titled: "EU Financial Sanction Regimes II – The General Requirements for the Imposition of Sanctions – Assessment II," the reference to 'Assessment II' is a reference to the first part of the Engel-test, in particular the first and second Engel-criteria, where the latter includes the first Öztürk criteria. The conclusions derived from their application must then be carried over and into Chapter 7, because it will provide the starting point for the application of the Engel-test. Accordingly, when Chapter 7 is titled: "EU Financial Sanction Regimes III – The EU Financial Sanctions – Assessment III," the reference to 'Assessment III' is a reference to the second part of the Engel-test, in particular the second Engel-criterion, and thereunder the second Öztürk-

criterion, and the third Engel-criterion. Chapter 7 is entirely devoted to Assessment III, and this entails that we now have outlined the purpose of the discussion in Chapter 7. Therefore, by reference to Assessment II and III, we may ask an additional research question: *"Which results can be derived from the application of the Engel-test to EU financial law?"*

This brings us to the second methodological approach taken in this Thesis, whereby we will take (2) an integrated and functional approach to EU banking and securities law under the application of the concept of a 'sanction regime'. Where Chapter 5 makes reference to the concept of 'sanction regimes' we will now be discussing a phenomenon and notion of which Chapter 2 will consider an *institutional* concept of punishment. In Chapter 3, it will also be revealed that the ECtHR adheres to a similar notion in its case-law in order to determine whether the sanction regime in question resembles a *regime of punishment*. The concept of a 'sanction regime' was applied by the EU Commission in its Communication on the "Reinforcing sanctioning regimes in the financial services sector,"[4] and it is now found within a number of Recitals in the legislative acts of EU financial law. Chapter 5 therefore discusses the utility of this concept and whether it has been appropriately defined by the EU Commission. On the basis of the conclusions derived, Chapter 5 will establish five constitutive pillars for the concept of a 'sanction regime, discuss the content of each of the pillars, and apply them to the provisions of what I have referred to as 'EU financial law'. It will follow that the concept of a sanction regime, by its first pillar, will define the scope of 'EU financial law', but it should be pointed out already here that it provides a conjunction between the EU legislative and legal acts comprising the EU banking and EU securities laws and which generally are deemed to be the most important ones for governing the structures and substantive rules and requirements of the financial sectors. Therefore, the reference to 'EU financial law' will be a reference to specific EU legislative and legal acts enumerated under the first pillar. Hence, Chapters 5 to 7 will take an integrated approach to EU banking and securities law by reading the law provisions from the enumerated EU legislative and legal acts together and compare them. This may be justified by the fact that: (i) a legal person in practice often will need to comply with the EU rules provided for both financial sectors; (ii) provisions within EU banking law already refers to provisions within EU securities law, and vice versa; (iii) the EU Commission also took such an approach in the EU Communication referred to above; and (iv), more importantly, the wording and black letters of the sanctioning provisions provided in EU financial law are *so similar*

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Reinforcing sanctioning regimes in the financial services sector, COM(2010) 716 final, Brussels, 8.12.2010.

– from a horizontal view that are going across the particular EU legislative and legal acts – that it has evolved as a view of mine that it would be an error in any methodological approach to the discussion of sanctions in the EU financial sectors, if the subject is not presented from an integrated and functional approach that takes a comprehensive and coherent view on the nature, purpose and severity of the legal powers and sanctions made available to the different sanctioning authorities found under EU financial law as well in these sanctioning authorities' observance of the ne bis in idem principle under Articles 4 of Protocol No. 7 and Article 50 EUCFR. Such argument will also prove to be relevant for the ECtHR and CJEU to consider in their application of the Engel-test. The Thesis therefore offers such an attempt but without neglecting the legal doctrinal method and a stricto sensu reading of the particular law provision on its own premises within the context of the particular EU legislative or legal act, as well as within the context of the interdependent EU legislative and legal acts, where the law provision has its legal basis. In addition, the integrated, functional, coherent and comprehensive approach will also prove important for the discussion of the three legal concepts and requirements to sanctions of effectiveness, proportionately and dissuasiveness as these are *general*.

By applying the concept of a sanction regime together with an integrative and functional approach, the utility of this methodological approach will manifest in the following ways: (i) to point out and narrow down the most important law provisions relevant for our discussions conducted in Chapter 6 and 7 and thus to structure the content and discussions of those two Chapters; (ii) to identity the different sanction regimes under EU financial law, and to discuss what I will refer to as the 'ECB sanction regime', which has been subject to a FSSA-review by the IMF under the FSAP; (iii) to observe any similarities and differences between the law provisions and point out any possible comparable inconsistencies and incoherencies; (iv) to provide for a more full and coherent picture of the legal powers and sanctions; and (v) to deduce and discuss the essential nature, purpose and severity of the legal powers and sanctions for the purpose of conducting a standalone assessment in accordance with Engel-test and the constitutional conception of sanctions. In addition (vi), we will be able to discuss what Chapter 6 in its title considers: "The General Requirements for the Imposition of Sanction," which includes the criminal and administrative law violations; the rules on criminal and administrative liability; the three general requirements to sanctions of effectiveness, proportionality and dissuasiveness; and the rules on the publication of sanctions. Finally, (vii) the conjunction allows to ask an additional research question: *"how should the three legal concepts and requirements for effective, proportionate, and dissuasive sanctions be defined?"*

This brings us to the final purpose of this Thesis. Chapter 5 is titled: "EU Financial Sanction Regimes I – The Concept, and its Principles and Structures – Assessment I." When we arrive to Chapter 5 we will be in a position where we have already discussed a large amount of comparative material of different sources in Chapters 2 to 4. As we at that point in time are moving towards a discussion of the black letters of EU financial law, Section II of Chapter 5 will bring to our attention that the sanctioning provisions provided in EU financial law have been adopted on the basis of an enormous comparative research conducted by the previous Committee of European Banking Supervisors ('CEBS'), the Committee of the European Securities Regulators ('CESR) and the Committee of the European Insurance and Occupational Pensions Supervisors ('CEIPOS') around the time of the GFC. The three Committees examined the pre-crisis national financial sanction regimes ('NFRS') with respect to administrative (primarily) and criminal sanctioning powers available at the national level and the national sanctioning authorities' application of those sanctioning powers. It was on the basis of the reports published by the Committees that the EU Commission published the Communication referred to above as well as other related documents. In these documents, the EU Commission derived a number of conclusions on financial sanctions and suggested new policy and legislative actions for the reinforcement of the NFSRs. It will be argued that the nature of the conclusions and policy and legislative actions suggested by the EU Commission are very similar in nature to the content of the international standards and principles on financial sanctions. Therefore, by bringing all this comparative material together, we are in position under Chapter 5 where we can ask an additional research question: *"may EU sanctions law with respect to sanctioning in the financial sectors contribute with any standards and principles on sanctions to the international framework on financial sanctions?"* – The title for Chapter 5 carries a reference to this research question by "Assessment I." It is discussed in Section II: "Conceptual minimum requirements for effective, proportionate and dissuasive financial sanctions." On this background, let us bring an overview of the research questions of this Thesis:

> *RQ-(I) "What is a legal sanction, and how should the concept be defined?"*
>
> *RQ-(II) "Which results can be derived from the application of the Engel-test to EU financial law?"*
>
> *RQ-(III) "How should the three legal concepts and requirements for effective, proportionate, and dissuasive sanctions be defined?"*
>
> *RQ-(IV) "May EU sanctions law with respect to sanctioning in the financial sectors contribute with any standards and principles on sanctions to the international framework on financial sanctions?"*

PART I

THEORY OF PUNISHMENT AND THE CONSTITUTIONAL AND INTERNATIONAL ARCHITECTURE FOR SANCTIONS

> "All systems of criminal law represent a shared commitment to acquitting the innocent and punishing the guilty. This shared commitment confers upon them a single unifying purpose that centers on the institution of punishment. Without punishment and institutions designed to measure and carry out punishment, there is no criminal law. It is fair to say, then, that the institution of punishment provides the distinguishing features of criminal law. The problem is: What is punishment? Not every form of coercion, not every sanction, constitutes punishment. Not even coerced confinement provides an adequate signal that the criminal law has come to play. One can lock people up for many reasons – for example, quarantine for disease, commitment for mental illness. Not all seizures of the person are equivalent to the old fashioned punishment of flogging. Grabbing a person to prevent him from committing suicide is neither assault nor punishment but rather beneficial coercion. Understanding criminal law, therefore, requires that we probe a distinction between punishment and forms of coercion, expressing a benevolent desire to aid the person affected. With some risk of oversimplification, I refer to all these alternative, beneficial uses of coercion as "treatment." [...] *Fathoming the contours of punishment depends not on the positive law of particular states but on the results of philosophical and conceptual inquiry*."
>
> George P. Fletcher, Basic Concepts of Criminal Law (1998), p. 25. Italics added.

§ 2. THE THEORIES ON PUNISHMENT

I. INTRODUCTION

"Law is the primary norm which stipulates the sanction."[5] Jeremy Bentham nevertheless made it clear to us that there exist four types of sources derived from the physical, political, moral and religious sphere of life from which pleasure and pain flows, and he stated that "as the pleasures and pains belonging to each of them are capable of giving binding force to any law or rule of conduct, they may all of them be termed *sanctions*."[6] Because sanctions are a source that provides motive and power, and thus giving binding force to any type of law, it also becomes questionable whether the existence of sanctions is a primary but necessary prerequisite for the existence of any effective law and norm. If a law does not compel its subjects to act according to its rule or norm, can it then be uphold that the law was binding? Can it even be considered a law? The depths of these questions are not fully explored in Chapter 2, but is should be clear even for lawyers that it is an important one.

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[5] Hans Kelsen, *General Theory of Law and State* (Oxford University Press 1961) 61.

[6] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (HardPress Publishing 2019) 24. Italics maintained. Bentham, in fn1 at p. 24-25, also refer to the Latin: 'sanctio', which according to him, "was used to signify the *act of binding*, and by a grammatical transition, *any thing which serves to bind a man*: to wit, to the observance of such or such a mode of conduct." Furthermore, in explaining the import of the word, Bentham refer to the Latin grammarian, which considered the word sanction to be derived by a farfetched process from the word 'sanguis', meaning 'blood': "because, among Romans, with a view to inculcate into the people a persuasion that such or such mode of conduct would be rendered obligatory upon a man by the force of what I call the religious sanction (that is, that he would be made to suffer by the extraordinary interposition of some superior being, if he failed to observe the mode of conduct in question) certain ceremonies were contrived by the priests: in the course of which ceremonies the blood of victims was made use of." Therefore, Bentham can define a sanction as "a source of obligatory powers or *motives*: that is, of *pains* and *pleasures*; which, according as they are connected with such or such modes of conduct, operate, and are indeed the only things which can operate, as *motives*." Italics maintained.

The questions that nonetheless are explored in Chapter 2 concern the sanctions from the political and moral sphere of life, which are discussed in accordance with a timeless question: "*if we can acknowledge that sanctions are a source of evil, pain and suffering, then how can we justify to impose sanctions on our fellow man?*" – Section II(1) will examine this question with respect to the most traditional positions held in the literature. The philosophical theories which we will discuss are all based on the general acknowledgement and presumption that punishment relates to justice and therefore nevertheless may bring some good or usefulness. Even Beccaria wrote that "[the] juster the punishments, the more sacred and inviolable is the security and the greater the freedom which the sovereign preserves for his subjects."[7] The literature is mostly devoted to this question of the justification for punishment.

Another must smaller branch of the literature have asked another question: *"what is punishment?"* – Section II(2) will examine this question. As we shall see, the theories on punishment will also share views on this question, including the objectives of punishment, but in the literature the answers to the question stands out as some of the first attempts to conceptualise a definition of punishment, and is therefore of relevance for the main research question.

Finally, we will conclude on the discussion of the justifications of punishment in Section II(1)(C) with a critical dialogue between the theoretical positions presented, because this dialogue brings forward points of criticism raise in the literature against each position in a conclusive matter. The final conclusion in Section III will therefore be devoted to the conclusions that can be drawn with respect to the main research question.

II. THEORIES ON PUNISHMENT

Antony Ellis have emphasised that "[it] is commonplace to present the issue of justification of punishment as a debate between *retributivism* and *consequentialism*."[8] I therefore follow this tradition in Section II.[9] Admittedly, there is also a prioritised focus on the retribution and deterrence theories which, in comparison to incapacitation and reform, are theories that are more engaged in a discussion of the legal functions of punishment and its use as a legal instrument. It will also be evident that there is more attention given to retribution theory than deterrence theory due to the following reasons: While the positions under consequentialism can be

[7] Cesare Beccaria, *On Crimes and Punishments, and Other Writings* (Fourth, Cambridge University Press 2003) 10.
[8] Anthony Ellis, *The Philosophy of Punishment* (Imprint Academic 2012) 26. Italics maintained.
[9] See, for instance, also: Michael Cavadino and others, *The Penal System: An Introduction* (006 Edition, SAGE Publications Ltd 2020) 37–66; Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press 2002) 294–317.

described in a rather summarised and consolidated versions for descriptive purposes as evidenced in the literature more generally, then retributivism is rather a shared commitment to a certain set of principles whose value, depth and breadth requires context from those philosophies in which they were originally found.[10] Therefore, retributivism also represents the older and oldest of positions which has been formed by a number of important writers in the western history of philosophy, and taken up for discussion by more modern and contemporary writers. Hence, retributivism provides for a very big tent that covers many different positions within so-called "retribution theory."[11] Therefore, I have chosen two fundamental positions represented by two older writers that generally are described as retributivists and therefore also represents retribution theory. One is Thomas Aquinas who seems to be a rather forgotten and neglected figure and writer, but whose contributions to retributivism may be reflected in his ideas on commutative justice and restitution. The other is Immanuel Kant who is very well represented in the literature, and seems to be the father of the position within retributivism that is generally referred to as 'just desert'. Nevertheless, the different theories and positions that discusses the justifications of punishment can very well be presented otherwise.[12]

Consequentialism is associated with other objectives than retributive justice. As rooted in the utilitarian thesis it generally holds that punishment must be justified by the value of its beneficial consequences (utility).[13] Beccaria wrote in his treaty "On Crime and Punishment," the origin for modern deterrence theories, that the purpose of punishment "is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter other from doing likewise."[14] Jeremy Bentham subscribed to Beccaria's utility principle in his famous treaty on the "Principles of Morals and Legislation," and wrote:

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[10] Glover makes the point that the "early Christian Fathers were very doubtful whether the coercion of one man by another with the threat of violence in the name of government was right; they thought it was a condition of affairs by no means ideal but necessitated by the Fall," cf. MR Glover, 'Mr. Mabbott on Punishment' (1939) XLVIII Mind 498, 500. Furthermore, by St Pauls' letter to the Colossians, Christianity has brought to the world the notion of equality of all human beings (3:13).

[11] For instance: Ellis (n 4) 38–61; Andrew Von Hirsch and others, *Principled Sentencing: Readings on Theory and Policy* (Third edition, Hart Pub 2009) 102–228; Kaplow and Shavell (n 5) 291–378; Cavadino and others (n 5) 46–53.

[12] Iwona Seredyńska, *Insider Dealing and Criminal Law : Dangerous Liaisons* (Springer 2012) 163; Markus Dirk Dubber, 'Theories of Crime and Punishment in German Criminal Law' (2005) 53 The American Journal of Comparative Law 679, 696–707. Seredyńska provides in Figure 3.1, at p. 163, a schematic overview of the different theories of punishment. The scheme she provides places (1) (crime) prevention theories and (2) retribution at the top as the two fundamental positions. With respect to prevention (1) it is categorised into two groups: (1)(a) individual prevention and (1)(b) general prevention, and each having a negative (i) and a positive (ii) branch. Under the category of 'individual negative prevention' (1)(a)(i) the theory of 'incapacitation' is categorised; under 'individual positive prevention' (1)(a)(ii) the theory of 'reform and/or rehabilitation' is categorised; under 'general negative prevention' (1)(b)(i) the theory of 'deterrence' is categorised; and under the 'general positive prevention' (1)(b)(ii) the theory of 'general positive prevention theory' is categorised. Retribution only has one category of 'retributive (just desert) theory. This schematic overview provides a great modern overview and starting point.

[13] Cavadino and others (n 5) 39; AM Quinton, 'On Punishment' (1954) 14 Oxford University Press on behalf of The Analysis Committee 133, 139.

[14] Beccaria (n 3) 31.

> "all punishment is mischief: all punishment in itself is evil: Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."[15]

It followed that the aim of punishment was to reduce the number of people who would be prone to commit similar acts of crime in the future. And because human beings generally strive for increasing their happiness and pleasure and to avoid pain and suffering, punishment is a mean to inflict pain and suffering utilised for the purpose to achieve a greater good and only justified if it promotes the greatest happiness to the greatest number of people. The underlying classical utilitarian principle is thus one that considers an act or social practice as morally desirable, if it promotes human pleasure or happiness better than possible alternatives. Punishment is only warranted if its added benefits outweigh its imposed harms.[16]

The theories representing consequentialism in Chapter 2 is deterrence theory, reform theory (including rehabilitation) and incapacitation. They represent three branches, aims and sentencing policies for a consequentialist approach to punishment, and they share the common idea that punishment is justified by its goal of crime-prevention, including reductivism.[17] All else equal, these three theories also tends, as a consequentialist's response to greater social harms, to warrant greater sanctions to prevent greater crimes.[18] Their goal of crime-prevention can then be further advanced within an utilitarian legal framework, which may use the law as a tool for social engineering, and further allow the justification for punishment to be "found in a calculation of its utility compared with the attendant disutilities."[19] Punishment under the utilitarian and consequentialist theories are therefore also used as a legislative and sanctioning technique to reduce further crime by means that either threatens with or actually punishes the offender through punitive, incarcerating and corrective measures.[20]

1. Theories on the Justification of Punishment

A. Retributivism

(I) Thomas Aquinas – Commutative Justice and Restitution

[15] Bentham (n 2) 170. See Chapter 14, at p. 178, where Bentham argue for goals (designs and objects) of punishment that follows the principle of utility and serves as the basic set of rules, which the legislator must follow.
[16] Kent Greenawalt, 'Punishment' (1983) 74 J. Crim. L. & Criminology 343, 353.
[17] Cavadino and others (n 5) 39; George P Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press USA 1998) 31. According to Fletcher, the last three purposes of punishment "are grouped under the general heading of "social protection" as the purpose of punishment." Emphasis maintained.
[18] Kaplow and Shavell (n 5) 328.
[19] Von Hirsch and others (n 7) 39; Joshua Dressler and Stephen Garvey, *Cases and Materials on Criminal Law* (7 edition, West Academic Publishing 2015) 35.
[20] CMV Clarkson and KM Keating, *Criminal Law: Text and Materials* (Sweet & Maxwell 1984) 12.

Aquinas' philosophy on judicial punishment is deeply integrated in his philosophy of good and evil, natural law, and the common good.[21] With respect to his idea of evil, then all evils that pertains to human beings, as rational creatures, falls into two categories, that is "into the evil of punishment [poena] and the evil of moral wrong [fault; culpa]."[22] The evil of fault refer to its opposite of the goodness in voluntary actions in the way that when voluntary actions lacks the due measure and order, which they are supposed to have, then they result in privation of a good, which Aquinas considers an evil and refers to as a 'disorderly act': "disordered acts of the will have the character of moral wrong, since one is blamed and rendered culpable by voluntarily engaging in disordered acts."[23] The evil of punishment refers to a suffering of an evil in the way that every privation of a good that human beings can employ for pursuing good activity is (signified by) a punishment. Therefore, the suffering caused by punishment results in a deprivation of forms, dispositions or anything else potentially necessary for good activity, which belongs to the soul, the body or external things.[24] On that binary basis of two evils, Aquinas specifies that the nature of punishment to consists of three constitutive elements. As a first element (i), punishment must be in relation to moral fault so that one may say that the person is properly punished for something the person did.[25] Thus, it is only offenders that can be punished and only for their offence.[26] Second (ii), just as sin essentially is something that proceeds from will, as an inordinate act and offence against an order,[27] punishment must also be a suffering against the will of the offender proportionate to fault, because "[p]unishment is

[21] Aquinas' philosophy of punishment is mainly discussed on the basis of two primary sources: Saint Thomas Aquinas, Summa Theologica (New ed edition, Ave Maria Press 1981), referred to in the following as 'ST'; Saint Thomas Aquinas, translated by Brian Davies and Richard Regan, *On Evil* (Oxford University Press, USA 2003), referred to in the following as 'On Evil'.
[22] On Evil, p. 76, Question 1, Article 4 (Q1, a4). Aquinas quotes Augustine, which in his work "On Free Choice" (PL 32: 1221-22), "calls moral fault the evil that we do, and punishment the evil that we undergo," p. 78, Q1, a4. Therefore, "it belongs to the nature of moral wrong to be willed, and it belongs to the nature of punishment to be unwilled," p. 77, Q1, a4. In ST, Vol. II, Pt. I-II, Q87, a1, Aquinas refer to Rom ii. 9, where it is written that: "Tribulation and anguish upon every soul of man that worketh evil," and because "to work evil is to sin. Therefore sin incurs a punishment which is signified by the words tribulation and anguish."
[23] On Evil, Q1, a4, p. 77.
[24] ibid. In Q1, a4, Reply to Objection 9, Aquinas also writes more generally: "Punishment as related to the subject punished is evil insofar as punishment in some way deprives the subject of something. But punishment as related to the cause that inflicts punishment sometimes has the nature of good, if the one punishing does so for the sake of justice," p. 79.
[25] Evils are the result of sin and fault as essentially an overindulgent will, cf. ST, Vol. II, Q87, a6, "he who has been too indulgent to his will;" and ST, Vol. II, Q108, a4, "he who by sinning has exceeded in following his own will."
[26] John Finnis, *Aquinas: Moral, Political, and Legal Theory* (1ª Ed. edition, Oxford University Press, USA 1998) 214. However, as Finnis also points out, there can be punishment without fault, but not without causa. See ST, Vol. III, Pt. II-II, Q108, a4; Q66, 5a. In Q108, 4a, where Aquinas makes the point that "man may be condemned, even according to human judgement, to a punishment of forfeiture, even without any fault on his part, but not without cause." Finnis also argues that the elements of commutative justice also emphasises a feature of punishment that it has a potential to "be undergone and accepted voluntarily and freely," p. 213, at fn146.
[27] ST, Vol. II, Pt. I-II, Q71, a1 and a6; and Q87, a1 and a3. At Q87, a3, Reply Obj. 4: "punishment [...] is essentially related to the disturbance of the order, and to God's justice." In Q87, a3, Aquinas also writes that "sin incurs a debt of punishment through disturbing of an order. But the effect remains so long as the cause remains. Wherefore so long as the disturbance of the order remains the debt of punishment must needs remain also." The principle that punishment is restoring the equilibrium of an order is emphasized and explained in more detail in the following.

proportionate to sin in point of severity, both in Divine and human judgments."[28] Third (iii), the nature of punishment must be caused by an external cause, as opposed to an internal cause such as the will of the offender, in the way that punishment is an effect of an external cause that has been acted upon.[29] Moreover, as punishment is a suffering contrary to the will, punishment cannot be self-imposed, but only imposed and inflicted by an external force; in case of the institution of punishment, legal and political authorities. These fundamental principles of Aquinas philosophy on punishment is explained in greater detail in the following.

To Aquinas judicial punishment is an act of human law and a legitimate method of securing that for which all human law exist: the common good.[30] Human law is responsible for two primary elements of the common good, namely peace and virtue, whereas peace is primarily understood as bodily safety and freedom from unprovoked aggression by others. Although human law does not have jurisdiction over all virtues acts, only those having a particular public nature, then peace and virtue are both equally depending on some form of legal coercion necessary to install virtue.[31] Aquinas explains law and punishment in this way:

> "But since some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by *force* and *fear*, in order that, at least, they might desist from evil-doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of training, which compels through fear of punishment, is the discipline of laws."[32]

To maintain peace and install virtue is thus two primary purposes of human law.[33] In addition thereto, as a third goal,[34] human law is also ordained towards the good common, as when the "lawgiver prescribes certain things pertaining to good order, whereby citizens are

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[28] ST, Vol. II, Pt. I-II, Q87, a3; Q87, a2 ("est de ratione poena qoud sit contraria volunti"), Q87, a3. On Evil, Q1, a4, p. 77 Aquinas explains why punishment has to be contrary to the will of the offender: just as "everyone's will inclines to seek the person's own good, and so it is contrary to one's will to be deprived of one's own good."

[29] On Evil, Q1, a4, p. 78.

[30] Peter Karl Koritansky, *Thomas Aquinas and the Philosophy of Punishment* (The Catholic Universe of America Press 2012) 139. Koritansky explains that: "Aquinas' claim that political authority is derived from divine authority is paralleled by his well-known teaching that all laws issued by human beings (he calls them "human laws") are derived from the natural and/or eternal law," p. 139. See further ST, Vol. II, Pt. I-II, Q90-Q97. In Q90, a3, Aquinas writes that: "A law, properly speaking, regards first and foremost the order of the common good."

[31] ST, Vol. II, Pt. I-II, Q96, a1, e.g. "human law should be proportionate to the common good;" a2, Reply to Obj. 2, e.g. "The purpose of human law is to lead men to virtue, not suddenly, but gradually;" a2, Reply to Obj. 3, e.g. "The natural law is a participation in us of the eternal law: while human law falls short of the eternal law."

[32] ST, Vol. II, Pt. I-II, Q95, a1. Italics added. This quote is a part of Aquinas' answer, which he initiates by reference to Isidore (Etym. V. 20): "Laws were made that in fear thereof human audacity might be held in check, that innocence might be safeguarded in the midst of wickedness, and that the dread of punishment might prevent the wicked from doing harm. But these things are most necessary to mankind. Therefore it was necessary that human laws should be made." In Q92, a1, Reply Obj. 2, he also writes: "It is not always through perfect goodness of virtue that one obeys the law, but sometimes it is through fear of punishment."

[33] ST, Vol. II, Pt. I-II, Q92, a1: "Consequently it is evident that the proper effect of law is to lead its subjects to their proper virtue: and since virtue is that which makes its subject good, it follows that the proper effect of law is to make those to whom it is given, good, either simply or in some particular respect."

[34] Peter Koritansky, 'Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas' (2005) 22 History of Philosophy Quarterly 319, 326.

directed in the upholding of the common good of justice and peace."[35] Therefore, the institution of punishment must also partake in satisfying these three goals.[36] Because the legal authorities also are entrusted with the preservation of justice understood as a certain kind of fairness and equilibrium that have as an essential characteristic to establish equality between the members of the society, so that every member is on equal terms with one another, the restoration of the equality of justice is also the primary goal of punishment, which gives punishments its main defining character.[37] Aquinas connects the principles in this way:

> "Punishment is due to sin. But every sin is voluntary according to Augustine [...]. Therefore vengeance should be taken only on those who have deserved it voluntarily. [...] Punishment may be considered in two ways. First, under the aspect of punishment, and in this way punishment is not due save for sin, because by means of punishment the equality of justice is restored [reparatur aequalitas iustitiae], in so far as he who by sinning has exceeded in following his own will suffers something that is contrary to his will. [...] Secondly, punishment may be considered as a medicine, not only healing the past sin, but also preserving from future sin, or conducing to some good [...]."[38]

Because punishment aim to restore the equality of justice,[39] punishment should also be considered to provide for some good.[40] We can recognise it as such because, like all natural goods, we are naturally inclined to desire it. Aquinas infers that it has passed from natural things to human affairs that whenever one thing rises up against another, it follows that the thing rising suffers from some form of detriment, and that nature responds to such contrary ones that supervenes by acts of greater energy. In a similar way, Aquinas concludes that human beings, as a part of human nature, have a natural inclination to repress those who rise up against him, and because all things are contained in an order as a part of that order, it also follows, "[consequently], whatever rises up against that order, is put down by that order or by the principle of that order." That "*repression* is punishment."[41] Rather than deriving from this 'is'

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[35] ST, Vol. II, Pt. I-II, Q96, a3.
[36] Koritansky (n 26) 143.
[37] Finnis (n 22) 213–214; Koritansky (n 26) 123.
[38] ST, Vol. III, Pt. II-II, Q108, a4.
[39] ST, Vol. III, Pt. II-II, Q57, a1: "It is proper to justice, as compared with the other virtues, to direct man in his relations with others: because it denotes a kind of equality, as its very name implies; indeed we are wont to say that things are adjusted when they are made equal, for equality is in reference of one thing to another. On the other hand the other virtues perfect man in those matters only which befit him in relation to himself [...] the right in work [...] is set up by its relation to others [...] Hence it is evident that the right is the object of justice." Q59, a1: "we speak of injustice in reference to an inequality between one person and another;" and Q59, Reply Obj. 1: "as legal justice is referred to human common good, so Divine justice is referred to the Divine good."
[40] Koritansky (n 26) 109. As Koritansky points out by punishment as a good: "To be sure, though punishment by its nature is always a certain kind of evil for the one suffering it, it may be considered as a good from the point of view of the institution that inflicting it," p. 109.
[41] ST, Vol. II, Pt. I-II, Q87, a1. Italics added. Aquinas continues to describe the scope of punishment in its three repressive functions: "Accordingly, man can be punished with a threefold punishment corresponding to the three orders to which the human will is subject. In the first place a man's nature is subject to the order of his own reason; secondly, it is subjected to the order of another man who governs him either in spiritual or temporal matters, as a member of either of the state or of the household; thirdly, it is subjected to the universal order of the Divine government. Now each of these orders is disturbed by sin, for the sinner acts against his reason, and against human and Divine law. Wherefore he incurs threefold punishment; one, inflicted by himself, viz. remorse of conscience; another, inflicted by man; and a third, inflicted by God." Furthermore, "a just

(nature as governed by natural laws) an 'ought' (human affairs as governed by humans laws), Aquinas would say that "human nature itself has the *ought* already built into it precisely in the form of natural inclinations."[42] Hence, there is a natural inclination for punishment to retaliate against those that rise up against the justice of that order. However, this notion of natural inclination towards the equality of justice does not entail that we should punish as severely as our passions compels us, for example as severely as our desires for vengeance requires, or that punishment should be determined independently of reason. Reason, or the "order of reason"[43] as Koritansky emphasises,[44] is depending upon something higher than the mere consultation of emotions and passions, which nonetheless may act alongside reason in the sight of a higher standard. On anger and vengeance, Aquinas writes:

> "if one desire the taking of vengeance in any way whatever contrary to the order of reason, for instance if he desire punishment of one who has not deserved it, or beyond his deserts, or again contrary to the order prescribed by law, nor for the due end, namely the maintaining of justice and the correction of defaults, then the desire of anger will be sinful, and this is called sinful anger."[45]

Moreover, a passion "is good in so far as it regulated by reason, whereas it is evil if it set the order of reason aside."[46] Therefore, passions like vengeance are not totally irrelevant for the execution of punishment, and "[p]roperly channelled, it does not long for the suffering of the criminal for its own sake, but for the equality of justice that will be restored by that suffering."[47] Because the natural inclinations are governed by the order of reason, Aquinas thereby provides a solid foundation for making a distinction between blind and excessive retaliation and just and orderly punishment. However, the link between our natural inclinations and repressive punishment nonetheless justifies punishment as a fundamental human good as we are naturally inclined to desire the justice of it. Koritansky also points out that "the natural inclination in man to repress those who rise up against him is evidence of the *reatus poena*" of which "reatus" is translated typically as "debt." However: "a more accurate (though clumsier) rendering might be something like "guilt" or "deservingness.""[48] This entails that reatus poena

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punishment may be inflicted either by God or by man: wherefore punishment itself is the effect of sin, not directly but dispositively." The focus in the following is, of course, only on the second repressive function inflicted by man.

[42] Koritansky (n 26) 85. Italics maintained.

[43] In ST, Vol. IV, Pt. II-II, Q153, a2, Aquinas seems to provide a definition: "A sin, in human acts, is that which is against the order of reason. Now the order of reason consists in its ordering everything to its end in a fitting manner."

[44] Koritansky (n 30) 329.

[45] ST, Vol. IV, Pt. II-II, Q158, a2. See also Q108, a1.

[46] ibid. Aquinas also considers vengeance (vindication; vindicatio) as a subvirtue of justice, cf. ST, Vol. III, Q108, a2.

[47] Koritansky (n 30) 329.

[48] Koritansky (n 26) 122. Italics, brackets and emphasis maintained. Koritansky therefore also states: "Punishment is deserved on account of a criminal's harmful action in such a way that society is not only permitted, but obliged, to inflict it as a matter of justice," p. 122.

is more than mere self-defence, as in animals, but deserved on account of sin, in so far it follows from a transgression of the order of divine justice:

> "because the act of sin makes man deserving of punishment, in so far as he transgresses the order of Divine Justice, to which he cannot return except he pay some sort of penal compensation, which restores him to the equality of justice [ad aequalitatem iustitiae reducit]; so that, according to the order of Divine justice, he who has been too indulgent in his will, by transgressing God's commandments, suffers, either willingly or unwillingly, something contrary to what he would wish. This restoration of the equality of justice by penal compensation is also to be observed in injuries done to one's fellow men. Consequently it is evident that when the sinful or injurious act has ceased there still remains the debt of punishment."[49]

So far much of Aquinas' philosophy reveals itself as a retributive theory deeply rooted in his ideas of the common good and as a response to injustice. Punishment answers to the overindulgent sinful will, which as a voluntarily act goes too far in transgressing the order of justice and in assaulting the common good. Punishment therefore represses the overindulgent will by inflicting some sort of suffering on the criminal, contrary to his will, in order to repair the inequality introduced to the society by the sinful will. Without that punishment, the inequality caused by the sinful will to the order of justice cannot be removed. Therefore, the underlying fundamental principle of Aquinas' retributive theory is that just as sin contravenes an order, an order of reason and divine law, then punishment is also inflicted by a principle of the same order. This principle also applies to the legal and political order.[50]

Finnis argues that the distinction, as we know it, between laws we categorises as 'civil' and 'criminal' is no more clearly marked by Aquinas than by Aristotle or by Jewish or Roman law, but that Aquinas identifies "the basis for that distinction: the difference between one's duty to compensate and one's liability to punishment."[51] While "compensation {reparatio, restitutio, satisfactio} is essentially a matter of restoring to specific losers – to those who now have less than they ought – what they have been deprived of," then "punishment {poena, retributio} is essentially a matter of removing from wrongdoers a kind of advantage they gained, precisely in preferring their own will to the requirements authoritatively specified for that community's common good."[52] Therefore, "in litigation of the kind we call civil, the court has the duty to give plaintiffs their rights {ius suum}, everything to which they are entitled as compensation for their injurious losses," and for what we call criminal proceedings, "the court can be authorized to impose, relax, remit, or withhold penalties with a view to wider considerations

[49] ST, Vol. II, Pt. I-II, Q87, a6.
[50] Koritansky (n 26) 135.
[51] Finnis (n 22) 210.
[52] ibid 210–211. Brackets maintained.

of public good {publicae utilitati}."[53] It follows that both compensation and punishment are two fundamental elements of Aquinas's notion on commutative justice.[54]

In Aquinas's idea of commutative justice, compensation and acts of recompense is governed by his principle of restitution. Aquinas defines 'restitution' in this way:

> "Restitution is opposed to taking away. Now it is an act of commutative injustice to take away what belongs to another. Therefore to restore is an act of that justice which directs commutations. [...] To restore is seemingly the same as to reinstate a person in the possession or dominion of his thing, so that in restitution we consider the equality of justice attending the payment of one thing for another, and this belongs to commutative justice. Hence restitution is an act of commutative justice, occasioned by one person having what belongs to another, either with his consent, for instance on loan or deposit, or against his will, as in robbery or theft."[55]

The principle of restitution therefore demands a certain equality (of commutative justice) that includes the return of the thing unjustly taken so that by giving it back the equality is re-established, which presupposes "that what rightfully belongs to one person is in the possession of another bound by justice to restore it."[56] Restitution can happen voluntarily so that the offender returns or otherwise restores the good unjustly taken as based on an agreement between two parties similar to a repayment of a debt or as a gift, or involuntarily without any basis in consent. In either case, the restoration happens by means of what Aquinas refer to as "equality of repayment," which belongs "to the same species of justice, namely commutative justice."[57] The equality that commutative justice requires are thus the acts of restitution to restore and compensate. In addition thereto, then commutative justice and restitution sometimes also requires some form of additional payment. For example, in voluntary transactions such as lending, the renter is not only bound by restitution to restore the house after using it, commutative justice also requires by acts of restitution to compensate for the use of the house. And, in such involuntary commutations like robberies, where one person steals property from another, the equality of justice is not restored simply be returning the stolen property. The

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[53] ibid 211.

[54] Koritansky (n 30) 330; Finnis (n 22) 215. See ST, Vol. II, Pt. I-II, Q87, a6; Vol. III, Pt. II-II, Q61, a1; Q80, a1, Reply Obj. 1, and Q108, a2 and a4. In Q61, a1, Aquinas distinguished between commutative justice and distributive justice: "Now a twofold order may be considered in relation to a part. In the first place there is the order of one part to another, to which corresponds the order of one private individual to another. This order is directed by commutative justice, which is concerned about mutual dealings between two persons. In the second place there is the order of the whole towards the parts, to which corresponds the order of that which belongs to the community in relation to each single person. This order is directed by distributive justice, which distributes common goods proportionately. Hence, there are two species of justice, distributive and commutative." In Q80, a1, Aquinas writes: "The revenge taken by authority of a public power, in accordance with a judge's sentence, belongs to commutative justice: whereas revenge which man takes on his own initiative, though not against the law, or which a man seeks to obtain from a judge, belongs to the virtue annexed to justice." And, in Q108, 2a: "Just as repayment of a legal debt belongs to commutative justice [...] so too the punishment of sins, so far as it is the concern of public justice, is an act of commutative justice."

[55] ST, Vol. III, Pt. II-II, Q62, a1.

[56] Koritansky (n 30) 330. Despite that restitution can be commanded by a judge or someone holding political authority, then Koritansky points out that restitution "properly speaking [is] the act of a private individual."

[57] ST, Vol. III, Pt. II-II, Q61, a3.

offender is also bound by restitution to pay compensation on account of his unjust act. In this way, the acts of making restitution shares with the acts of recompense or compensation, the ability "to terminate (or at least forestall) the wrong of withholding due recompense."[58]

However, the debt of punishment still remains after the criminal has paid (even penal) compensation and brought back unto equal terms with the rest of the law-abiding members of the society.[59] Or, moreover, as the principle of restitution constitutes one element of commutative justice, punishment still constitutes another.[60] Two key differences between restitution and punishment stands out. First, while the main purpose of restitution is that it is always to the victim and refer to an imbalance between two private individuals,[61] then punishment governs the relationship between the criminal offender and the political community (and order) as a whole.[62] Therefore, the debt punishment "is rather owed to an individual criminal by the whole community of which he is a part and against which he has committed his crime [wherefor punishment is] a political act, and an act of law that must be carried out by the community or by some vicar thereof."[63] The debt of punishment is therefore something that is owed to the offender by the community in the sense that the offender "*is paid* what he deserves by the community," and so that if the community fails to punish, "then *it* will commit the injustice, not the criminal."[64] Second, the debt of punishment is also distinct from both the debt of compensation and the additional payment due to the victim of robbery, because the offender is not only bound by commutative justice "to make compensation for the loss incurred [...] *in addition* he must be punished for the injustice committed."[65] As Koritansky point outs, "punishment is required over and above the requirement to compensate the victim of crime for his losses, even when such losses are, as in the case of assault, intangible,"[66] and has nothing "to do with

[58] Finnis (n 22) 212.
[59] Koritansky (n 26) 124. See also Supra, at n52.
[60] In ST, Vol. II, Pt. I-II, Q87, a6, Aquinas therefore also points out that the debt of punishment is not paid before punishment has removed 'the stain of sin'. Moreover, in Reply Obj. 3, he writes: "When the stain is removed the wound of sin is healed as regards the will. But punishment is still requisite in order that other powers of the soul be healed, since they were disordered by the sin committed, so that, to wit, the disorder may be remedied by the contrary of that which caused it. Moreover punishment is requisite in order to restore the equality of justice, and to remove the scandal given to others, so that those who were scandalized at the sin may be edified by the punishment, as may be seen in the example of David quoted above." See also Koritansky (n 18), pp. 161-162.
[61] Vol. III, Pt. II-II, Q62, a1, and a6. Aquinas writes in a6, Reply to Obj. 1: "The chief end of restitution is, not that he who has more than his due may cease to have, but that he who has less than his due may be compensated;" and Reply to Obj. 3. "Since restitution is chiefly directed to the compensation for the loss incurred by the person from whom a thing has been taken unjustly, it stands to reason that when he has received sufficient compensation from one, the others are not bound to any further restitution in his regard."
[62] Koritansky (n 26) 153.
[63] Koritansky (n 30) 332. See also ST, Vol. II, Pt. I-II, Q21, a3, and Q92, a2.
[64] ibid. Italics maintained.
[65] ST, Vol. III, Pt. II-II, Q62, a6. Italics added.
[66] Koritansky (n 26) 154.

negating a gain, a benefit, or an advantage enjoyed by the criminal."[67] The good that Aquinas sees in, and is sought in, the institution of punishment can only be realised through punishment because it rests on an equally between the offender and the society. Therefore, even if the offender pays compensation for the losses suffered to his victim and an additional payment as restitution, and even if the offender "feels genuine remorse for his crime, the disparity in his favor that he gained over the rest of the society cannot be removed until he is made to suffer from something against his will to counter-act his willful injustice."[68] Punishment thus reveals itself not as blind retaliation, but as retribution motivated towards a concern for the equality of justice; a restoration of the political order; and both as an attribute of the common good.

Retribution is therefore the primary goal of punishment, which gives punishment its *main* defining characteristic.[69] The nature of punishment essentially also "consists in being contrary to the will, painful, and inflicted for some fault,"[70] because punishment (vengeance) as contrary to the will, "should be taken by depriving a man of what he loves most."[71] With respect to the types of deprivations and punishments:

> "death, whereby man is deprived of life; stripes, retaliation, or the loss of an eye for an eye, whereby man forfeits his bodily safety; slavery, and imprisonment, whereby he is deprived of freedom; exile, whereby he is banished from his country; fines, whereby he is mulcted in his riches; ignominy, whereby he loses his good name."[72]

In response to how severe the offender should be punished, it has already been argued above that "punishment corresponds to fault in point of severity,"[73] so that punishment generally "should be measured not by the harm that happens to have been done but by the scale of

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[67] ibid 155.
[68] Koritansky (n 30) 333. Aquinas write: "This restoration of the equality of justice by penal compensation is also to be observed in injuries done to one's fellow men. Consequently it is evident that when the sinful or injuries act has ceased there still remains the debt of punishment." See ST, Vol. II, Pt. I-II, Q87, a6.
[69] ibid 334.
[70] ST, Vol. II, Pt. I-II, Q46, a6; Q87, a2, a3 and a6. In Q87, 3a, Aquinas write: "sin incurs a debt of punishment through disturbing an order. But the effect remains so long as the cause remains. Wherefore so long as the disturbance of the order remains the debt of punishment must needs remain also." This also reveals punishment as retribution.
[71] ST, Vol. III, Q108, a3.
[72] ST, Vol. Q108, a3. Aquinas here refers to Augustine's reckoning (De Civ. Dei xxi).
[73] ST, Vol. II, Pt. I-II, Q87, a4. In Reply Obj. 3, he writes: "Duration of punishment corresponds to duration of fault, not indeed as regard the act, but on part of the stain [of sin], for as long as this remains, the debt of punishment remains. But punishment corresponds to fault in the point of severity. And a fault which is irreparable, is such that, of itself, it lasts for ever; wherefore it incurs an everlasting punishment. But it is not infinite as regards the thing it turns to; wherefore, in this respect, it does not incur punishment in infinite quantity." In ST, Vol. III, Pt. II-II, Q66, a6, Reply to Obj. 2, Aquinas gives an example of the proportionality in punishment with respect to robbery: "Hence according to the present judgement the pain of death is not inflicted for theft which does not inflicted an irreparable harm, except when it is aggravated by some grave circumstance [...]." In "On Evil," Q2, 10, ad 4, where Aquinas writes: "The punishments that God inflicts in the future life correspond to the gravity of the moral wrong [...] But the punishments inflicted in the present life whether by God or human beings does not always correspond to the gravity of moral wrong. For lesser moral wrongs are sometimes punished for a time by heavier punishments in avoid to greater dangers. For example, punishment in the present life are employed quasi-medicinally," p. 132, that is also a reference to both deterrent and medicinal punishment.

the offenders fault [that is] by the extent of the offender's manifested self-preference in disregard of the path marked out by law which others constrain themselves to follow."[74]

Within the limits of justice, other factors can also justify less or more severe punishment. Even though punishment may be merited it "need not be imposed when its imposition would cause disproportionate harm to others."[75] Punishment is therefore not limited to a strict form of retribution, which becomes even more clear as we consider the other purposes of punishment: (i) medicinal punishment, and (ii) deterrence. With respect to medicinal punishment (i), Finnis argues that Aquinas everywhere adopts Aristotle's phrase that punishment is a kind of medicine, similar to a remedy or cure, thereby having some sort of 'medicinal function' in a reformatory, rehabilitating, corrective or remedial sense, for instance, as intended for the health and the good of the soul and against future sins,[76] and "conducing either to the amendment of the sinner, or to the good of the commonwealth whose calm is ensured by the punishment of evil-doers."[77] In fact, Aquinas even admits, without neglecting that retribution is the essential motivation of punishment, that the "punishments of this life are medicinal rather than retributive."[78] But he also acknowledges that "the punishment that is inflicted according to human laws, is not always intended as a medicine for the one who is punished, but sometimes only for others," as deterrence (ii): "thus when a thief is hanged, this is not for his own amendment, but for the sake of others, that at least they may be deterred from crime through fear of punishment,"[79] and they are "also remedies and medicines against future sins, in order that either they who are punished, or others may be restrained from similar faults."[80]

Punishment therefore "involves far more than the possible reform of the offender, and includes also the restraining and the sheer deterrence of the offender and of everyone else who needs deterring from wrongdoing and coercive inducement to decent conduct."[81] These

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[74] Finnis (n 22) 214.
[75] ibid 215. In ST, Vol. III, Pt. II-II, Q43, a4, Aquinas writes: "But if it is evident that the infliction of punishment will result in more numerous and more grievous sins being committed, the infliction of punishment will no longer be a part of justice."
[76] ST. Vol. II, Pt, I-II, Q87, a8.
[77] For instance, Aquinas writes in ST, Vol. III, Pt. II-II, Q68, a1, that: "Now the punishment of this life are sought, not for their own sake, [...], but in their character of medicine, conducing either to the amendment of the sinner, or to the good of the commonwealth whose calm is ensured by the punishment of evildoers."
[78] The sentence continues: "For retribution is reserved to the Divine judgment which is pronounced against sinners according to the truth (Rom. ii. 2)," Cf. ST, Vol. III, Pt. II-II, Q66, a6, Reply Obj. 2.
[79] ST, Vol. II, Pt. I-II, Q87, a3, following "Prov. xix. 25: The wicked man being scourged, the fool shall be wiser."
[80] ST, Vol. II, Pt. I-II, Q87, a8, Reply Obj. 2.
[81] Finnis (n 22) 212. In ST, Vol. III, Pt. II-II, Q33, a6, Aquinas writes about punishment in a *reformatory, corrective, and deterrent sense* that: "the correction of the wrongdoer is twofold. One, which belongs to prelates, and is directed to the common good, has coercive force. Such correction should not be omitted lest the person correction be disturbed, both because if he is unwilling to amend his ways of his own accord, he should be made to cease sinning by being punished, and because, if he be incorrigible, the common good is safeguarded in this way, since the order of justice is observed, and others are deterred by one being made an example of." In ST, Vol. II, Pt. I-II, Q87, a6, Aquinas writes about punishment in a *remedial, medicinal*

medicines and deterrent functions and purposes do not remove retribution as the main aim of punishment, rather they emphasise that punishment have the potential and ability to heal a disorder, "an unjust inequality, a defectus in statu reipublicae," which was "introduced into the whole community by the wrongdoer's conduct."[82] In particular, the medicinal function to remedy a social disorder gives to punishment another of its defining characteristics.[83] In this way, Koritansky can also argue that Aquinas is not rigidly committed to the realisation of equality of justice at all costs. So long as punishment pursue its primary retributive goal of equality of justice, and the offenders "experience a loss commensurate with the degree to which they indulged their wills beyond the boundaries of legality,"[84] there is space for mercy and for legal authorities both to impose penalties that "will place the offender back upon equal terms with the rest of the law abiding citizenry,"[85] and "to mete out punishment according to a wider and richer conception of the common good that includes the full scope of benefits that punishment can successfully provide," for instance, other morally significant goals such as "rehabilitation, deterrence and the protection of society."[86] Therefore, prudent legal and political authorities, "must punish with the whole public good in view, assigning appropriate penalties to criminals in light of various constraints caused by their (at times) competing responsibilities and the limitations of their human condition."[87]

(II) Immanuel Kant – Law of Punishment and Lex Talionis

We are now turning to Immanuel Kant's justification of punishment. It is based upon the universal principle of justice that each person has a right to freedom under universal laws compatible with the freedom of others and the hypothetical notion of a social contract or social constitution, which provides the foundation for a civil society and commonwealth. Establishing the constitution, human beings leave the state of nature and their own natural and individual

and deterrent sense: "punishment is a requisite in order to restore the equality of justice, and to remove the scandal given to others, so that those who were scandalized at the sin may be edified by the punishment."

[82] ibid.

[83] Compare Finnis at p. 212 and Koritansky at p. 334.

[84] Koritansky (n 30) 334.

[85] ibid 335. In this way punishment also reveals its ability to cure and remedy an equality. It sets in order the guilt, whose essence was wrongfully willing. The reordering and restorative function punishment can be accounted in a remedial and medicinal sense or through remedies in a reformatory and deterrence sense. See ST, Vol. III, Pt. II-II, Q108, a4, and also Finnis at p. 214. Once the debt of the offender is paid through punishment, he is also liberated.

[86] ibid 334. At p. 158, Koritansky refer to ST, Vol. III, Pt. II-II, Q64, a2 with respect to the death penalty and argue: and argue: "[r]ather than the need to restore the equality of justice, Aquinas emphasizes protecting society from the criminal," p. 158, and "justified by the need to preserve society's moral integrity," p. 159. This also relates to modern incarceration.

[87] ibid; Koritansky (n 26) 160. The prudent legal and political authorities is "executing divine justice," cf. p. 160, fn51 (n 18). Koritansky further emphasises that although the nature of punishment is retributive as opposed to medicinal, then human legislatures are therefore "sometimes more obliged to focus upon the "medicine" as their goal. Therefore, to Aquinas, contrary to Immanuel Kant and his over-reliance of lex talionis, there is room for mercy, p. 335 (n 38).

inclinations to do what seems right and good in their own eyes, because by realising their own freedom, they also realise that they have a reciprocal obligation of not to interfere with the freedom of others, and therefore each human being must restrict their own freedom and behaviour. Because the limitation applies to all human beings as members and citizens of the civil society, the constitution also ensures that all members should be treated in accordance with three juridical attributes that belongs to the members by right: *lawful freedom*, *civil equality, and civil independence*.[88] Therefore, they subject themselves to an external restraint of public compulsory laws, which is administered by the state (*civitas*). The state forms the union of a number of men, which subjects them to such coercive public laws, and through three main branches of its legislative, executive and judicial authority, the state exercises its powers and realises its autonomy.[89] Another important form freedom limitation is that all members of the society have waived their right to punish on their own when their rights and freedoms have been violated. Instead, the state is entrusted with the task and conferred the right and power to punish the offenders for their violations of public laws established by the society.[90]

To Kant the law of judicial punishment (poena forensis), as opposed to the law of natural punishment (poena naturalis),[91] was a categorical imperative discovered by pure reason. This entailed that punishment must be carried out as strong categorical *obligation*:

> "Even if a civil society were to be dissolved by the consent of all its members (e.g. if people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each as done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice."[92]

[88] Immanuel Kant, *The Metaphysics of Morals* (2. Edition, Cambridge University Press 2017) 100. *'Lawful freedom'* entails that it is the right of every citizen to obey to no law other than that to which he has given his consent of approval. *'Civil equality'* entails that it is the right of the citizen to recognise no one as a superior among the people in relation to himself. *'Civil independence'* entails that the citizen owes his existence and preservation to his own rights in the society, thereby not to be subject to the arbitrary will of another, whereby follows that each citizen needs not to be represented by any other than himself where rights are concerned.
[89] ibid 97–103. §§ 43-49.
[90] ibid 114. Moreover, at § 49(E), p. 114, Kant writes: "The right to punish is the right a ruler has against a subject to inflict pain upon him because of his having committed a crime." Kant also distinguishes between private and public crimes, where 'private crimes' refer to embezzlement understood as misappropriation of money or good entrusted for commerce, and fraud in purchase or sale when committed in such a way that the other could detect it. 'Public crimes' refers to crimes against the commonwealth and not just an particular individual person. Counterfeiting money or bills of exchange, theft and robbery, and the like are public crimes and can be divided into crimes arising from a mean character (indolis abiectae) and crimes arising from a violent character (indolis violentae). Private crimes are dealt with in civil court and public crimes in criminal court.
[91] Natural punishment follows a principle according to which crime, as a vice, punishes itself. Therefore, natural punishment never falls within the cognizance of the legislator, p. 114.
[92] Kant (n 84) 116.

The main reason for inflicting punishment on the offender is because of the mere fact that the offender has committed a public crime, because "[no] one suffers punishment because he has willed *it* but because he has willed a punishable action."[93] Kant writes:

> "It must always be inflicted upon him only *because he has committed a crime*. For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality. He must previously have been found *punishable* before any thought can be given to drawing from his punishment of use for himself or his fellow citizens."[94]

This passage also entails that punishment never can never be inflicted merely as a means to promote some other greater good for the civil society or for the criminal himself. The law of punishment thus becomes a categorical imperative that neither is justified because of some political objectives dictated by human nature or natural desires nor due to some great promise that punishment will produce to the society:

> "The law of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment or even reduces its amounts by the advantage it promises, in accordance with the pharisaical saying, "It is better for one human being to die than for an entire people to perish." For if justice goes, there is no longer any value in human beings' living on the earth."[95]

Therefore, justice requires punishment and just punishment. The offender is only justified as punishable because he is a transgressor of the law and not because of his personal or moral culpability, or any other psychological motivations. This idea is in line with Kant's conception of rights which only relates to actions in their external manifestation and that public justice is not concerned with virtues or internal motivations of just and unjust actions. Kant is relative indifferent to the motivations of the offender, because to act morally is a demand of ethics, not a demand of legal justice. Hence, there is an governing notion of separation between law and morality, which is central.[96] It simply falls outside law's jurisdiction to require that law-abidingness is satisfied with praiseworthy moral motives and that offenders should be punished more severe because of their morally reprehensive motives.[97] Judicial punishment is restricted to criminal desert in opposition to moral desert, and only criminal desert entitles the state to punish the offender. Only "the law-breaker (legally) deserves the sanctions defined by law."[98] The judge is allowed to hope that punishment may have beneficial utilitarian

[93] ibid 117. Italics maintained.
[94] ibid 114. Italics maintained.
[95] ibid 114–115.
[96] Thomas E Hill, 'Kant on Wrongdoing, Desert, and Punishment' (1999) 18 Law and Philosophy 407, 414–423; B Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution' (1989) 8 Law and Philosophy 151, 156–169.
[97] Byrd (n 92) 180.
[98] Hill (n 92) 424.

consequences,[99] but the Judge is never allowed to punish for the sake of utilitarian consequences and the maximization of utility, and neither for the sake or impulse of vengeance or hatred.

Kant appealed to the lex talionis principle and the law of retribution (or retaliation)[100] in order to determine how severe the society or judge may punish:

> "None other than the principle of equality (in the position of the needle on the scale justice), to incline no more to one side than to another. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the law of retribution (ius talionis) – it being understood, of course, that this is applied by a court (not by your private judgement) – can specify definitely the quality and quantity of punishment: all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them."[101]

As Kant adheres to a strict justice and lex talionis principle and insist that the only legitimate basis for imposing punishment is the fact that the offender has committed a crime, then the judge is prevented from punishing the offender more severely for more condemnable motives and to show mercy for less condemnable motives. These belongs to realm of ethics and not political justice.[102] Koritansky has critically argued that the holding of punishment as a categorical obligation and the strict application of a lex talionis principle excludes the legitimacy of mercy altogether. He has also argued that adhering to a strict lex talionis principle requires not only that one adhere to a standard of equal justice, but also what he refer to as *"poetic justice."*[103] Lex talionis is a reliable principle for murder as it requires death penalty, but for crimes such as kidnapping, rape and perjury a too strict application of lex talionis does

[99] Koritansky (n 30) 319–322; Koritansky (n 26) 46–47.
[100] Immanuel Kant, *The Philosophy of Law* (Reprint edition, The Lawbook Exchange, Ltd 2010) 196. In this edition, Kant's *ius talionis*, formulating his principle of equality and law of retribution, has also been translated as the law or "Right of Retaliation." See further at pp. 196-197.
[101] Kant (n 84) 115. At pp. 116-117, Kant also writes with respect to "the best equalizer before public justice is death – Moreover, one has never heard of anyone who was sentenced to death for murder complaining that he was dealt with too severely and therefore wronged; everyone would laugh in his face if he said this. [...] Accordingly, every murderer – anyone who commits murder, orders it, or is an accomplice in it – must suffer death; this is what justice, as the idea of judicial authority, wills in accordance with universal laws that are grounded a priori." At p. 115 [6:332], Kant also writes: "A fine, for example, imposed for a verbal injury has no relation to the offense, for someone wealthy might indeed allow himself to indulge in a verbal insult on some occasion." Hill (n 92) here interprets Kant's law of retribution to require more equality in severity, as the rich man, in comparison to the poor, would receive a more mild punishment, if the fine was set independently from any financial considerations, p. 435-436.
[102] Hill (n 92) 439. Hill also points out that the main point of Kantian punishment is not moralize.
[103] Koritansky (n 30) 324.

not provide for *"poetic exactness,"* unless one is fully committed to rape the rapist.[104] Modern sentencing policies deals with such issues of poetic justice and poetic exactness.[105]

(III) Contemporary Retributivism – Just and Simple Desert

While the two previous Sections provides the philosophical background for retribution theory, the following Section rather deals with the contemporary version of retribution theory, and which often is referred to as 'just desert' or 'simple desert'. A key difference from the two previous Sections is that just and simple desert is represented and formed by a number of contemporary writers of which we will attempt to point towards the most fundamental characteristics of what may be considered a common retributive position.

The contemporary branch of retribution theory of just or simple desert often argues along Kantian lines. They generally subscribes to three fundamental Kantian principles for the justification: (1) only those guilty of legal offenses should be punished; (2) the severity of the punishment should be proportional to the gravity of the offence, thereby following the law of retribution or traditional lex talionis principle by which the offender should receive back in degree and (with exceptions) in kind what they inflicted upon others; and (3) the state has a duty to punish the offenders regardless of whether the offenders have any instrumental or utilitarian value to be promoted by deterrence or reform in the particular case.[106, 107] To punish according to these three retributive principles entails that the criminal offender can never complain of unfairness, because it is strictly forbidden to punish an offender according to any other considerations which indicates a more or less severe form of punishment depending on the degree of the offence.[108] The commitment to the three fundamental principles may seem to imply a move away from any moral objectives and considerations for the imposition and justification of punishment; hence, a move towards an instrumentalization of the imposition of

[104] ibid 322–325; Don E Scheid, 'Kant's Retributivism' (1983) 93 Ethics 262, 273. Scheid also interprets Kant's lex talionis in the same direction so that punishment, to be just, must be equal to the offence in kind and degree. In particular, Kant's discussion of capital punishment, Scheid argues, supports a more rigid proportionality principle as there is an emphasis on equality in 'kind' and not only on 'degree'. Contemporary retributivism generally maintains that punishment should be equal to the degree (seriousness) of the offence and rather neglects the equality in 'kind' between the offence and punishment.
[105] Von Hirsch and others (n 7) 229–293.
[106] Hill (n 92) 428; Byrd (n 92) 153.
[107] It is not so much whether Kant is a retributivist that is argued in the literature, but what kind of retributivism his position represents. Whether Kant accepts deterrence to prevent public offenses and crimes have also been discussed. See, for instance: Scheid (n 100); Byrd (n 92); Mark Tunick, 'Is Kant a Retributivist?' (1996) 17 History of Political Thought 60.
[108] Scheid (n 100) 262–263. Scheid argues, for instance, that retributivism essentially consists of two claims: "1. The fact that a person has committed a legal offense is the necessary and sufficient condition for the just imposition of punishment on that person; 2. To be just, the punishment must be proportionate to the crime committed, so that, roughly, more serious crimes receive more severe punishments and less serious crimes receive less severe punishments."

punishment, as a rather objective exercise. However, just and simple desert is most often a moral version so that punishment may be inflicted due to the moral desert of the offender rather than the legal (and criminal) desert.[109] Nonetheless, the emphasis on moral guilt is not a necessary commitment. The position can be modified so that it "no longer connects moral guilt so strongly to justifiable punishment;"[110] whereby the answer to why society punish rather becomes a question of fairness so that "citizens who make sacrifices by obeying the law requires that violations be punished rather than reap benefits for disregarding legal standards."[111] This modification may nevertheless be viewed as controversial.

It seems to be a fundamental result, crucial for the characterisation of the position of just and simple desert, that no further reasons can be given to why offenders (morally) deserve to be punished,[112] looking mainly at the wrongful acts,[113] and without necessarily supporting the broader moral or philosophical Kantian teachings.[114] For instance, a declared modern retributivist has stated that "one fact and one fact only can justify the punishment of this man, and that is a *past* fact, that he has committed a crime."[115] Hence, punishment is not a corollary of law, "but of law-breaking by a member of the society. This is a static and an abstract view but I see no escape from it."[116] Simple or just desert theories on punishment are thus "based upon the principle that people who commit crimes deserve punishment,"[117] and that for an offence: "punishment is right in itself."[118] It "is the only theory that takes into account the notion of justice,"[119] because desert establishes the necessary link between punishment and fairness, so that "the concept of deserved punishment is identical with the concept of justified punishment."[120] Just and simple desert also typically relies "on the moral culpability of the offender or the logical response to law-breaking as inherent to the concept of punishment or ideas of law."[121] If future crimes are prevented, it might be considered "a happy surplus for a retributivist, but no part of the justification for punishment."[122] This disinclination towards the

[109] Ellis (n 4) 39–61. Ellis points out, at p. 40, that the best version of the theory suggests that the offender deserves to suffer in proportion to the moral seriousness of his offence.
[110] Greenawalt (n 12) 349.
[111] ibid. See further pp. 349-350.
[112] Ellis (n 4) 6.
[113] SI Benn, 'An Approach to the Problems of Punishment' (1958) 33 Philosophy 325, 326.
[114] Koritansky (n 26) 40.
[115] JD Mabbott, 'Punishment' (1939) 48 Mind 152, 152. Italics maintained.
[116] ibid 160–161. Two other statements, which may expresses other retributivists' view: "They had broken a rule; they knew it and I knew it. Nothing more was necessary to make punishment proper," p. 155; "To punish a man is to treat him as an equal. To be punished for an offence against rules is a sane man's right," p. 158, quoting W. F. R. Macartney, "Walls Have Mouth."
[117] Dressler and Garvey (n 15) 35.
[118] Glover (n 6) 500.
[119] Seredyńska (n 8) 175.
[120] Hugo Adam Bedau, 'Retribution and the Theory of Punishment' (1978) 75 The Journal of Philosophy 601, 610.
[121] Von Hirsch and others (n 7) 110–111.
[122] Dressler and Garvey (n 15) 42.

beneficial consequences of punishment does not entail that a retributivist is in denial of the preventive functions punishment, but crime prevention is considered rather incidental. Instead, offenders should be punished to the full extent of her or his moral or legal deserts even if no future crime can be deterred or other utilitarian good produced.[123] As the offender deserves punishment, the state not only has a right, but a duty to punish the offender.[124]

A modern desert theorist may therefore be viewed as someone "who claims that the quantum of punishment for crimes should, on grounds of justice, be proportionate to their relative seriousness," and with respect to "the three main issues in the justification of punishment – Why punish? Whom to punish? And How much to punish? – desert theorists will agree in principle about the second and third."[125] There is a commitment to impose sanctions with maximal care for justice, so the result is fair and just punishment. Therefore, the commitment is also extended to the principle of proportionality, which rather than "an eye for an eye" as the standard for proportionality in kind, the proportionality standard should be one of degree.[126] Therefore, retributivists and desert theorists typically advocates for some sort of tariff system,[127] which expresses that the severity of punishment must fit the crime in the way that it should be proportionate in its severity to the gravity of the offence or "relatively seriousness, as determined by the harm done or risked by the offence and by the degree of culpability of the offender."[128] Because grossly excessive sanctions in relation to the gravity of the offence are perceived as unfair and unjust punishment, the notion of proportionality is imposing a bar against grossly excessive and draconian sanctions for lesser offences.[129] In effect, the proportionality principle is therefore operating as a limitation principle for punishment's severity. However, except from such proportionality restraints, commensurate to just desert, the retributivists' commitment to just punishment are generally not extended to a preference for particular type of punishment or sanctioning scheme.[130]

[123] Benn (n 109) 330; Dressler and Garvey (n 15) 42–43.
[124] Greenawalt (n 12) 347.
[125] Von Hirsch and others (n 7) 102.
[126] Kaplow and Shavell (n 5) 302.
[127] Cavadino and others (n 5) 47. They argue that retributivism advocates for "what is known as *tariff*, a set of punishments of varying severity which are matched to crimes of differing seriousness: minor punishments for minor crimes; more severe punishments for more serious offences. The punishment should fit the crime in the sense of being in proportion to the moral culpability shown by the offender in committing the crime. The Old Testament lex talionis (an eye for an eye, a life for a life, etc.) is one example of such a tariff, but only one: a retributive tariff could be considerably more lenient then this, as long as the proportionate relationship between crimes and punishments is retained," p. 47. Italics maintained.
[128] Von Hirsch and others (n 7) 104.
[129] ibid 118.
[130] Greenawalt (n 12) 347.

B. Consequentialism

(I) Deterrence

On an utilitarian foundation, the classical deterrence theory, also known as 'negative prevention theory', generally operates at two levels of: (a) individual or specific deterrence; and (b) general deterrence.[131] Their aim is to prevent crime through deterrence.[132] The components on which deterrence are based on a mechanism of fear through the actual imposition of punishment and the threats of punishment or additional punishment. There are generally three components to deterrence: (i) certainty, (ii) severity, and (iii) celerity, because sanctions will deter offenders and potential offenders "to the extent that they are relatively certain to be imposed, sufficiently severe as to prove aversive and are imposed sufficiently soon after the offence occurs."[133] Deterrence is fundamentally also a psychological mechanism, because it is the offender's or potential offenders' subjective expectations of these dimensions that ultimately matters, because sanctions may be severe, but they will have little deterrent effect, if the potential offenders consider it to be unlikely that the sanctions be imposed.[134]

Regarding (a), then 'individual deterrence' or 'specific deterrence' is based on the assumption that once the offender actually has experienced the punishment, the offender will not reoffend as the harm inflicted by the punishment will create fear in the offender of being punished again, if he will continue to commit crimes.[135] Thus, the punishment must be "severe enough to outweigh in his mind the benefits of crime."[136] From the legislative and sentencing perspective, the provisions of law should prescribe such form of punishment, which not only removes the benefit gained from the committed crime, but also outweigh the benefits from repeating the crime.[137] The sanctioning formula, which the individual and specific deterrence is based upon, is therefore a formula that questions how severe the offender, A, should be punished in order to deter the same person, A, from repeating her or his actions. The proper punishment is then chosen by looking into the future and selecting the appropriate sanctions which are severe enough to deter the offender from repeating his actions.[138] However, because punishment is an evil or source of pain, the sanctions to be chosen should be the least punitive ones that suffices to deter the offender from reoffending, referred to as the 'principle of

[131] Seredyńska (n 8) 165–171; Cavadino and others (n 5) 39.
[132] Clarkson and Keating (n 16) 12; Bentham (n 2) 171.
[133] Von Hirsch and others (n 7) 40.
[134] ibid.
[135] Dressler and Garvey (n 15) 38; Cavadino and others (n 5) 39.
[136] Greenawalt (n 12) 352.
[137] Clarkson and Keating (n 16) 12–13.
[138] Greenawalt (n 12) 352.

frugality or parsimony'[139] and related to the problem of 'marginal deterrence'.[140] Nevertheless, in cases of repeat and persistent offenders, more severe punishment will be warranted because the previous sanctions imposed on the offender has proven ineffective to prevent the repetition of the crime.[141] Therefore, the aim pursued under individual and specific deterrence is to prevent recidivism, and in this perspective punishment is way of reforming the offender and change her or his behavioural and destructive tendencies.

Regarding (b), then 'general deterrence' rest upon the assumption that the threat of punishment deters potential offenders from committing crimes, hence reducing future violations and the unhappiness or pain it would cause.[142] According to Bentham's view, general deterrence is a matter of providing rational self-interested individuals good reasons for not committing crimes.[143] General deterrence therefore focuses on the members of the entire community rather than the individual. The provisions of law should prescribe punishments that threatens those who might contemplate committing an act of crime so that the harm of the punishment threatened with, will outweigh the benefits to be gained from criminal activity; even in those cases where the harm are discounted by the probability of avoiding detection.[144] At the sentencing level, the offender is or may be made into an example for those tempted to engage in similar activities. This form of sentencing is often described as 'exemplary sentencing', because the general deterrence formula is based on a formula that questions how severe the person, A, should be punished in order to deter the persons, X^n.[145] The provisions of law should also be designed on this formula so that "the greater the temptation to commit a particular crime and the smaller the chance of detection, the more severe the penalty should be."[146] However, setting the level of punishment is not entirely a matter of cold rational calculation

[139] Von Hirsch and others (n 7) 41; Cavadino and others (n 5) 42. As Cavadino and Others makes it clear, too severe punishment, higher than the punishment's ability to deter, results in the problem of 'overkill', causing "unnecessary suffering to the offender, and all suffering is bad unless it prevents a greater amount of suffering or brings about a greater quantity of pleasure."
[140] Von Hirsch and others (n 7) 43.
[141] Dressler and Garvey (n 15) 39.
[142] Johannes Andenaes, 'General Preventive Effects of Punishment' (1966) 114 University of Pennsylvania Law Review 35, 949. At p. 949, Andenaes defined 'general prevention' as "the restraining influences emanating from the criminal law and the legal machinery," and argued that: "The decisions of the courts and the actions by the police and prison officials transmit knowledge about the law, underlining the fact that criminal laws are not mere empty threats, and providing detailed information as to what kind of penalty might be expected for violations of specific laws. To the extent that these stimuli restrain citizens from socially undesired actions, which they might otherwise have committed, a general preventive effect is secured." Andenaes nonetheless distinguishes (general) deterrence from general prevention in the sense that the latter "also includes the *moral* or *socio-pedagogical* influence of punishment. The "messages" sent by law and the legal processes contain factual information about what would be risked by disobedience, but they also contain proclamations specifying that it is *wrong* to disobey," p. 950. Emphasis and italics maintained. However, as Andenaes is also aware, other authors use the term deterrence also in this broader preventive meaning.
[143] Greenawalt (n 12) 351.
[144] ibid.
[145] Clarkson and Keating (n 16) 13–17.
[146] Dressler and Garvey (n 15) 38.

similar to that, for instance, of setting the level of fines. Exemplary sentencing may create irrational associations between the punishment and the committed crimes so that people on a subconscious level may fear punishment even though they are rationally confident that it will not occur to them.[147] Exemplary sentencing is therefore also referred to as a mean of 'norm reinforcement' or 'psychological coercion' in the society,[148] because over time the norms will become internalised in the individual and contribute to the development of an internal judgment that decides between actions that should be deemed right and wrong as well as compel a moral obligation and motivation to obey the rules.[149] Therefore, the ultimate aim pursued under general deterrence is to prevent future crime committed by any person.

The individual, but particularly, the general preventative aspect of deterrence thus have both an 'educative' aim and function. The practices of punishment reinforces the community's norms by affecting the dictates of individual consciences.[150] As the sanction regime allows for punishment to imposed or threatens with punishment in the background, then punishment has a profound subconscious effect on the community by educating its members and influencing and building up the habit of not violating the laws as well as providing knowledge that instructs on rightful conduct. If the habits are broken too often, an environment of breaking the law could be established as the new normal and causing further destabilisation to the society.[151] As the utilitarian case for punishment thus "operates by reforming the criminal, by preventing a repetition of the offence, and by deterring others from imitating it,"[152] it is essentially a technique for social control, which may be considered justified so long as it prevents more harm than it produces. However, where the harm inflicted on criminals outweighs the expected advantages to the society, punishment loses its justification. Every act of punishment therefore also becomes an admission of failure, and "the problem of justifying punishment arises only because it is not completely effective; if it were, there would be no suffering to justify."[153]

The expressive and educative functions of punishment under deterrence theory are concerned with the effects of punishment and are forward looking in their aim to prevent future crimes, while retribution, in a comparison of the expressive function, is rather concerned with denunciation and therefore aims to the express the right level of resentment and indignation

[147] ibid.
[148] Seredyńska (n 8) 166.
[149] Greenawalt (n 12) 351.
[150] ibid.
[151] Clarkson and Keating (n 16) 17–22.
[152] Benn (n 109) 330.
[153] ibid.

against the committed crime.[154] Despite, the utilitarian case for punishment has a strong preventive focus on the deterrent effect of punishment on the specific offender and potential offenders, then it does not necessarily entails that the victim's feelings for vengeance is not, or cannot be, acknowledged by the utilitarian position. Satisfying the victim's feelings and desire for punishment may be considered as a legitimate aim for punishing the offender, as the utilitarian case for punishment aim to increase happiness and reduce unhappiness of those who wants the offender to be punished. On utilitarian grounds, the condemnation component of punishment can thus also be supported as "condemnation and feelings of guilt are useful instruments in guiding human behaviour."[155] However, as "[serious] criminal punishment represents society's strong condemnation of what the offender has done, and performs a significant role in moral education,"[156] it is questionable whether moral resentment and indignation can be separated from the educative function of punishment under the deterrence theories. In this way, retributive condemnation may be viewed as an integrated part of deterrence.

The underlying utilitarian rational of the deterrence theory has also invited economist to analyse criminal law on the basis of the economic notions such as 'cost-benefit analysis' and 'efficiency', as well as a tool for welfare maximization.[157] Different attempts have aimed at providing the best equation that would account for the optimal level of deterrence, or at least, the most rational solution predicted under a cost-benefit analysis. These analyses are based on the assumption that a criminal offender, like any other human being, is a rational agent that pursues criminal activities on the basis of his estimation of the potential gains following from the commission of the offence (benefits assessment) against the cost of being captured (probability assessment) and punished (severity assessment), and thus also deterrable. To Hylton, the attempts in the economic literature that aims to set the most optimal criminal penalties can be divided into three categories:[158] (i) classical deterrence theory;[159] (ii) neoclassical deterrence theory;[160] and (iii) modern attempts, including Hylton's own theory, that aim to synthesise the

[154] Clarkson and Keating (n 16) 20.
[155] Greenawalt (n 12) 353.
[156] ibid 351.
[157] For instance: Gary S Becker, Crime and Punishment: An Economic Approach (National Bureau of Economic Research 1974); Stigler George J., 'The Optimum Enforcement of Laws' (1970) 78 The Journal of Political Economy; Richard A Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Colum. L. Rev. 1193; Darryl K Brown, 'Cost-Benefit Analysis in Criminal Law' (2004) 92 Columbia Law Review; Kaplow and Shavell (n 5); Keith N Hylton, 'Economic Theory of Criminal Law' (2019) Law&Economic Series Paper No. 19-9 Boston University School of Law; Keith N Hylton, 'The Theory of Penalties and the Economics of Criminal Law' (2005) Vol. 1 Review of Law & Economics.
[158] Hylton, 'Economic Theory of Criminal Law' (n 153) 1–10.
[159] ibid 2–5; Hylton, 'The Theory of Penalties and the Economics of Criminal Law' (n 153) 178. Besides Beccaria and Bentham, Posner (fn153) represents classical deterrence theory.
[160] Hylton, 'Economic Theory of Criminal Law' (n 153) 6; Hylton, 'The Theory of Penalties and the Economics of Criminal Law' (n 153) 178. The 'neoclassic deterrence theory' is represented by Gary S. Becker's Crime and Punishment (fn153).

previous two.[161] For the purposes here, we will only focus on classical deterrence theory and some of the points made by Hylton and Posner.

Pursuant to doctrine of the classical deterrence theory criminal sanctions should completely deter crime by eliminating the prospect of the gain on the part of the offender. The expected gain from the offence is weighed against the expected penalty, the latter defined as the probability of punishment multiplied by the penalty. Therefore, for the penalty to have full deterrent effect, the expected penalty must, *at least*, be as large as the gain the offender gets from the commission of the criminal offence: Gain $\leq$ Probability $\times$ Penalty. This formula implies that "that the penalty must be at least as great as the offender's gain divided by the probability of punishment."[162] Thus, complete deterrence is a 'gain-eliminating approach'.

To Posner a tort law system was not enough for social control.[163] First of all, there are crimes that do not hurt anybody and thus are without any real victims, but there are also violations against common law prohibitions where the proper sanction is something greater than what the law estimates as the victim's loss determined as: "the extra something should be the difference between the victim's loss and the offender's gain, *and then some*."[164] Posner's idea is that for those economic crimes like theft, tax evasion and price fixing, and which he refer to as 'coercive transfers', the markets offers substitute transactions. Criminal sanctions should be used to create incentives for channelling coercive transfers into the market so that the offender expects a higher gain by making market transactions than by making coerced transfers:

> "To understand this, assume first that the gain is greater than the loss: B has a jewel worth $1000 to him, but worth $10,000 to A, who steals it ("converts" it, in tort parlance). We want to channel transactions in jewelry into the market, and this requires that the coerced transfer be a losing proposition to A. If A is risk neutral, if the probability of B's getting and collecting a judgment against A is one (an important assumption, to be relaxed shortly), and if legal proceedings are costless, then making A liable for damages of only $1000 will not do the trick, and even making him pay $10,000 (restitution) will not quite do it, but will just make him indifferent between stealing and buying. We shall have to add something on, and make the damages, say, $11,000."[165]

Moreover, only the extra some ($11000-10000 = $1000) deters A and provides him with an incentive of not to bypass the market transactions. The criminal monetary sanctions (fines, here: punitive damages) must be adjusted upward so that the offender is made worse off by his potential coercive transfers to discourage criminal behaviour. However, for optimal

[161] Hylton, 'The Theory of Penalties and the Economics of Criminal Law' (n 153) 175–182.
[162] Hylton, 'Economic Theory of Criminal Law' (n 153) 2.
[163] Posner (n 153) 1201–1214.
[164] ibid 1201. Italics added. That 'extra something' is "being designed to confine transfers to the market-transaction costs are not prohibitive," p. 1201.
[165] ibid 1201–1202. Brackets maintained.

deterrence against coercive transfers even more severe criminal fines must be imposed, because the problem of concealment (probability of being captured and convicted):

> "the formula for deciding how large an award of damages (D) must be if the probability (p) that the tortfeasor will actually be caught and forced to pay the damages is less than one is D = L/p where L is the harm caused by the tortfeasor in the case in which he is caught, and includes any adjustment to discourage bypassing the market by a coerced transfer. If p = 1, L and D are the same amount. But if, for example, L = $10,000 and p = .1, meaning that nine times out of ten the tortfeasor escapes the clutches of the law, then D, the optimal penalty, is $100,000. Only then is the expected penalty cost to the prospective tortfeasor (pD) equal to the harm of his act (L)."[166]

Certain modifications to the formula must nevertheless be introduced, thereby taking into account such elements like: (i) risk-immune and risk-averse of potential criminal offenders; (ii) an additional effect of stigma expressed in the imposition of the punishment, and (iii) account of marginal deterrence which aim to establish a balance between lesser and more serious crimes.[167] For our purposes, the concept of 'marginal deterrence' is most important. It requires "as big a spread as possible between the punishments for the least and most serious crime,"[168] because offenders may otherwise decide to commit a more serious crime than a less serious crime in situations where the severity of the punishments are at the same level for both the serious and less serious crimes. The balancing between crimes must therefore remove the incitement for murdering: "If the maximum punishment for murder is life imprisonment, we may not want to make armed robbery also punishable by life imprisonment, for then armed robbers would have no additional incentive not to murder their victims."[169] Thus, economic deterrence theory offers a conceptual view on when a punishment is numerically deterrent.

(II) Incapacitation

Incapacitation theory, also referred to as 'negative individual prevention',[170] aim to protect the public against "murderers, muggers and rapists," and "simply means that the offender is (usually physically) prevented from reoffending by the punishment imposed, either temporarily or permanently."[171] The theory holds that punishment is justified to the extent that it actually prevents the offender from reoffending and that incarceration is the form of punishment which

[166] ibid 1203.
[167] ibid 1207.
[168] ibid 1210; Von Hirsch and others (n 7) 66.
[169] Posner (n 153) 1210. The argument continues: "But arguments based on marginal deterrence is inconclusive [...]. Moreover, the argument does not lead inexorably to the conclusion that capital punishment should be the punishment for simple murder. For if it is, then we have the problem of marginal deterring the multiple murderer. Maybe capital punishment should be reserved for him, so that murderers have a disincentive to kill witnesses to the murder, though against the number of such complementary murders may be less if the initial murder is punished severely."
[170] Seredyńska (n 8) 172–173.
[171] Cavadino and others (n 5) 42.

have the most preventive effect.[172] The theory seems not to be directly opposed to the other punishment theories, because it rather recognises the limitations of their aims and policies in practice. In particular, to the extent the offenders continues to be a persistent danger to others then a decision must be to be taken by the sentencer: in order to fully protect the members of the society against the escalation of any danger and to completely prevent the re-emergence of future crime, punishment in the form of incapacitation may be the only appropriate protective sentence. The idea of incapacitation is thus one of simple restraint by "rendering the convicted offender incapable, for a period of time, of offending again,"[173] and, perhaps, "possibly vindication, which favours the imposition of punishments sufficient to ensure that citizens aggrieved by offences accept the state's response and do not seek to take the law into their own hands."[174] Where the reform and rehabilitation theories aim to change the offenders' destructive habits and attitudes so that the offender may become less inclined to criminal behaviour, the incapacitation theory presupposes or promises no such changes. Incapacitation rather aim to prevent the offender from reoffending, at least for period of time, by excluding the offender from the liberties of the normal society, or the access thereto, or otherwise interpose obstacles which impede the offender from taking certain actions in the society.[175]

The notion of incapacitation is often related to the punishment for the commission of the most serious crimes and dangerous criminals. It generally captures such types of punishment as: "death penalty, severance of limbs, deportation to penal colonies and now the long term incarceration in prison or hospital."[176] By physical preventive means, imprisonment, for instance, ensures that convicted criminals are temporarily out of general circulation, and the death penalty sentence ensures that permanently.[177] Incapacitation is also related to less draconian and drastic means of punishment, for instance, such as probationary or parole supervision, perhaps accompanied with random urine tests to detect illegal drugs use; prohibitions against using alcohol, firearms, or contacting certain victims; disqualifications, withdrawals or revocations of a driving licence; exile or house arrest.[178] Punishment under the incapacitation theories may therefore also be viewed as a form of risk management, capable of imposing more (death penalty, imprisonment) or less (supervision, prohibitions, withdrawals) severe means of punishment in order to protect the society against the risk of danger, which is associated with

[172] Ellis (n 4) 20; Cavadino and others (n 5) 42–44.
[173] Von Hirsch and others (n 7) 75.
[174] ibid 40.
[175] Fletcher (n 13) 30.
[176] Clarkson and Keating (n 16) 22.
[177] Greenawalt (n 12) 352.
[178] Dressler and Garvey (n 15) 39; Von Hirsch and others (n 7) 75.

the offenders, and their relative dangerous disposition to act upon their destructive tendencies.[179] Incapacitation theory's relation to the most severe types of punishment, dangerous offender, and risk management often becomes clear in the research that attempts to construct reliable models to predict offenders' likelihood of reoffending.[180] Since incapacitation fundamentally is a consequentialist theory for the justification of punishment, one of the "key issue[s] is the factual question of how effectively prison manages to reduce crime in this way."[181]

(III) Reform

The three main competing justifications of "criminal sanctioning – deterrence, incapacitation, and retribution (just deserts) – contain not even the pretense that the state has an obligation to do good for its charges."[182] This leaves space for a fourth general punishment theory here referred to as reform theory, but often also used more or less interchangeably with rehabilitation theory, but both also referred to as 'positive individual prevention'.[183] Reform theory is based on "the idea that punishment can reduce the incidence of crime by taking a form which will improve the individual offender's character or behaviour and make him or her less likely to reoffend in the future."[184] Because it deals with remedial, corrective, and rehabilitating means of punishment, it has been questioned whether reform theory actually is a punishment theory. H. A. Bedau has argued that it is not obvious that the reformer "thinks the concept of punishment is necessarily the concept of something harmful in itself. If the reformer really is defending a theory of punishment, rather than (as sometimes he seems to be) advocating an alternative to punishment [...]."[185] On very similar notes, it has also been argued that reform and rehabilitation are very vague objectives that "now embraces any strengthening of the offender's disposition and capacity to keep within the law which is intentionally brought about by human effort otherwise than through fear of punishment."[186] However, while the deterrence and incapacitation theories are based on harsh sanctions and fear of punishment and therefore mainly aims at the negative prevention of crime, then the reform theory is more ambitious in its crime-preventive aim to positively improve of the offender's character and reforming or correcting

[179] Seredyńska (n 8) 172–173; Greenawalt (n 12) 352.
[180] Von Hirsch and others (n 7) 75–101.
[181] Cavadino and others (n 5) 43.
[182] Von Hirsch and others (n 7) 29.
[183] Seredyńska (n 2) 171.
[184] Cavadino and others (n 5) 44.
[185] Bedau (n 116) 606.
[186] Heather L Hart, 'Prolegomenon to the Principles of Punishment' (1960) 60 Blackwell Publishing 24. Hart also refer to reform, and the corrective theory, as "not an ideal for punishment."

the offender into a better person that is capable of becoming re-integrated into the society.[187] The theory therefore treats the offender similar to an "ill person," which needs to be "treated" from criminal tendencies and her or his inclination towards criminal behaviour, a "sickness,"[188] so that the offender can become a more happier person and desist from crime.[189]

The means of punishment are therefore based on some sort of treatment model, which have the ability to cure, repair, correct and change the offender, and the means are usually conceived as corrective and remedial measures rather than punitive sanctions by involving more positive steps of state intervention to alter the character and behaviour of the offender and to improve her or his social skills.[190] At the sentencing level, the appropriate measures are less concentrated on the wrongful act actually committed, but is more focused on the offender as a person, her or his character and individual behavioural tendencies as well as her or his social environment. As the reform of the offender will reduce the risk of recidivism, and increase the possibilities for becoming positively re-united with the ordinary society, there is a strong commitment to look for any chance of improvement of the offender.[191] The appropriate choice of measure should thus be the one having the best chances for correcting the offender, and if combined with a sentence of imprisonment, then the optimism about reforming the offender may result in a view that considers incarceration as an opportunity to provide for reformative and rehabilitating treatment and training rather than as a retributive or deterrent punishment.[192] The corrective and remedial measures varies according to the offence committed and the character of the offender, but typical examples are treatment and educational measures such as: psychological therapies, medications, psychosurgery as a more drastic intervention, and educational training programs, methods for the inducement and repentance or recognition of guilt as less drastic interventions. Perhaps the most important factor for the positive individual prevention and reform theory is that in order to maximize the possibilities for positive reform, the measures imposed or employed should be tailored to the offender's individual character, often referred to as 'individualisation of sentences'.[193] Therefore, by altering "the options that the released convict will face,"[194] the benefits of a successful reform program is that it ultimately protects the other members of the society against being victimised by the reformed

[187] Clarkson and Keating (n 16) 29.
[188] Dressler and Garvey (n 15) 40. Accordingly, prisons has thus been regarded as "correctional institutions."
[189] Von Hirsch and others (n 7) 40; Greenawalt (n 12) 352.
[190] Cavadino and others (n 5) 44.
[191] Dubber (n 6) 698.
[192] Cavadino and others (n 5) 44.
[193] Clarkson and Keating (n 16) 31.
[194] Dressler and Garvey (n 15) 39.

offender. Like individual deterrence and incapacitation, another positive trait of reform theory is that the reform program's success can be measured by its rates of recidivists.[195]

C. Conclusions and a Critical Dialogue and a Reconciliation

As most evidenced by Aquinas' retributivism, retributivism can cover a broad position, but also a more narrow position similar to Kant's retributivism as represented by 'just and simple desert'. Just and simple desert is thus at the heart of modern retribution theory.[196] While traditional retributivism has also been associated with other justifying aims for punishment, such as: vengeance,[197] denunciation or reprobation,[198] or atonement or expiation,[199] then modern retribution theory generally refers to the notions of justice for the justification of punishment and justifies punishment in its relation to guilt and the past crimes committed by the offender. The focus on past crimes entails that retributivists generally are backward-looking and often stands by such claims: that it is morally right to return an evil for an evil; that the offender deserves punishment as severe as his crime (tariff system); that the society needs to express condemnation of the offenders criminal actions; that rights need to be vindicated; and that both the offender and victim have (human) rights. Generally, retributivism can easily be associated with the 'formal justice theory', which requires that equals should be treated equally, e contrario unequals unequally, and "like cases be treated alike."[200] However, retributivism should not be confused therewith, because it is not a strict application of particular principle of justice

[195] Von Hirsch and others (n 7) 1.
[196] Cavadino and others (n 5) 47; Bedau (n 116) 608. Bedau: "Retributivism without desert - the concept of punishment as something deserved by whoever is rightly made liable to it - is like Hamlet without the Prince of Denmark."
[197] Clarkson and Keating (n 16) 2–3. The purpose of vengeance has generally been argued as twofold. First, it aims to satisfy the victim's or her or his family's desire for vengeance, but the state should exact vengeance in order to prevent private retaliation. The first argument that may justify vengeance is thus based on the victims' desire to vengeance, and the state's punishment of the offender is justified thereupon. But, what if the victim will not have a desire to punish the offender, should the legal position within the state thus be, with respect to the state's right to punish, depending upon an arbitrary factor such as the victim's and her or his relatives' desire for vengeance? The first argument therefore leads to a second argument. The community also has a need for vengeance in order to show disapproval of the condemned action. The state therefore reacts to an offence by means for punishment. Together, the first and second argument thus entails that punishment becomes institutionalised in the punishing state, which act out the individual's and society's need for vengeance.
[198] ibid 3–5; Cavadino and others (n 5) 49–51; Feinberg (n 193). The argument for denunciation or reprobation is an 'expressive function' of punishment, and the symbolic significance of punishment is widely acknowledged by the legal scholars as the conventional device for the expression of attitudes of resentment, indignation, revulsion as well as disapproval and reprobation by the community.
[199] Clarkson and Keating (n 16) 5–6. Atonement or expiation has also been argued as a justification of punishment. The offender must work of his guilt through suffering the punishment or to pay of her or his debt owed to the society. When the suffering is over or the offender has paid the debt, the offender becomes reconciled with the society. The underlying principle for punishment is therefore purification and the aim is to wipe of the slate clean and cleanse the offender so that her or his reputation can be restored. However, the purification purpose is not one of true expiation of sin, which depends upon the proceeds of the offender her- or himself. It is rather a secular version under which the society deems the offender to have purged her or his guilt by punishment. A often asked correlated question, also relevant for a secular application the justification, is whether the offender should have a right to expiation?
[200] Hart (n 182) 23; Cavadino and others (n 5) 47.

and punishment, and the formal justice theory is also not a theory that explains why punishment is justified, but a formula that dictates how society should punish. Therefore, where retributivism requires us to punish because the offender deserves punishment, the formal justice theory require us to do it equally and on a non-arbitrary basis.[201] In that way, it is nevertheless also possible to be both a retributivist and a supporter of the formal justice theory.

(I) A Critical and Conclusive Dialogue

The dialogue and discussions in the literature between the retributivists and utilitarian consequentialists have often excelled in pointing out relevant criticism for each of the theoretical positions. As part of a conclusion, this Section offers a short panorama of some of the most essential and frequent of the critical arguments, in a conclusive form, raised against each of the positions to identify and clarify the strengths and weaknesses of their arguments.

Some of the most fundamental criticism raised against *modern retribution theory* and *desert theory* are the following. First, Hart has observed about the criticism against retribution theory: "To some critics is appears to be a mysterious piece or moral alchemy in which the combination of two evils of moral wickedness and suffering are transmuted into good."[202] Moreover, if the "essential contention of retributivism is that punishment is only justified by guilt [...] and therefore it is necessary that a man be guilty if he is to be punished,"[203] without any appeal to further beneficial arguments, then the retributivist either fails or refuses to look at the consequences of a rule and thus also denies the justification for it. Moreover, punishment because justice requires it, or a rule has been broken, is not a sufficient justification.[204]

Second, Quinton has argued that the antinomy between retributivism and utilitarianism can be overcome, because retribution, "properly understood, is not a moral but *logical doctrine*, and that it does not provide a moral justification of the infliction of punishment but an elucidation of the use of the word."[205] A variation of this critique is given by Kaplow and Shavell. They hold that the rationale for the retributive conception is difficult to identify, and that the

[201] Dressler and Garvey (n 15) 42.
[202] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2 edition, Oxford University Press 2008) 234–235.
[203] Quinton (n 9) 134. Italics added. Quinton essentially argued that while retributivism answers the question of "when (logically) we can punish?", then utilitarianism provides an answer to "when (morally) may we or ought we to punish?" p. 134. In this way, retribution is a local doctrine that does not provide a moral justification of the infliction of punishment, but only an elucidation of the use of the concept of punishment, while utilitarianism instead provides a number of possible moral attitudes towards punishment without really being in conflict with logical claim of the retributivists, p. 134.
[204] Benn (n 109) 326–328.
[205] Quinton (n 9) 134.

theory does not define what constitutes the wrongful behaviour that deserves to be punished despite most retributive writers have in mind a category of wrongs they assume wrong.[206] The difficulty in justifying the retributive principle itself is thus one of retributions theory's most criticised problems, including that the position ultimately reduces to vengeance.[207]

Third, critics have argued against the over-reliance on the *lex talionis principle* and that retributive and retaliatory punishment results in some form of poetic exactness in order for punishment to "fit the crime."[208] Even if retaliatory or retributive punishment is not to be effected in a literal sense but in accordance with the spirit of the law, critics have emphasised that such principle "involves a sort of arithmetical equation of suffering as impracticable as the hedonistic calculus. Suffering of one sort cannot be equated with another, though it may be possible to prefer one to another."[209] Despite that a more modern version of the lex talionis principle manifests as proportionality in degree (poetic justice) so that the injury caused and nature of the violation sets an upper limit to the punishment that can legitimately be inflicted on the offender, it is still argued that the argument seeks the nature and severity of the penalty in the nature and seriousness of the crime and that such an appropriate scale is lacking.[210] Moreover, the proportionality concept is essentially an exercise of both poetic exactness and poetic justice reflecting proportionality in kind and degree, but the critique is how it is possible to assess the degree of wrongfulness and to provide for poetic justice?[211]

Third, when retributivists upholds a restoration principle or a doctrine of annulment that treats punishment as *an annulment of a wrong or crime* (Hegel),[212] then it is veiled utilitarianism, because this is "to justify punishment by its effects, by the desirable future consequences which it brings about."[213, 214] If punishment actually would be able to annul a wrong, "it would be justified by the betterment of the victim of the crime or of the society in general."[215] Furthermore, by arguing that punishment is the offender's right or that punishment tends to a recognition of the commission of a wrong, it introduces a reformative justification,

[206] Kaplow and Shavell (n 5) 303.
[207] Cavadino and others (n 5) 48. They also provide a retributive concern about retribution theory: "If – as appears to be the case – detected offenders typically start from a position of social disadvantage (which means that the obligation to obey the law weighs more heavily upon them than on others) then punishment will tend to increase inequality rather than do the opposite." Therefore, even "retributivists should be strongly critical of many aspects of our penal system," p. 48-49.
[208] Quinton (n 9) 135.
[209] Benn (n 109) 335.
[210] Bedau (n 116) 611; Benn (n 109) 336.
[211] Kaplow and Shavell (n 5) 305–311.
[212] ibid 296–297. At fn11.
[213] Quinton (n 9) 135.
[214] Greenawalt (n 12) 347; Benn (n 109) 328.
[215] Benn (n 109) 328.

which is an utilitarian argument.[216] Therefore, retributivist often offers utilitarianism in disguise. Furthermore, a doctrine as that of annulment is only applicable to certain classes of crimes where the clock can be turned backwards. Theft and fraud can be compensated, but "murder, wounding, alienation of affection or the destruction of property or reputation" cannot.[217] Punishment cannot fully restore, annul, erase or otherwise make crimes disappear.[218]

The most fundamental and enduring criticism against *deterrence theory* and negative prevention theory "is the claim that utilitarianism necessitates a disjunction between punishment and justice."[219] Accordingly, as a first point, it is generally argued that the deterrence theory treats the offender as a mean to satisfy social purposes rather than as an end in her- or himself. As the avoidance of greater future harms justifies the infliction of present harm, deterrence regards "citizens merely as numbers to be aggregated in an overall social calculation [and shows] no respect for the moral worth and autonomy of each individual."[220] According to the logic and interests of general deterrence, it may even be justified ultimately to punish the innocent as the innocent can be sacrificed and justified by reference to the prevention of a number of probable future crimes and victims who are then spared.[221]

Second, on a similar note as the first objection, then excessive punishment and exemplary sentencing are also aligned with the interest of general deterrence because punishing the offender with exceptional severity can also be justified by reference to the number of probable future crimes and spared victims.[222] Variations of the second objection have argued that deterrence often makes a show out of punishment sometimes;[223] that it is intrinsically unfair and morally wrong to inflict severe punishment on offenders who only commit minor offences, despite it may be useful under a deterrence strategy; and unfair if varying punishments are inflicted on offenders who have committed identical offences with similar degrees of moral guilt.[224] Furthermore, "[the] harsher the penalty system is, the less plausible it becomes to see it as embodying chiefly a moral appeal rather than a system of bare threats."[225] Moreover, without any appeal to and restriction by (poetic) justice, deterrence brings unjust results.

[216] ibid 329.
[217] Quinton (n 9) 135.
[218] Fletcher (n 13) 32; Seredyńska (n 8) 177–178.
[219] Koritansky (n 26) 11.
[220] Von Hirsch and others (n 7) 42.
[221] Benn (n 109) 331; Von Hirsch and others (n 7) 42.
[222] Von Hirsch and others (n 7) 42.
[223] Benn (n 109) 331.
[224] Greenawalt (n 12) 354.
[225] Von Hirsch and others (n 7) 118. See also pp. 120-121.

Third, against the standard for punishment, which holds that punishment must be effective at preventing crime, the effectiveness of deterrence as a crime prevention strategy is questioned by the empirical research on these issues.[226] With respect to individual deterrence, deterrence seems not to work in practice, because contrary to its doctrine, there is quite some research which indicates "that offenders who suffer more severe or punitive penalties (including penalties specifically aimed at deterrence) are *more* (not less) likely to reoffend," and that "individual deterrence seems to be a little value in justifying our penal practices."[227] With respect to general deterrence, there is only little doubt that the existence of a system of punishment has some general effect. Increases in potential offender's perceived likelihood of detection seems to have a deterrent effect, but the types of sanctions that are actually inflicted on offenders and the severity of the punishment imposed seems to make little difference to general deterrence. Generally, empirical research seems to conclude that it is not like "that deterrence never works, but it does mean that its effects are limited and easy to overestimate."[228]

Fourth, the more specific criticism raised against the economic approach to deterrent punishment argues, for instance, that optimal deterrence is not the only objective of punishment.[229] The critique also stresses incoherency and inconsistency issues across the different theoretical approaches, because not all of the formulas take into account the same elements in their analyses. Neither is seeking the most effective solution necessarily the most desirable solution in terms of justice as the economic solutions often neglect to take into account human rights guarantees and the principles of proper and just application of criminal law.[230] In addition, the social science literature seems to suggest "that potential offenders commonly do not know the law, do not perceive an expected cost for a violation that outweighs the expected gain, and make rational self-interest choices."[231] However, there is evidence for a more general suggestion that "the probability of punishment should be more heavily weighted in the deterrence equation than should the intensity of the punishment,"[232] and that "there is considerable crime-reducing potential in a distribution of punishment that tracks the principles of justice [a justice based system for the distribution of punishment] shared by the community."[233]

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[226] ibid 57–63; Koritansky (n 26) 24; Andenaes (n 138) 970. In 1966, Andenaes concluded "that as a general rule, though not without exceptions, the general preventive effect of the criminal law increases with the growing severity of penalties."
[227] Cavadino and others (n 5) 40. Italics and brackets maintained.
[228] ibid 41.
[229] Kaplow and Shavell (n 5) 318–352; Posner (n 153) 1201–1214.
[230] Seredyńska (n 8) 167.
[231] Paul H Robinson and John M Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) Paper 56 Faculty Scholarship 953.
[232] ibid 977. See further pp. 992-999.
[233] ibid 981. The argument considers just desert based punishment system cost-efficient. See further, pp. 982-987.

Some of the most important criticism raised against *incapacitation theory* and negative individual prevention is based on its assumption that the dangerous offenders that are deemed more likely to reoffend are to be restrained by imposing a longer term of imprisonment than they otherwise would receive. The problem with the implementation of such notion is that research seems to demonstrate that it is very difficult to predict those offenders who are likely to reoffend, i.e. a problem of overprediction and "false positives."[234] Moreover, "our powers of prediction are simply not up to do the job, whether we use impressionistic guesswork, psychological testing, statistical prediction techniques or any other method."[235]

Second, a criticism against the same assumption and overprediction emphasizes that incapacitation inflicts punishment for a crime that has not yet been committed and thus contravenes the fairness-constraint of the principle of proportionality requiring that the punishment is based on the gravity of the offence.[236] The aim of crime prevention leads to punishment in anticipation of an offence to be committed in the future, because the punishment is based on predictions of how offenders will act in the future.[237] Such predictions are unjust because they may lead to false positives in the sense that persons may be unnecessarily punished.[238]

A third point of criticism raises the more principal question of how long periods of imprisonment the offender should be imposed? The answer seems often to be a retributive answer depending upon what the offender deserves, because "[protective] sentencing cannot be without limit; it cannot ignore the dictates of just deserts – of justice."[239] Therefore, with respect to the severity of punishment, incapacitation theory often invoke retributive answers and just desert and a respect of the proportionality principle.[240]

The criticism against *reform theory* and positive individual prevention have argued, besides the criticism that does not consider reform as a theory on the justification of *punishment*, that it is unfair to treat the interests of offenders as having as much intrinsic weights as the interests of victims or ordinary law-abiding citizens.[241]

Second, reform as permissible basis for state intervention and compulsory measures should not force changes in people's character, and by doing so, the state violates the person's

[234] Von Hirsch and others (n 7) 77.
[235] Cavadino and others (n 5) 43.
[236] Seredyńska (n 8) 173; Von Hirsch and others (n 7) 78.
[237] Benn (n 109) 331.
[238] Greenawalt (n 12) 356.
[239] Clarkson and Keating (n 16) 25.
[240] Von Hirsch and others (n 7) 85–100.
[241] Greenawalt (n 12) 354.

intrinsic human right to be respected as a person.[242] Similarly, a treatment model, which is too focused on treatment, risks giving the state an open-ended authority to cure, correct or rehabilitate an offender of her or his antisocial behaviour without having full regard to the offender's original wrong committed; that the state may be given too long time for treating the offence; and that certain of the compulsory measures for treatment are too intrusive and radical.

Finally, similarly to the criticism against incapacitation theory, it is argued that as the reform theory heavily relies on individual predictions and has a strong focus on positive prevention and recidivism, the compulsory measures treats the offender for harmful acts before they have been committed, which is intrinsically unfair and permit an unequal treatment of similar offenders.[243] Except from one approach restricted to men who have committed very serious crimes and themselves experienced abuse and trauma, there is not in the empirical research any evidence for considering corrective and remedial measures employed to reform the offender as more effective in preventing recidivism than employing punitive sanctions.[244]

(II) Reconciliation

The hope for a *reconciliating* and *unifying* theory has been considered an understandable one.[245] However, contemporary retributivism and consequentialism should not necessarily be viewed as mutually exclusive. Hybrid theories with mixed arguments have also tried to combine the two fundamental positions.[246] Satisfying both retributive and utilitarian criteria can even be thought necessary to warrant punishment.[247] Perhaps most legal scholars and philosophers today considers the objectives that justifies punishment as complementary and that some sort of a mixed theory is the most cogent theory.[248] Greenawalt has argued that the basic reasons for having compulsory legal rules backed by severe sanctions are utilitarian, but that notions of just desert provides more stringent constraints on the severity of punishment than the uncensored utilitarian position acknowledges.[249] Naturally, people also tends to think in more retributive terms for the justification of punishment. Hence, a disenchantment from the retributive premises on punishment may eventually also result in less law-abiding, "if the law does

[242] ibid 356.
[243] ibid 357–358.
[244] Cavadino and others (n 5) 45.
[245] Ellis (n 4) 5.
[246] Cavadino and others (n 5) 49; Dressler and Garvey (n 15) 43; Hart (n 251) 1–28; Koritansky (n 26) 24–38.
[247] Dressler and Garvey (n 15) 34.
[248] Greenawalt (n 12) 354.
[249] ibid 354–355.

not recognise that offenders should receive the punishment they "deserve.""[250] To the extent that the complex psychological and sociological assumptions that underlies retributivism and utilitarianism are accurate, they have, and may, subtly blend underneath the substantive positive law. Tariff systems and sentencing manuals often also reflects the notion of proportionality, combine thereto different mitigating and aggravating criteria and a permissible minimum and maximum range of punishment. Within that retributive range, punishment is justified and deserved, and the utilitarian theories are considered complementary as well as invited to fill out the gap with more exact types of sanctions and specific level of punishment.[251]

2. Conceptualisation of Punishment

Before we make our final conclusions, I would like to bring a little attention to what may be viewed as another branch of the theories on punishment. Two important questions have been asked: (1) What is the proper analysis of the concept of punishment?; (2) What (exactly) is punishment? – While the first question is generally neglected in the literature,[252] the theories on the justification of punishment have only indirectly dealt with the second question but without constructing any rigid boundaries for the use of the concept.[253] A lack of a proper definition thus invites for an open-textured and vague use of the concept, "because in several directions there is no sharp line drawn at which we must stop using it."[254] However, some attention has been given to the second question, which is the topic for our discussion.

Antony Flew is among the first of the contemporary philosophers who has proposed a primary and "standard case"[255] for the concept of 'punishment' as opposed to a secondary case and use of the term. His proposal seems to be one of the first attempts to conceptualise the notion of punishment. Despite his proposal rather amounts to a theoretical case than a legal definition of the concept of punishment, the criteria which he determines also creates certain characteristics, contours, and boundaries which more or less may influence any attempts to construct a legal concept. Flew's proposal (I) was later applied and drawn upon by: (II) Hart, (III) Greenawalt, and (IV) Benn (less so) in their own attempt to construct a theoretical concept.

[250] ibid 359.
[251] Clarkson and Keating (n 16) 48.
[252] Sidney Gendin, 'The Meaning of "Punishment"' (1967) 28 Philosophy and Phenomenological Research 235, 235; Bedau (n 116) 601.
[253] Greenawalt (n 12) 343; Seredyńska (n 8) 145; Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49 The Monist 397, 397.
[254] Antony Flew, 'The Justification of Punishment' (1954) 29 Philosophy 291, 291.
[255] ibid 292.

Because their ideas are very similar, including their criteria that makes up a standard case for the concept of punishment, we will discuss the governing ideas of these criteria on the basis of what Hart proposed for his "standard or central case of 'punishment':"[256]

> "(i) It must involve pain or other consequences normally considered unpleasant.
> (ii) It must be for an offence against legal rules.
> (iii) It must be of an actual or supposed offender for his offence.
> (iv) It must be intentionally administered by human beings other than the offender.
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed."[257, 258]

The first criterion is that punishment *(i) must involve pain or other consequences normally considered unpleasant.* Albeit they have different arguments, then all three writers agree that the nature of punishment is associated with an evil, pain, suffering, harmful consequences and unpleasantness, etc.[259] Most of the theories on the justification of punishment seems to share this view except, perhaps, the position of reform and rehabilitation.

The second criterion is that punishment *(ii) must be for an offence against legal rules.* In this regard, Hart's view implies a more legal application, while the others are taking a broader and more conceptual view. The governing idea is that punishment can only be imposed for the violation of an applicable norm; hence: an 'offence', or a 'breach of standards'.[260]

The third criterion is that punishment *(iii) must be of an actual or supposed offender for his offence.* This criterion concerns the question of to whom punishment may be inflicted, and Hart refers to it as a question of distribution, and regards the criterion as "retribution in distribution of punishment."[261] The governing idea is that the scope of punishment should be restricted to the person that violates the norm, the offender, and therefore has "ownership to the offence." The restricting implies a commitment to avoid punishing the innocent and that the offender(s) are agents that are fit to carry a responsibility for their actions.[262]

The fourth criterion stipulates that punishment *(iv) must be intentionally administered by human beings other than the offender.* Greenawalt argued that "God and Humans can punish; hurricanes cannot."[263] The governing idea seems to exclude divine, natural and self-

[256] Hart (n 182) 4.
[257] ibid.
[258] K Baier, 'Is Punishment Retributive?' (1955) 16 Oxford University Press on behalf of The Analysis Committee 25, 27; Bedau (n 116) 604. As a contrast, Baier nevertheless defined 'punishment' as: "the name of a method, or system, of inflicting hardship, the aim of which is to hurt all and only those who are guilty of an offence," p. 27. H. A. Bedau, defines 'punishment' as: "Something imposed on a person counts as a punishment only if it is a harm or deprivation or causes suffering or pain to that person," p. 604.
[259] Flew (n 194) 293; Hart (n 182) 8; Greenawalt (n 12) 344; Benn (n 109) 331.
[260] Flew (n 194) 293; Hart (n 182) 6–8; Greenawalt (n 12) 345.
[261] Hart (n 182) 12.
[262] Flew (n 194) 293; Hart (n 182) 8–12; Greenawalt (n 12) 344.
[263] Greenawalt (n 12) 344.

punishment from the concept of punishment. Therefore, punishment must not only be administered be the others than the offender, but also inflicted by the human hand.[264]

The fifth and last common criterion is that punishment *(v) must be imposed and administered by an authority constituted by a legal system against which the offence is committed.* Again, here Hart makes the concept a rather legal concept, but the governing idea is that punishment must be imposed by some authority having legitimate authority to punish. For example, Flew accepts that a parent, Dean of a College, a Court of law, and a referee, when acting according to their legitimate authority, can be said to impose a punishment.[265]

Where Flew and Hart considers these five constitutive elements to constitute the primary and standard case for the concept of punishment, Greenawalt goes a step further and includes *'condemnation'* among the constitutive elements. The unpleasant consequences following from punishment "are usually preceded by a judgment of condemnation" so that the responsible agent subject to punishment "is explicitly blamed for committing a wrong."[266] The link between condemnation and punishment is, and also can be, attenuated on the basis of the nature of the wrong and the kind of authority that has the power to condemn. For instance, despite parking violations can be subject to unpleasant punishment, "no one really blames the persons who perform them."[267] Condemnation can also be viewed as a form of punishment in itself, particularly "[if] members of a society regarded a formal condemnation as extremely shameful," but Greenawalt, however, "adopted the common assumption that punishment involves more than condemnation." Thus, to Greenawalt, condemnation forms part of punishment, but can also be viewed as a form of punishment in itself.

III. CONCLUSIONS

We will conclude where the discussions ended. In a comparison of the discussions on the justifications of punishment (Section II(1)) with the conceptualisation of punishment (Section II(2)), it is evident that the latter provided for an entirely different discussion than the former and therefore represents a different philosophical branch of the theories on punishment. It is also evident that the justifications of punishment mostly focused on what qualified as the first constitutive element of the standard case of punishment, i.e. it must involve an evil, pain or

[264] Flew (n 194) 294; Hart (n 182) 5; Greenawalt (n 12) 345.
[265] Flew (n 194) 294; Hart (n 182) 5; Greenawalt (n 12) 345.
[266] Greenawalt (n 12) 344.
[267] ibid.

other harmful and unpleasant consequences, and the justification thereof. The two branches nevertheless points at two different aspects of the concept of punishment, where one aspect concerns (i) the essential nature, purpose and severity of punishment and therefore relates to the fundamentals of 'what is punishment', and which 'applied measures' that will result in the imposition of a punishment. Instead, the second aspect concerns (ii) the essential institutional criteria for the imposition of punishment. In particular, the fifth constitutive element that required a sanctioning authority makes it evident that the discussion related to an 'institutional concept of punishment', but this conceptualisation (ii) is nevertheless also including the first aspect of the concept of punishment (i). In their common attempt to make the concept of punishment a primary case, Flew, Hart and Greenawalt also more or less directly acknowledged that both aspects of punishment falls within the "exclusive province of the law."[268] The holds even more true, if Greenawalt's element of a 'judgement of condemnation' is included among as an additional constitutive element for the standard case of punishment.

The theories on the justifications of punishment nevertheless expressed and shared a number of views on the first aspect of the concept of sanctions (i). In this regard, Aquinas' views stands out. These are in one sense very broad but also very specific. To Aquinas, the essential nature of punishment is not only an evil, it is an evil in the sense of 'deprivation' or 'loss'. Hence, death equals a deprivation of life. Stripes and the loss of eye for an eye as is a deprivation or forfeiture of bodily safety; slavery and imprisonment a deprivation of freedom; fines a deprivation of riches; ignominy a deprivation of good name, etc.

A number of observations on Aquinas' conceptualisation of punishment reveals some shared views with consequentialism. I would like to bring attention to three observations.

First, on a foundation of commutative justice, Aquinas considered restitution to established the basic level of justice through measures of compensation and acts of recompense. Such measures could form part of punishment. However, punishment was something more, something above level of restitution, because in addition to make compensation for the loss incurred, the offender must be punished for the injustice committed.[269] Therefore, the imposed punishment much reach over and above the requirement to compensate, i.e. the level of restitution and the basic level of commutative justice. This idea was also found within economic deterrence and the view represented by Posner on optimal deterrence, because damages at

[268] ibid 343.
[269] ST, Vol. III, Pt. II-II, Q62, a6.

"$10,000 (restitution) will not quite do it, but will just make him indifferent between stealing and buying. We shall have to add something on, and make the damages, say, $11,000."[270]

Second, for preventive purposes such as to restrain those found depraved and prone to vice, punishment essentially applies measures of *force* and *fear* so that they might desist from evil-doing and leave others in peace.[271] For the purposes of deterrence, a hanged man, such as a thief, was hanged "not for his own amendment, but for the sake of others, that at least they may be deterred from crime through fear of punishment,"[272] so that "others may be restrained from similar faults."[273] This is another point in which Aquinas' retributive position accords with deterrence theory in its views on individual and general deterrence, including exemplary sentencing and its educative functions that will lead to norm reinforcement. More generally, Aquinas' older retributive position is not a contrary to modern deterrence theory.

Third, albeit it is not exactly clear what Aquinas means by the 'medicinal' functions of punishment, the contexts in which he uses the concept nevertheless makes it clear that a medicinal function is something similar to a remedy or cure with reformatory, rehabilitating, and corrective potential, when it is intended for the health and "for the good of the soul, if he bears it patiently" and as "remedies and medicines against future sins."[274] At the same time, it is nevertheless also "conducing either to the amendment of the sinner, or to the good of the commonwealth whose calm is ensured by the punishment of evil-doers."[275] Hence, the term 'medicinal' carries obvious associations with the purposes of punishment and preventive treatment measures discussed under the reform and rehabilitation theories. On the other hand, the medicinal functions may also be viewed as a function of punishment in its relationship with the purpose of deterrence in a similar way as modern deterrence theory holds by the imposition of severe sanctions that they provide an incentive for the offender of not to repeat the offence. In this way, punishment and deterrence carries a reformatory and corrective potential by encouraging the offender to change his behaviour. The medicinal function is thereby also a remedy for a social disorder. In either way, the same governing ideas are nevertheless there.

[270] Posner (n 153) 1201–1202.
[271] ST, Vol. II, Pt. I-II, Q95, a1.
[272] ST, Vol. II, Pt. I-II, Q87, a3.
[273] ST, Vol. II, Pt. I-II, Q87, a8, Reply Obj. 2.
[274] ST. Vol. II, Pt, I-II, Q87, a8 and Reply Obj. 2.
[275] ST, Vol. III, Pt. II-II, Q68, a1.

> "Punishment as related to the subject punished is evil insofar as the punishment in some way deprives the subject of something."
>
> Saint Thomas Aquinas, On Evil (De Malo), Question 1, Article 4, Reply to Objection 9, p. 79.

> "36. With regard to the nature and severity of the measure, the Court reiterates that "according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty" [the Öztürk case, para. 53], except "those which by their nature, duration or manner of execution cannot be appreciably detrimental" [the Engel case, para. 82]."
>
> Escoubet v. Belgium, para. 36. Emphasis and references maintained.

§ 3. THE CONSTITUTIONAL CONCEPTION OF A LEGAL SANCTION AND CRIMINAL SANCTIONS

I. INTRODUCTION

The main purpose of Chapter 3 on "The Constitutional Concept of Sanctions" is to discuss the concept of 'sanctions' as governed by the European Convention on Human Rights ('ECHR')[276] and as developed by the European Court of Human Rights ('ECtHR') by its application of the Engel-criteria under Articles 6 ECHR and Article 4 of Protocol No. 7 ('4-P7') to the ECHR and the Welch Factors under Article 7 ECHR, together referred to as the 'Engel-test'. The Engel-test determines whether the criminal law-guarantees enshrined in Articles 6-7 and 4-P7 becomes applicable. For similar purposes, the European Court of Justice ('CJEU') has also acknowledged and applied the Engel-test in rulings relating primarily to Article 50 and 52(3) of the Charter of Fundamentals Rights of the European Union ('EUCFR') and Article 6 of the Treaty on European Union ('TEU'). The CJEU has thereby made the Engel-test applicable and transferred the autonomous notion of sanctions as governed by the ECHR and developed by the ECtHR into the EU legal order. Chapter 3 thus follows two tracks. The first track is to the establish the Engel-test as well to discuss its functions. This is the purpose of Section II. The second track aims to establish the sanction theory of the ECtHR, discuss the architectural structures and principles that makes up the constitutional concept of sanctions on the basis of the results and principles that can be derived from the case-law of the ECtHR and CJEU, including those cases under the civil-limb of Article 6 ECHR, where the ECtHR has shared views on the concept of sanctions. This is the purpose of Section III. The Conclusion in Section IV will then

[276] Subtitled as the "European Convention for the Protection of Human Rights and Fundamental Freedoms."

bring all the considerations together and provide a legal definition of the concept of a sanction. This definition will serve its purpose in Chapter 7 primarily, where the EU financial sanctions will be analysed and discussed on the basis of this constitutional concept of sanctions.

II. THE ENGEL-TEST

1. The scope of the Engel-test and the autonomous notion of a criminal sanction

A. The Engel-test and Articles 6, 7 and 4 of Protocol No 7

"Access to justice forms one of the pillars of the rule of law."[277] Albeit the text of Article 6 ECHR does not expressly refer to the right to a court, the ECtHR considers the right to a court to be protected by and read into Article 6.[278] The key and fundamental principle governing Article 6 is that it guarantees the right to a court in civil, administrative and criminal proceedings, and within these proceedings it "provides all kinds of safeguards regarding the fairness of the trial."[279] Two key and fundamental principles relating to the rule of law are also contained in Article 7 ECHR. First, the principle of 'nullum crime sine lege' determines that a criminal conviction only is permitted when based on a norm existing at the time of the incriminating act or omission. Second, the principle of 'nulla poena sine lege' determines that no heavier penalty may be imposed than the penalty applicable at the time the offence was committed.[280] In addition, Article 4-P7 contains another fundamental principle of law, the principle of 'ne bis in idem', which aims to prohibit the repetition and duplication of criminal proceeding that have been concluded by a final decision.[281] The ECtHR has emphasised its relationship with Article 6 ECHR stating that the "protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a hearing in criminal proceedings. [Article 4-P7] enshrines a fundamental right guaranteeing that no one is tried or punished in criminal proceedings for an offence of which he or she has already been finally convicted or acquitted."[282] Accordingly, the repetitive and duplicative "aspect of trial or

[277] Van Dijk Pieter and others, *Theory and Practice of the European Convention on Human Rights: Fifth Edition* (5 ed edition, Intersentia Publishers 2018) 497.
[278] Golder v. the United Kingdom, paras. 24-36.
[279] Pieter and others (n 2) 497.
[280] ibid 655.
[281] ibid 981–982.
[282] Michalache v. Romania, para. 48. E.g. see also Marguš v. Croatia, para. 114; Sergey Zolotukhin v. Russia, para. 58; Nikitin v. Russia, para. 35; and Kadušić v. Switzerland, para. 82. However, Article 4-P7 is separate from Article 6 in that complaints under Article 4-P7 will be declared inadmissible if the Member State has not ratified Protocol No. 7, cf. Blokker v. the Netherlands and ECtHR, Guide on Art. 4-P7, para. 3, p. 5 (see fn8 below).

punishment is central to the legal problem addressed by [Article 4-P7],"[283] and Article 4-P7 thus contains two prohibitions and corresponding rights, a prohibition against double prosecution and against double punishment. However, the ne bis in idem principle is primarily used as a reference to the former prohibition against double prosecution.[284] The ECtHR has issued guidelines on the scope and content of these three Articles, including their principles and rights protected.[285]

Article 6 ECHR governs the "Right to a fair trial" in both criminal and civil proceedings. While Article 6(1) has both a criminal and civil -head or -limb, the rights contained in Article 6(2)-(3) are only applicable in respect of criminal proceedings, hence according to its criminal-head. Under its criminal-head, Article 6 becomes applicable whenever the defendant (applicant) has been subject to a 'criminal charge,' or, as often expressed by the ECtHR in its case-law due to the wording of Article 6(2)-(3), whenever the applicant is "charged with a criminal offence."[286] Accordingly, the criminal-head of Article 6 becomes applicable whenever it has been determined that the defendant has been subject to a 'criminal charge' or 'charged with a criminal offence', and for this purpose the ECtHR applies the Engel-test.

Article 7(1) ECHR, first sentence, stipulates that: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."[287] The application of this principle requires the existence and determination of a 'finding of guilt',[288] and of a 'criminal offence'.[289] With respect to the concept of a 'criminal offence', the ECtHR's guidelines, and the case-law more generally, has determined that the ""criminal offence" concept [...] has an autonomous meaning, like "criminal charge" in Article 6," and the Engel-test with the three Engel-criteria "for assessing whether a charge is "criminal" within the meaning of Article 6

[283] Michalache v. Romania, para. 48, and Nikitin v. Russia, para. 35.
[284] Pieter and others (n 2) 981–982.
[285] European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb)'. Updated on 31 August 2022. Link: https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf. Referred to as: '*ECtHR, Guide on Art. 6, criminal*'. European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb)'. Updated on 31 August 2022. Link: https://www.echr.coe.int/documents/guide_art_6_eng.pdf. Referred to as: '*ECtHR, Guide on Art. 6, civil*'. European Court of Human Rights, 'Guide on Article 7 of the European Convention on Human Rights – No punishment without law: the principle that only the law can define aa crime and prescribe a penalty'. Updated on 31 December 2021. Link: https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf. Referred to as: '*ECtHR, Guide on Art. 7*'. European Court of Human Rights, 'Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights – Right not to be tried or punished twice'. Updated on 31 December 2021. Link: https://www.echr.coe.int/documents/guide_art_4_protocol_7_eng.pdf. Referred to as: '*ECtHR, Guide on Art. 4-P7*'.
[286] Article 6 ECHR and ECtHR, Guide on Art. 6, criminal, para. 16, p. 9. In Zaicevs v. Latvia, para. 53, the ECtHR also stated that the concept of "criminal offence" in Article 2(1) P7 corresponds to that of "criminal charge" in Article 6(1).
[287] Article 7(1) ECHR.
[288] See further ECtHR, Guide on Art. 7, paras. 3-5, p. 6, and the cases referred to therein.
[289] See further ECtHR, Guide on Art. 7, paras. 3-5, p. 6, and the following.

must also be applied to Article 7."[290] Accordingly, the Engel-test is also applies under Article 7 to determine whether the first principle of nullum crimen sine lege becomes applicable. However, it will also follow that the Engel-test applies to determine whether the second principle of nulla poena sine lege becomes applicable due to the concept of a penalty 7 punishment.

Article 4-P7 is titled and governs the "Right not to be tried or punished twice." Its scope of application depends on the term "punished." As evolved in the case-law, the two prohibitions against double prosecution and punishment becomes applicable whenever three general requirements are satisfied, that is, when: (1) both sets of proceedings are criminal in nature; (2) the proceedings concerned the same offence ('idem'); and (3) there was a duplication of proceedings ('bis').[291] From the ECtHR's guideline, and as settled in the case-law, it follows that the first requirement (1) and thus "the notion of "criminal procedure [/ proceedings]" in the text of Article 4 of Protocol No 7 *must be interpreted in the light of the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 [...], commonly known as the "Engel criteria*."[292] Accordingly, the Engel-test with the three Engel-criteria at its centre is also involved in the determination of the scope of the ne bis in idem principle.[293]

The first case which provided the Engel-criteria and which also reflected on the characteristic and essential elements of what constitutes a criminal sanction was the case of Engel and Others v. the Netherlands, from 1976.[294] In the Engel case, the ECtHR concluded that the disciplinary proceedings under Dutch military law was of a criminal nature after having assessed the proceedings and sanctions in the light of what have become the three Engel-criteria. Since the Engel case, the ECtHR has continuously referred to the Engel-criteria, and today a reference thereto has almost taken a standardised form.[295] The first time, the ECtHR summarised the content and methodology provided by the Engel-criteria was in the case of Öztürk v.

[290] ECtHR, Guide on Art. 7, para. 6, p. 6, and referring to Brown v. the United Kingdom; Société Oxygène Plus v. France, para. 43; Žaja v. Croatia, para. 86. In Société Oxygène Plus v. France, para. 43, the ECtHR expressed the view that if the matter does not fall within the criminal scope of Article 6 it can no longer be qualified as a 'penalty' from the point of view of Article 7. In this regard, see also Bowler International Unit v. France, para. 67; Göktan v. France, paras. 44-48; Monaco v. Italy, paras. 40 and 68-69; and Çelikateş and Others v. Turkey.
See further below.

[291] Mihalache v. Romania, para. 49. However, in addition under the third requirement (3), three sub-issues exists, which often also needs to be determined, that is: (i) whether there were new proceedings; (ii) whether the first set of proceedings was concluded by a final decision; and (iii) whether the exception in Article 4(2) is applicable. See further ECtHR, Guide on Art. 4-P7, para. 5, pp. 5-6, and, in particular, the key case of A and B v. Norway.

[292] ECtHR, Guide on Art. 4-P7, para. 10, p. 7. Italics added. See also, inter alia: Matijašić v. Croatia, para. 22; Seražin v. Croatia, para. 64; Timofeyev and Postupkin, para. 86; Pantalon v. Croatia, para. 27; Sergey Zolotukhin v. Russia, para. 52; and Malige v. France, para. 34.

[293] Furthermore, the scope of Article 4-P7 is limited to the application at the national level, cf. ECtHR, Guide on Art. 4-P7, paras. 6-7, and the case-law referred to therein.

[294] Engel and Others v. the Netherlands, 23 November 1976, Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72.

[295] E.g. Ramos Nunes de Carvalho E Sá v. Portugal, para. 122.

Germany.[296] In this landmark case, the ECtHR also elaborated on the second Engel-criterion and provided two cumulative conditions for conducting the assessment under the second Engel-criterion. They examines: (I) the scope of the norm(s) violated by the defendant, and (II) the purpose of the sanctions. These two cumulative conditions have been and will be referred to as the 'Öztürk-criteria'.[297] This entails that the Engel-test essentially consists in applying three alternative Engel-criteria ((A)-(C)) and the two cumulative Öztürk-criteria ((B)(I)-(II)) together with the indicative and criminal classification factors (Section II(3)):

> (A) The legislative classification of the offences and sanctions;
> (B) The nature of the offence:
> (I) The scope of the norm violated;
> (II) The purpose of the sanctions;
> (C) The nature and severity of the sanctions.[298]

As already argued above, when the Engel-test is satisfied, the ECtHR will often find the defendant has been subject to a 'criminal charge', 'criminal offence' and / or 'criminal proceedings'. As evolved in the case-law, the ECtHR also now often reiterates:

> "the notion of a "criminal charge" in the text of Article 6 of the Convention must be interpreted in the light of the general principles concerning the corresponding words "criminal offence" and "penalty" in Article 7 of the Convention, and "criminal proceedings" and "penal procedure" in Article 4 of Protocol No. 7."[299]

Because there is full confluence and identity between the concepts of a 'criminal charge' and 'charged with a criminal offence' under Article 6 and 7,[300] which corresponds to the notion of 'criminal proceedings' under Article 4-P (together all three concepts will be referred to as a 'criminal charge' in the following) and which "must be interpreted in the light of the corresponding words "criminal charge" and "penalty" in Articles 6 and 7,"[301] a first question needs to ask to which extent there is be full confluence and identity between the autonomous notions a 'criminal charge' and a 'criminal sanction', and how they differ? – This is thus a question that compares these two concepts towards stipulating their *similarities* and *differences*. Where the similarities prevail they may also be full confluence between the two

[296] In Öztürk v. Germany, para. 50, the ECtHR stated that: "The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 [...], to the ordinary meaning of the terms of that Article [...] and to the laws of the Contracting States."
[297] Pieter and others (n 2) 526–537.
[298] Engel and Others v. the Netherlands, para. 82, in conjunction with Öztürk v. Germany, para. 53. Because the wording of Article 7 and 4-P7 already makes use of the terms "punishment" and "penalty," they are already carrying a criminal connotation, which is unfortunate when references are made to 'penalties' that do not qualify as criminal sanctions. The term 'sanction' is preferred in the following as it is a better fit for a use in a neutral sense awaiting a legal classification.
[299] Mikhaylova v. Russia, para. 55. See also Paksas v. Lithuania, para. 68; and Sergey Zolotukhin v. Russia, para. 52, referring to Haarvig v. Norway; Rosenquist v. Sweden; Manasson v. Sweden; Göktan v. France; Nilsson v. Sweden; and Blokker v. the Netherlands.
[300] ECtHR, Guide on Art 6, para. 16, p. 6, and ECtHR, Guide on Art. 7, para. 6, p. 6.
[301] ECtHR, Guide on Art. 4-P7, para. 10, p. 7.

concepts, and where the differences prevail the concept of a 'criminal charge' will reveal itself as a broader concept than that of a 'criminal sanction'.

First, some clarification is found in the guidelines of the ECtHR stating that "[in] using the terms "criminal charge" and "charged with a criminal offence", the three paragraphs of Article 6 refer to identical situations. Thus, the (Engel-) test of applicability of Article 6 under its criminal-head will be same for the three paragraphs."[302] The guidelines further provides that the concept of a 'criminal charge' is also an autonomous one, "independent of the categorisations employed by the national legal systems of the member states [and this] is true both for the determination of the "criminal" nature of the charge and for the moment from which such "charge" exist."[303] Accordingly, the legal position under Article 6 is one in which the test of applicability of Article 6 under its criminal-head is the same for the three paragraphs while. However, the second statement nevertheless points to a distinction and assessment, which needs to determine whether the defendant was subject to a charge 'criminal' in nature and the moment such a charge existed. In principle, this entails that the determination must satisfy two formal requirements, whether the defendant has to been subject to a criminal *'charge'*, and whether that charge is *'criminal'* in nature.[304] The case-law of the ECtHR can also be separated into a rather clear-cut split between the assessment of these two requirements.[305]

With respect to the existence of a 'charge', the ECtHR has defined the concept as to mean "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence."[306] The ECtHR considers this definition of a charge to correspond to the test of whether: "the situation of the [suspect] has been substantially affected."[307] The case-law of the ECtHR is rather settled on the question of the existence of a charge, and the cases generally relates to issues of when the defendant either formally or de facto (in reality) was considered *charged* with a criminal offence.[308] This aspect of the charge is a first way in which the concept of a criminal 'charge' reveals itself as a broader concept

[302] ECtHR, Guide on Art. 6, criminal, para. 16, p. 9.
[303] ECtHR, Guide on Art. 6, criminal, para. 15, p. 9.
[304] DJ Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Third edition, Oxford University Press 2014) 376–381; Pieter and others (n 2) 523–531.
[305] ECtHR, Guide on Art. 6, criminal, paras. 15-27, pp. 9-11.
[306] ECtHR, Guide on Art. 6, criminal, para. 17, p. 9, following Deewer v. Belgium, para. 46.
[307] ECtHR, Guide on Art. 6, criminal, para. 17, p. 9. See also the cases of Eckle v. Germany, para. 73; Ibrahim and Others v. the United Kingdom, para. 249; and Simeonovi v. Bulgaria, para. 110.
[308] Therefore, for instance, in Corigliano v. Italy, No. 8304/84, para. 34, the ECtHR stated that: "Whilst "charge", for the purposes of Article 6 § 1 [...], may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect." See more generally the ECtHR, Guide on Art. 6, criminal, paras. 17-20, p. 9-10, and also Pieter and others (n 2) 523–526.

than a 'criminal sanction'. Because the Engel-test almost never is involved in the determination of the charge, this aspect of the criminal 'charge' is also one outside the scope of the Engel-test, albeit it can be generally concluded as a matter of principle and confluence between the concepts that when the Engel-test is satisfied, the criterion of whether the situation of the suspect has been substantially affected will also be satisfied.

Second, the Engel-test is instead the applicable test for determining whether the concepts of charge, offence, or proceedings under Articles 6-7 and 4-P7 are *'criminal'* in nature. Thus, to be clear, the Engel-test is in all situations applied to determine whether the concepts of '*criminal* charge', '*criminal* offence', '*criminal* proceedings' exists in order to trigger the criminal guarantees in Articles 6-7 and 4-P7. Within the scope of these three provisions, in particular within Article 7, the Engel-test is also applied to determine whether the defendant has been subject to criminal sanctions, or the ECtHR has concluded that the defendant was subject to a criminal sanction wherefore Articles 6-7 and 4-P7 also applied. This is the legal position of the Engel-test in the case-law under these three Articles. The point is nevertheless a different one. The autonomous notion of a criminal sanction is always involved under the assessment of each of the Engel-criteria due to the content and logical structure of the criteria. Even where the ECtHR finds that the offence committed have some criminal colour and thus points to the existence of a criminal charge, the assessment will due to the second Öztürk-criterion and / or third Engel-criterion always need to continue towards finding whether the defendant also risked the imposition of sanctions having a criminal nature and character. Except when the ECtHR has found that Articles 6 must apply due to the first Engel-criterion, the nature of the violation committed, that is the very nature of the norm broken, seems never on a standalone basis to have been able to determine the outcome of the assessment and thus whether Article 6, and also 7 and 4-P7, applies.[309] On the contrary, the concept of a criminal sanction, as an *autonomous* concept, can by itself determine whether Articles 6-7 and 4-P7 must apply.[310] Moreover, by the logical structures of the Engel-criteria and their content, the

[309] Under Article 6, the ECtHR has often expressed the following: "for Article 6 to apply in respect of the words "criminal charge", it suffices that the offence in question should by its nature be "criminal" from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by virtue of its nature and degree of severity, belongs in general to the "criminal" sphere," cf. e.g. Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, para. 39; Öztürk v. Germany, para. 54; Lutz v. Germany, para. 55. Accordingly, the notion of a criminal 'offence' and criminal 'sanction' can determine and result in a 'criminal charge' for the purposes of Article 6, thereby triggering the application of the criminal-head guarantees therein. The nature of the violation, that is the nature of the norm broken, is primarily involved in either the first Engel-criterion, the first Öztürk-criterion under the second Engel-criterion, or as criminal classification factor discussed in Section II(3), primarily Section II(3)(A)(I).

[310] This point may be illustrated by the following example, which follows from the sanctioning principles discussed in this Chapter: where the ECtHR has found that the defendant has violated a criminal norm, and the proceedings therefore already have some criminal colour, the defendant will *not* be subject to a criminal charge, if the purpose of the sanctions only are reparatory, because the reparation-purpose of the sanctions are not attributed to the criminal sanctions. Reversely, where the

assessment is almost always directed more towards the character of the sanctions involved than the nature of the offence, and where the ECtHR adheres to other elements in its justification of its conclusion, then these elements are still applied within the structures of the Engel-criteria, which, again, almost always involve some feature of the sanctions that are either imposed or risks to be imposed. Hence, in every conclusion adopted by the ECtHR, the character of the sanctions have always formed an inherent part of the assessment and its conclusion of whether the defendant has been subject to a criminal charge. This argument is thus a matter of principle due to the logical structure and content of the Engel-criteria. And, the argument therefore also explains the validity of statement and views, such as, that: (i) the three provisions of Article 6, 7 and 4-P7 all corresponds and depends upon the same *autonomous* notion of what defines a sanction as a 'criminal sanction' *(punishment)*;[311] (ii) the notions of "criminal charge" and "penalty" contained in Articles 6 and 7, they correspond;[312] and (iii) whether or not the sanction in reality classifies as a criminal sanction seems often also to be the decisive element for the classification of the charge as criminal,[313] in particular in the case-law under Article 4-P7.[314] This discussion will continue in the following Section, II(1)(B).

Third, where the ECtHR concludes that the defendant was subject to a criminal sanction, the defendant will also be subject to a criminal charge. There is thus full confluence and identity between the concept of a criminal sanction and a criminal charge in these situations. However, albeit the autonomous notion of a criminal sanction always more or less directly is involved due to the logical structures and content of the Engel-criteria and thus the purposes, nature and severity attributed to criminal sanctions, the case-law is also rich on cases where the ECtHR has adhered to a number of different elements giving the national legal system in

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defendant has violated a disciplinary norm, the defendant will be subject to a criminal charge by virtue of the purpose, nature and severity of the sanctions, as would be the situation due to the principle that has followed since the Engel-case, that is, when the defendant are imposed or risks the imposition of a deprivation of liberty.

[311] E.g. the ECtHR has stated and for some time now held that: "the concept of a "penalty" in Article 7 of the Convention is, like the concept of "criminal charge" in Article 6 § 1 of the Convention, an autonomous one," cf. Escoubet v. Belgium, paras. 34-35; Pantalon v. Croatia, para. 28; Malige v. France, paras. 34-35; Welch v. the United Kingdom, paras. 27-28; and Georgouleas and Nestoras v. Greece, paras. 32 and 37.

[312] Galan v. Italy, para. 71; Société Oxygène Plus v. France, para. 43; Malige v. France, para. 34.

[313] For instance, see: Engel and Others v. the Netherlands, paras. 80-85; Öztürk v. Germany, paras. 46-56; Lutz v. Germany, paras. 50-56; Jussila v. Finland, paras. 29-39, and 43; Schmautzer v. Austria, para. 28; Janosevic v. Sweden, paras. 64-71; Xhoxhaj v. Albania, para. 245; Matijašić v. Croatia, paras. 21-38; and Grande Stevens and Others v. Italy, paras. 94-101, and the cases referred to therein. See also Seražin v. Croatia, paras. 62-90; Escoubet v. Belgium, paras. 31-39, Becker v. Austria, paras. 25-29; Ezeh and Connors v. the United Kingdom, paras. 102; Sergey Zolotukhin v. Russia, paras. 48-57; Mihai Toma v. Romania, para. 21; Maszni v. Romania, para. 66; Raimondo v. Italy, para. 43; De Tommaso v. Italy, para. 143; and Palmén v. Sweden, para. 26; Blokker v. the Netherlands; R v. the United Kingdom; and Davydov v. Estonia. For example, in Demicoli v. Malta, para. 34, the ECtHR concluded that: "what was *at stake* was thus sufficiently important to warrant classifying the offence with which the applicant was charged as a criminal one." Italics added. In Garyfallou v. Greece, para. 34, the ECtHR stated: "the sanctions to which the applicant company and its legal representatives were liable was sufficiently severe to warrant considering the charge against them to be a criminal charge for the purposes of the Convention."

[314] See the case-law on Article 4-P7 more generally in respect of 'criminal proceedings'. As an example, see: Matijašić v. Croatia, paras. 21-38.

question some "criminal colours" that signifies the involvement of elements that more or less commonly or generally are attributed to criminal law. These elements are discussed in Section II(3) and I refer to them as the 'criminal classification factors', because the existence of these factors may provide some relative criminal colour and weight to the charge, offence, proceedings, as well as sanctions. When the factors are characterising the charge, offence, or proceedings, and the ECtHR have placed some relative weight on them for justifying its conclusions, the weight placed on these factors signifies that is not the sanctions themselves that has fully determined the outcome. Moreover, these situations reveals ways in which the criminal charge is a broader concept than the concept of a criminal sanction. Furthermore, as will shall see, the existence of the criminal classification factors within the specific legal regime in question in some ways corresponds to the idea of whether this legal regime resembles a "regime of punishment,"[315] which will influence whether Articles 6-7 and 4-P7 applies, because the ECtHR referred to these criminal classification factors / elements as "punitive."[316] This (institutional) notion of a 'regime of punishment' is always more or less directly involved in the assessment whenever the ECtHR examines the existence of the criminal classification factors.

Fourth, as argued below, the application of the Engel-test is not necessary where the first Engel-criterion apparently is satisfied and /or the parties to the case do not dispute this result, but instead rather dispute, typically, the scope and content of the criminal guarantees. This entails that irrespective of whether the national legal system of justice would satisfy the Engel-test subject to a full-blown scrutiny of the ECtHR, this is rather irrelevant in these situations, because both parties agree that there is a 'criminal charge' for whatever the reasons, factors or the other characteristics of national law might be. Therefore, this also points to an aspect of the concept of a 'criminal charge' in which is a broader than a criminal sanction.

B. The Engel-test and the autonomous notion of a criminal sanction

The first time that the ECtHR applied principles similar to those of the Engel-criteria under Article 7 was in Welch v. the United Kingdom for the purpose of the determination of the autonomous concept of a 'penalty' *(punishment)*.[317] In the subsequent case-law, the nature of these principles and the test they provides for, has turned out to be factors of a different kind than the Engel-criteria (as discussed in the following) and therefore referred to as the 'Welch

[315] Welch v. the United Kingdom, para. 33. See further Section II(3)(A).
[316] Welch v. the United Kingdom, para. 35.
[317] Welch v. the United Kingdom, para. 28.

factors' in the following. The Welch factors were adopted on the basis of a review of the case-law under Article 6 and applied in accordance with that case-law.[318] Today, the autonomous concept of a 'criminal sanction' and Welch-factors factors are usually introduced similarly as:

> "47. The concept of a "penalty" in Article 7 has an autonomous meaning. To render the protection offered by this Article effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision. The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a "penalty" is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence. However, other factors may also be taken into account as relevant in this connection, namely the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity [...]."[319]

It follows from the case-law more generally that the Welch factors are very similar, if not fully identical, to the Engel-criteria, in particular where ECtHR undertakes a cumulative approach with the Engel-criteria (to be discussed in the following). In accordance with the second Öztürk-criterion under the second Engel-criterion, the Welch factors contains a focus on *(i)* the purpose of the legal powers in question. In accordance with the third Engel-criterion, the Welch factors also contains a focus on *(ii)* the nature and *(iii)* the severity of the legal powers in question.[320] In accordance with the first Engel-criterion, the Welch factors also looks into *(iv)* the characterisation, including the classification, of the legal powers under national law; and *(v)* the procedures involved in the making and implementation of the legal power, albeit this factor are not explicitly articulated under the first Engel-criterion but nevertheless often more or less directly examined under the Engel-test, in particular where the ECtHR undertakes a more thorough analysis of the relevant national law and case-law. The conclusion on this formal comparison and analysis of the Engel-criteria and Welch factors, which is even

[318] In Welch v. the United Kingdom, paras. 27 and 34, the ECtHR referred, inter alia, to the cases of Demicoli v. Malta, para. 31, and Campbell and Fell v. the United Kingdom, para. 72 decided under Article 6 ECHR. In paragraphs 31 and 72, there are in both cases also made references to the cases of Engels and Others v. the Netherlands and Öztürk v. Germany. Accordingly, the ECtHR adhered in all those cases to the Engel-criteria (Engels and Others v. the Netherlands, para. 82, and Öztürk v. Germany, para. 50). Since the beginning, the ECtHR has taken a rather coherent view on the concept of criminal sanctions.

[319] Ulemek v. Serbia, para. 47. The second sentence origins from Welch v. the United Kingdom, para. 28, and contains the Welch factors. As applied in the subsequent case-law, the assessment conducted under Article 7 with respect to the legal character of 'penalties' are generally based on five "Welch factors:" (1) whether the measure was imposed on the basis of a conviction of a criminal offence; (2) the characterisation of the measure under national law; (3) the procedures involved in the making and implementation of the measure; (4) the nature and purpose of the measure imposed; and (5) the severity of the measure, cf. e.g, G.I.E.M. S.r.l. v. Italy, paras. 215-232.

[320] In ECtHR, Guide on Art. 7, para. 13, the ECtHR has elaborated on the assessment of whether a legal power classifies as a criminal sanction, referring, in particular, to the static and dynamic elements of the assessment: "13. The specific conditions of execution of the measure in question may be relevant in particular for the nature and purpose, and also for the severity of that measure and thus for the assessment of whether or not the measure is to be classified as a penalty for the purposes of Article 7 § 1 [...]. In some cases, especially if national law does not qualify a measure as a penalty and if its purpose is therapeutic, a substantial change, in particular in the conditions of execution of the measure, can withdraw the initial qualification of the measure as a penalty within the meaning of Article 7 of the Convention, even if that measure is implemented on the basis of the same detention order [...]. The Court has specified that some of the criteria used to establish whether a measure amounts, in substance, to a penalty are "static" (e.g. the criterion whether the measure in question was imposed following conviction for a criminal offence), and that some are "dynamic" (and therefore liable to change over time, e.g. the nature and purpose of the measure and its severity) [...]." These principles derives from Ilnseher v. Germany, paras. 202-209.

more evident as a settled reality in the case-law, is that there are no real substantial difference between the Engel-criteria and Welch factors as their application will result in the same conclusions, and the case-law does not allow to conclude that the application of the of Engel-criteria would lead to a different result than by the application of the Welch factors in a classification assessment of the legal powers as criminal sanctions. It also follows as a rather deducted conclusion and reality under the application of the Engel-criteria and the Welch factors that the autonomous concept of a 'criminal sanction' is primarily depending on the purpose (i), nature (ii) and severity (iii) of the sanctions. The emphasis on whether the penalty "is imposed following a decision that a person is guilty of a criminal offence," seems to point to the more specific purpose of retribution, which therefore are among the purposes under (i) that are attributed to the criminal sanctions (as discussed below in Section II(2)(B)(II)(1).

A number of arguments supports that fact that there is almost full confluence and identity between the application of the Engel-criteria and Welch factors. First, as already argued, Articles 6-7 and 4-P7 relies upon the same autonomous notion of what constitutes a criminal sanction. The ECtHR has often stated that the "notion of what constitutes a "penalty" cannot vary from one Convention provision to another."[321] This is also in line with the general obligation of the Contracting Parties, as consistently promoted by the ECtHR, to read "the Convention and its Protocols [...] as a whole, and interpreted in such a way as to promote internal consistency and harmony between their various provisions."[322] Where the ECHR provides for autonomous notions and concepts, the ECtHR must accordingly also promote a consistent application thereof.[323] Therefore, in cases decided under Article 7, the ECtHR has also referred to cases decided under Article 6 and vice versa,[324] or directly applied the Engel-criteria under Article 7, instead of the Welch factors, to determine whether the defendant / applicant has been subject to a punishment / penalty.[325] Under Article 4-P7, the ECtHR seems rather generally to

[321] Göktan v. France, para. 48. Emphasis maintained. See also Rosenquist v. Sweden, p. 10; Nilsson v. Sweden, p. 10-11; Routsalainen v. Finland, para. 42; Khmel v. Russia, para. 58; Asadbeyli and Others v. Azerbaijan, para. 150; Haarvig v. Norway, p. 11; Igor Tarasov v. Ukraine, para. 24; Maresti v. Croatia, para. 56; Tomasovic v. Croatia, para. 19; Lucky Dev v. Sweden, para. 51; Häkkä v. Finland, para. 37; Nykänen v. Finland, para. 38; A and B v. Norway, para. 105; Muslija v. Bosnia and Herzegovina, para. 25; Pirttimäki v. Finland, para. 45; Glanz v. Finland, para. 48; Boman v. Finland, para. 29; Simkus v. Lithuania, para. 31; Kiiveri v. Finland, para. 30; Rinas v. Finland, para. 40; Milenkovic v. Serbia, para. 32; Österlund v. Finland, para. 36. With respect to Article 7, see also Coëme and Others v. Belgium, para. 145; Scoppola v. Italy, para. 96; Mihai Toma, para. 20; Del Rio Prada v. Spain, paras. 81-82.
[322] Margus v. Croatia, para. 128.
[323] Lázaro Laporta v. Spain, paras. 15-16, and Pantalon v. Croatia, para. 27.
[324] Where the ECtHR referred to the case-law from Article 6 in Article 7, e.g.: Jamil v. France, para. 32 (referring to Engel and Others v. the Netherlands, para. 82, and Öztürk v. Germany, para. 53); Valico S.r.l. v. Italy, p. 12; Zaja v. Croatia, para. 36; Nadtochiy v. Urkaine, para. 32; Mihai Toma v. Romania, paras. 20-22; Georgouleas and Nestoras v. Greece, paras. 33-44; Timofeyev and Postupkin v. Russia, paras. 70-82; Galan v. Italy, paras. 96; and Platini v. Switzerland, paras. 45-46. Where the ECtHR has referred to the case-law from Article 7 in Article 6, e.g.: Escoubet v. Belgium, para. 35; and Malige v. France, paras. 34-35.
[325] Société Oxygène Plus v. France, paras. 40-51; and Pantalon v. Croatia, paras. 25-33.

refer to cases decided under Article 6 and 7.[326] Such references, inferences, adherences and applications would otherwise be invalid. Second, very recently the ECtHR has also stated that the Welch factors "resemble the criteria to be considered in determining whether or not there was a "criminal charge," commonly known as the "Engel-criteria" [...], which apply also to Article 7 of the Convention and Article 4 of Protocol No. 7."[327] Third, in a few cases relating to Article 7 and 4-P7, the ECtHR seems to have initiated the process of merging the Welch factors under the Engel-criteria, because the Engel-criteria have "a wider range."[328] Two tests for deciding on the same issue is also not conducive to a consistent and coherent read. Therefore, they should also be read and interpreted as one.

There is nonetheless one important difference that concerns the character of the methodology of the Engel-criteria in comparison with that promoted by the Welch factors. While the Engel-criteria are *alternative* in character, the character of the Welch factors are what they claim to be: *factors*. The alternative character of the Engel-criteria means that it suffices to confirm that one of the Engel-criteria are satisfied. Therefore, a large number of cases have also been decided on the basis of the second Engel-criterion.[329] In these respects, the ECtHR has often expressed that it suffices to show that either "the offence in question should by its nature be "criminal" from the point of view of the Convention, *or* should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere."[330] Much less cases have been decided on the sole basis of the third Engel-criterion, but in some cases the ECtHR has also applied the Engel-criteria in the reverse order, thereby starting with the third Engel-criterion.[331] Where deprivations of liberty are at stake, the result seems now so evident that criminal law-guarantees should apply.[332]

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[326] For instance, as a rather new case: Seražin v. Croatia, paras. 62-90.
[327] Rola v. Slovenia, para. 54. Emphasis maintained. In Zaja v. Croatia, the ECtHR applied the Engel-criteria under Article 7: "Even though these criteria were initially developed for the purposes of determining the applicability of Article 6 of the Convention under its "criminal head", they are equally pertinent to the issue of applicability of Article 7 [...]." cf. para. 86. See also Nadtochiy v. Ukraine, paras. 20-23 and 32-33.
[328] E.g. Georgouleas and Nestoras v. Greece, paras. 31-44; Mjelde v. Normay, p. 15; Storbråten v. Norway, p. 17; and Haarvig, v. Norway, p. 11. See also Malige v. France, para. 35.
[329] E.g. Öztürk v. Germany; Lutz v. Germany; Umlauft v. Austria; Palaoro v. Austria; Pfarrmeier v. Austria (concerning traffic law); Lauko v. Slovakia; Kadubec v. Slovakia; Čanády v. Slovakia; Muslija v. Bosnia and Herzegovina; Pramstaller v. Austria (concerning minor offences and/or administrative offences); Bendenoun v. France; Janosevic v. Sweden; Jussila v. Finland; Nykänen v. Finland (concerning tax and VAT law penalties).
[330] Lutz v. Germany, para. 55. Emphasis maintained. Italics added. See also Garyfallou AEBE v. Greece, para. 33; Lauko v. Slovakia, para. 57; Ezeh and Connors v. the United Kingdom, para. 86; Ziliberberg v. Moldova, para. 31; Jussila v. Finland, para. 31; Västberga Taxi Aktiebolag and Vulic v. Sweden, para. 78.
[331] E.g. Garyfallou v. Greece; A.P., M.P. a. T.P. v. Switzerland and E.L., R.L. and J.O.–L. v. Switzerland. Perhaps, the ECtHR did so in order to show that, in the light of its previous case-law, that the fines (tax surcharges) at stake obviously had a criminal character as they were "not inconsiderable," cf. paras. 40 and 45 of the Switzerland cases.
[332] E.g. Mills v. the United Kingdom, para. 20; Moore and Gordon v. the United Kingdom, para. 18; Findlay v. the United Kingdom, para. 69; Wilkinson and Allen v. the United Kingdom, para.19; Smith and Ford v. the United Kingdom, para. 19.

The difference in character between the Engel-criteria and Welch factors is nonetheless blurred by the fact that the ECtHR is not always consistent in applying the Engel-criteria and also not as alternative in character. When an isolated analysis of each of the Engel-criteria do not allow for a clear and definitive conclusion, the ECtHR instead applies a 'cumulative approach'.[333] In fact, the cumulative approach has become the most common approach taken by the ECtHR. Even in cases where the ECtHR seems to have decided the issue after an assessment based on the second Engel-criterion, the ECtHR has then still found it necessary to use the third Engel-criterion to provide for *further evidence* for its conclusions made under the assessment of the second Engel-criterion.[334] The cumulative approach thus reveals a close and integrated relationship between the second and third Engel-criteria and it is often so close that it is impossible to determine which of the two Engel-criteria that had more weight. This holds and applies even more so, when the ECtHR also takes into account the additional criminal classification factors. Therefore, it can be said that the cumulative approach transforms the character of the Engel-criteria into factors of a similar weight as the Welch factors because both ends up fostering an overall assessment. Therefore, references to the 'Engel-test' in this Chapter and the rest of this Thesis should be understood as a full integration between the Engel-criteria and Welch factors together with the criminal classification factors discussed in the following Section, II(3). A reference to the Engel-test may thus contain a reference to either the Engel-criteria applied in accordance with their alternative character, or to the Welch factors and / or Engel-criteria applied in a similar manner under the cumulative approach.

The Engel-test is therefore the standard-test for determining whether the criminal law-guarantees enshrined in Articles 6-7 and 4-P7 becomes applicable.[335] In conducting that assessment, the ECtHR must also have regard to the objects and purposes of Articles 6-7 and 4-P7 and to the ordinary meaning of the terms applied therein. The ECtHR also has recourse to international, comparative and customary criminal law of the Contracting Parties ('Member States').[336] The Engel-test does not allow the ECtHR to conduct an assessment of whether the sanctions actually imposed are appropriate and based on an appropriate and proportional

[333] ECtHR, Guide on Art. 6, criminal, para. 27, p. 11. See also for instance: Campbell and Fell, para 67-73; Bendenoun v. France, para. 47; Demicoli v. Malta, paras. 30-35; Ravnsborg v. Sweden, paras. 31-36; and J. B. v. Switzerland, paras. 47-49.
[334] E.g. Pantalon v. Croatia, para. 32.
[335] This entire Chapter has aimed to exhaust the case-law of the ECtHR on Articles 6 and 7 and 4-P7 and its application of the Engel-test and Welch factors. However, to refer to just some of those cases that I consider as the key and leading cases, then in respect of *Article 6*: Campbell and Fell v. the United Kingdom; Öztürk v. Germany; Ravnsborg v. Sweden; Jussila v. Finland; Steininger v. Austria; Grande Stevens and Others v. Italy; Ramos Nunes de Carvalho e Sá v. Portugal; and Gestur Jónsson and Ragnar Halldór v. Iceland. *Article 7*: Welch v. the United Kingdom; Jamil v. France; Zaja v. Croatia; G.I.E.M. S.R.L.and Others v. Italy; and Rola v. Slovenia. *Article 4 of Protocol No. 7*: Gradinger v. Austria; Göktan v. France; Sergey Zolotukhin v. Russia; Nykänen v. Finland; Johannesson and Others v. Iceland; and A and B v. Norway.
[336] Section II(3)(B), and, e.g.: M. v. Germany, paras. 69-75.

sentencing.[337] The proportionality of sanctions and the appropriateness of sanctioning decisions largely falls outside the scope of the Engel-test, thereby Articles 6-7 and 4-P7, in accordance with the margin of appreciation doctrine.[338]

When the ECtHR has applied the Engel-test and found the criminal law-guarantees contained in Articles 6-7 and 4-P7 applicable,[339] the main consequence that follows from the "positive result" is that the legislative classification of the offences and sanctions under national law are *reclassified for the purposes of Articles 6-7 and 4-P7*, while a "negative result" confirms the classification under national law. This does not entail that that the sanction imposed by the national authorities or courts are invalid, only that the criminal safeguards guaranteed by Article 6-7 and 4-P7 as interpreted by the ECtHR must be observed and afforded to the defendant. Hence, it is not necessary to reclassify the law provisions and categories of offences and sanctions provided under national law into criminal law so long that the safeguards are observed and afforded. In addition thereto, the application of the Engel-test has gradually evolved and resulted into in a situation under Article 6 ECHR where there exists criminal charges of different weight. This result entails the ECtHR has opened for a distinction in terms of the stringency and fullness of the application criminal guarantees under Article 6 between the hard core of criminal law and what may be referred to as 'periphery criminal law', based on the involvement of a high or low degree of stigma, so that outside the traditional categories of criminal law certain new areas belonging to periphery criminal law like "tax surcharges proceedings [...], minor road traffic offences proceedings [...], or proceedings concerning an administrative fine for having providing premises for prostitution"[340] do not require a full and stringent application of the stricter criminal-head guarantees protected by Article 6. This further entails that where a sanctioning decision that makes the subject charged with a criminal offence, perhaps due to the classification of the sanction as criminal pursuant to the Engel-test, is taken by an administrative authority which by itself does not afford the criminal law-

[337] E.g.: "it is not the Court's role to decide what is the appropriate sentence applicable to a particular offence" cf. Muller v. Austria, para. 28. See also Dungveckis v. Lithuania, para. 46; and Segame Sa v. France, para. 59

[338] On this doctrine, see the literature in the next footnote.

[339] E.g. on the guarantees, see, for instance: Dijk Pv, Hoof Fv, Rijn Av, Zwaak L (eds), '*Theory and Practice of the European Convention on Human Rights'* (5th edition, Intersentia Publishers 2018); Grabenwarter C, *'European Convention on Human Rights: Commentary'* (1st Edition, Beck; Hart Publishing 2014); Harris DJ, O'Boyle M, Warbrick C, *'Law of the European Convention on Human Rights'* (3rd edition, Oxford University Press 2014); Harris DJ, O'Boyle M, Warbrick C, *'Law of the European Convention on Human Rights'* (2nd edition, Oxford University Press 2009); Herlin-Karnell E, *'The Constitutional Dimension of European Criminal Law'* (1st edition, Hart Publishing 2012); Mitsilegas V, di Martino A and Mancano L (eds), *'The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis'* (Hart Publishing 2019); Peers S, Hervey T, Kenner J, Ward A, *'The EU Charter of Fundamental Rights: A Commentary'* (1st edition, Hart/Beck 2014); Stavros S, *'The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and a Comparison with Other Instruments'* (Springer 1993); Trechsel S, *'Human Rights in Criminal Proceedings'* (Oxford University Press 2005).

[340] ECtHR, Guide on Art. 6, criminal, para. 4, p. 7.

guarantees provided by Article 6 ECHR, then that sanctioning decision must be subject to a subsequent control by a judicial body which has full jurisdiction, including "jurisdiction to examine all questions of fact and law relevant to the dispute before it."[341] In this way, it is "possible to partially waive the procedural guarantees in the administrative phase, thus gaining efficiency of the sanctioning action, in the assumption that a judge can reassess, in a public hearing, the merits of the facts and the amount of the sanction applied."[342] The consequences that follows from the distinction between the hard core and periphery criminal law in respect of the extent and stringency of the criminal-head guarantees is not fully settled in the case-law.[343] Except from the indications already given here, it is also not possible to fully determine the specific extent of when a criminal charge have more or less weight and thereby carries more or less stigmatisation. It also matters less for the Engel-test and the concept of criminal sanctions as this distinction only applies once the criminal-head of Article 6 becomes applicable.

2. The Engel-criteria

A. The legislative classification of the offence and sanctions

The Contracting States are free under the ECHR, in their function as guardians of the public interest, to designate an act or omission as an administrative infringement or as a criminal offence, to establish under national law a distinction between administrative and criminal law, and to create mixed violations which includes prohibited acts or omissions in both categories of administrative and criminal law.[344] However, for the purposes of Article 6, the ECtHR already noted in the Engel case that all Contracting Parties upholds "a distinction of long standing, albeit in different forms and degrees, between disciplinary proceedings and criminal

[341] Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, para. 51. See also inter alia: Öztürk v. Germany, para. 56; Lutz v. Germany, para. 57; Schmautzer v. Austria, para. 34; Gradinger v. Austria, para. 42; Lauko v. Slovakia, para. 64; Kadubec v. Slovakia, para. 57; Jussila v. Finland, para. 43; Marčan v. Croatia, para. 37; and Sancakli v. Turkey, paras. 43-52; and Grande Stevens and Others v. Italy, para. 139. In Lutz v. Germany, para. 57, the ECtHR stated the general principle with respect to the level of protection of the criminal law-guarantees in administrative proceedings that: "Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention, provided that the person concerned is able to bring any decision thus made against him before a tribunal that does afford the safeguards of Article 6." On the other hand, the principle of an oral and public hearing constitutes a fundamental principle enshrined in Article 6(1) ECHR that is more strictly applicable in hardcore area of criminal law, where there must at first instance be a tribunal which fully meets the requirements of Article 6 therefore allows the defendant to have his case heard with the opportunity, "*inter alia*, to give evidence in his own defence, hear the evidence against him, and examine and cross-examine the witnesses," cf. Marčan v. Croatia, para. 34. Italics maintained. However, where administrative proceedings resulted in the imposition of a fine that is threatened with imprisonment if the fine is not paid, i.e. coercive sanction of default imprisonment to an unpaid fine, there could legitimately be call for stronger guarantees to apply to the administrative proceedings at issue, cf. Marčan v. Croatia, para. 38. See also Baischer v. Austria, paras. 9 and 19-30; Marguč v. Slovenia, p. 8.

[342] D'Ambrosio R in "The Legal Review of SSM Administrative Sanctions" of Zilioli C and Wojcik (eds), 'Judical Review in the European Banking Union' *(Edward Elgar Publishing 2021)*, para. 19.07, p. 318.

[343] Pieter and others (n 2) 544.

[344] E.g. Engel and Others v. the Netherlands, para. 81, and Öztürk v. Germany, para. 49.

proceedings."[345] Since the Engel case, the purpose of the first and second Engel-criteria have been to resolve the issue of whether the national laws provisions were governed by disciplinary or criminal norms. With respect to the first Engel-criterion, this is question of to what extent the national legislative classification of the offence and sanctions are decisive?

The ECHR is not opposed to the sovereign will of the Contracting States having the autonomy to design its own legal system. However, before the Engel-case, the ECtHR had already concluded that the notion of criminal 'charge' contained in Article 6 should be understood as having an autonomous meaning within the ECHR.[346] By the later Engel-case, it was thus also logical move of the ECtHR to attach an autonomous meaning to the notion of 'criminal' charge. The ECtHR argued that the operation of the essential clauses and criminal guarantees constitutes fundamental principles of any democratic society and that these becomes applicable whenever the applicants are accused of claims that carries a 'criminal charge' for the purpose of Article 6. Otherwise, the operation of the protective clauses and guarantees would escape the supervision of the ECtHR and be subject to the sovereign will.[347]

The vast majority of cases of where Article 6 is applied under its criminal-head is because that the nature of the matters undoubtfully belong to the traditional areas of the (hard) core of criminal law. In these situations, the parties to the case rarely dispute or question the applicability of Article 6 under its criminal-head, and the ECtHR does thus also not have a need to apply the Engel-test. The result is that Article 6 applies under its criminal-head, which is in accordance with the alternative character of the first Engel-criterion, because the national legislative classification of the laws applicable providing the legal bases for the criminal offences and sanctions have stayed decisive.[348] Hence, the applicability of Article 6 has been decided on the basis of the penal provision itself, "not the criminal offence subsumable under the respective provision."[349] These situations therefore provides for the main rule.

Because the concept of a 'criminal sanction' is autonomous concept, there is a logical exception in the case-law emerging therefrom with respect to the alternative character of the first Engel-criterion. In a few cases before the ECtHR the first Engel criterion has not been

[345] Engel and Others v. the Netherlands, para. 80. See also Gestur Jónsson and Ragnar Halldór Hall v. Iceland, para. 76; Ramos Nunes de Carvalho e Sá v. Portugal, para. 123. In the key case of Ramos Nunes de Carvalho e Sá v. Portugal, this proposition was re-emphasised by the ECtHR as it stated that it "has long held that disciplinary proceedings as such cannot be characterised as "criminal,"" cf. para. 123. Emphasis maintained.
[346] Neumeister v. Austria, para. 18.
[347] E.g. Engel and Others v. the Netherlands, para. 81; and Campbell and Fell v. the United Kingdom, paras. 68-69. Obviously, the same can be held with respect to Article 7 and 4-P7.
[348] ECtHR, Guide on Art. 6, criminal, para. 23, p. 10.
[349] Grabenwarter (n 28) 108.

absolute in the sense that the national criminal classification of the legal powers in question automatically had stayed decisive. First and foremost, this seems to be the situation where the legal power in question does not qualify as a sanction, and therefore cannot classify as a criminal sanction. In Escoubet v. Belgium, an 'immediate withdrawal of a driving licence' was having legal basis in the consolidated Acts of 16 March 1968, which constituted a separate criminal statute. The ECtHR did not consider it decisive. Instead, it stated:

> "The Court notes further that the fact that immediate withdrawal is a measure governed by the consolidated Acts of 16 March 1968, which constitute a separate criminal statute, is not decisive. The fact that a measure is provided for in a criminal statute of a respondent State does not in itself signify that it falls within the scope of Article 6 of the Convention. That Article is not applicable unless there is a "criminal charge" against a particular person."[350]

The ECtHR has taken very similar stances in other cases as well.[351] For example, in Maaouia v. France, an exclusion / deportation order, excluding aliens from French territory, was qualifying as a preventive measure and not a criminal sanction albeit the characterisation of the deportation and exclusion under national law was open to different interpretations. The ECtHR then provided a very principled statement: "*In any event*, the domestic legal order's characterisation of a penalty cannot, by itself, be decisive for determining whether or not the penalty is criminal in nature."[352] This statement first and foremost protects and governs the concept of a 'criminal sanction' as an autonomous concept. It also contains implications for the Engel-test as well, because as the ECtHR's case law will evolve and it becomes evident what defines a criminal sanction, there are grounds for a more direct and honest conflict between the first Engel-criterion on the one side and the second and third Engel-criteria on the other. For instance, as we shall see, purely reparatory and preventive sanctions are classified as non-criminal sanctions, but if such types of sanctions are having legal basis within national criminal law, the case-law of the ECtHR and its statements seems to indicate that the criminal guarantees will not apply for the purposes of Article 6-7 and 4-P7. Such consequence is a logical consequence that follows from the autonomous notion of a criminal sanction.

The ECtHR often reiterates as a general principle applicable under the Engel-test that: "[the] classification in domestic law is not, however, decisive for the purposes of the

[350] Escoubet v. Belgium, para. 34. The dissenting opinion of Judges Tulkens, Fischbach and Casadevall considered the result a paradoxical view, pp. 16-18.
[351] Seražin v. Croatia, paras. 67-68. In Tyler v. the United Kingdom, the Commission noted "that ecclesiastical law in the United Kingdom describes proceedings for conduct unbecoming a priest as a "criminal suit," and further notes that ecclesiastical law is a fully integrated part of ordinary domestic law. However, the definition of an offence in the internal legal system is only one criterion in determining whether proceedings determine criminal charges, and is not decisive," p. 5. In Demicoli v. Malta, paras. 31-33, the reasoning of the ECtHR also goes in the same direction.
[352] Maaouia v. France, para. 39. Italics added. Deportation and exclusion orders are generally outside the criminal scope of Articles 6-7 and 4-P7, cf. e.g. Lupsa v. Romania, para. 63; Mamatkulov and Askarov v. Turkey, para. 82; and C. G. and Others v. Bulgaria.

Convention, having regard to the autonomous and substantive meaning to be given to the term "criminal charge.""[353] Even where the national criminal courts and / or constitutional courts have not considered the legal powers in question to qualify as a criminal sanction or not even to qualify as a legal sanction, the ECtHR often shows determination, as the guardian of the ECHR, to decide the issue for itself on the basis of the second and third Engel-criteria.[354]

The case-law is therefore often represented by the methodological fact that mainly the second and third Engel-criteria expressly have maintained their alternative character.[355] Outside the scope of the hard core and traditional area of criminal law, where the applicants questions the classification of the offence and sanctions, the ECtHR will apply the Engel-test. In these situations, the first Engel-criterion "is of relative weight and serves only as a starting point."[356] The ECtHR examines how national law classifies and prescribes the norms violated by the offender(s) and which sanctions that are available to the sanctioning authority.[357] It is used to set the stage and to provide the broader legislative context of the offences and sanctions and often takes into account the related national case-law relevant for the current issue.[358] Hence, the first Engel-criterion carries only a relative weight in these situations and it has only played a very little role in the history of the case-law,[359] if played any role at all.[360]

Decriminalisation is a legislative declassification technique which shares a close connection with the core of the first Engel-criterion in the attempt to opt-out a subject matter formerly covered by national criminal law and declassified and relabelled under a different category. The ECtHR has acknowledged the legitimacy of decriminalisation, because it might be reasonable and serve the general interests of the individuals and the societies' need for an proper and effective administration of justice by relieving the judicial authorities from the task of prosecuting and punishing minor and numerous offences like road traffic rules.[361] On the

[353] Escoubet v. Belgium, para. 33. See also Becker v. Austria, para. 26; G.I.E.M. S.r.l. and Others v. Italy, paras. 212 and 220, and the case-law cited therein.
[354] Escoubet v. Belgium, paras. 28-39; and Seražin v. Croatia, paras. 58-92.
[355] See, for instance: Ezeh and Connors v. the United Kingdom, para. 86; Jussila v. Finland, para. 31; Steininger v. Austria, para. 34; Sancakli v. Turkey, para. 29; Sergey Zolotukhin, para. 53.
[356] Gestur Jónsson and Ragnar Halldór Hall v. Iceland, para. 85.
[357] Engel and Others v. the Netherlands, para. 82, and Michalache v. Romania, para. 58.
[358] Three rather new but typical examples can be found in Ramos Nunes de Carvalho e Sá v. Portugal, paras. 70-82 and 124; Michalache v. Romania, paras. 31-43 and 58; and Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, paras. 25-31.
[359] Öztürk v. Germany, para. 52; Jussila v. Finland, paras. 30-31; and Grande Stevens and Others v. Italy, para. 95.
[360] Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press 2005) 18.
[361] ECtHR, Guide on Art. 6, criminal, para. 20, p. 10, and Öztürk v. Germany, para. 49. In that case, the 1968/1975 legislation aimed to decriminalise "petty offences" in the Federal Republic of Germany from the sphere of criminal law and include them among "regulatory offences," cf. paras. 17 and 51. In Lutz v. Germany, the ECtHR reiterated its statement from the Öztürk case, para. 56, with regard to minor road traffic offences: "Having regard to the large number of minor offences - notably in relation to road traffic - which are not so discreditable that the offenders deserve the stigma of a criminal penalty, a Contracting State may have good reasons for introducing a system which relieves its courts of the task of dealing with the great majority of them. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with

other hand, decriminalisation may also been viewed by ECtHR with suspicion because the approach itself are indicative of the criminal nature of the underlying norms.[362] When the consequences that follows from the decriminalisation mainly entails a degradation of the level of protection so that the criminal law-guarantees contained in the ECHR no longer remains applicable, the ECtHR has considered such decriminalisation as incompatible with the objectives and purposes of the ECHR and to hinder a true realisation of the Human Rights.[363]

Therefore, it should now be clear that the ECtHR examines the national provisions in accordance with the second and third Engel-criteria. In these situations, the ECtHR remains "free to go behind the appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of [Article 7]."[364] Accordingly, the ECtHR assesses the realities and substantive, rather than the formal, nature of the provisions, and it does so "in the light of the common denominator of the respective legislation of the various Contracting States"[365] to ascertain whether the offences and sanctions classify as criminal.

B. The nature of the offence

"The very nature of the offence is a factor of greater importance."[366] In the key case of Öztürk v. Germany, the ECtHR expressed a number of views which have become important for the characterisation of the nature of a criminal offence and sanction. A first view expressed that "the relatively lack of seriousness of the penalty at stake [...] cannot divest an offence of its inherently criminal character."[367] This first statement emphasised the alternative character of the second Engel-criterion and the autonomous character of the notion of a criminal offence and sanction. The ECtHR then expressed a second view: "The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6 [...]. There is in fact nothing to suggest that the criminal offence referred to

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the Convention, provided that the person concerned is able to bring any decision thus made against him before a tribunal that does afford the safeguards of Article 6," cf. para. 57.

[362] Janosevic v. Sweden, para. 68: "It appears that the change from the earlier system, which was one of penalties for intentional or negligent conduct, to the new system based on objective factors was prompted by the need for greater efficiency."

[363] Engel and Others v. the Netherlands, para. 81; Öztürk v. Germany, para. 49; Campbell and Fell v. the United Kingdom, para. 68; Lutz v. Germany, para. 57; Ioan Pop v. Romania, paras. 25-27; and Nykänen v. Finland, para 38. Attempts to decriminalise seems never to have been able to escape the scope of criminal-law guarantees, particularly not when the sanctions maintain their purpose to provide for punishment and deterrence and there continues to exist a close connection between the administrative and criminal proceedings.

[364] Welch v. the United Kingdom, para. 28. See also Jamil v. France, para. 30, and M. v. Germany, para. 121.

[365] Engel and Others v. the Netherlands, para 82.

[366] Engel and Others v. the Netherlands, para. 80; Öztürk v. Germany, para. 52; Jussila v. Finland, para. 32.

[367] Öztürk v. Germany, para. 54. See also Lutz v. Germany, para. 54; Ezeh and Connors v. the Unithed Kingdom, para. 86; Ziliberberg v. Moldova, para. 34; Jussila v. Finland, para. 31; Ramos Nunes De Carvalho e Sá v. Portugal, para. 122.

in the Convention necessarily implies a certain degree of seriousness."[368] The two statements makes it clear that the autonomous notion of a criminal offence and criminal sanction may be criminal due to their nature and therefore not depending on a certain degree of seriousness. Nevertheless, if the second Engel-criterion is of greater importance than the first Engel-criterion so that it is capable itself to determine whether Article 6 applies under its criminal-head, but at the same time it does not necessarily depend upon seriousness, then an obvious question follows: what makes an offence qualify, and thus to be classified, as a criminal offence?

In the Öztürk case, the ECtHR had to determine whether violations of German traffic law amounted to a criminal offence. According to German law at that time, the German legislator, by the adoption of legislation 1968/1975, aimed to decriminalise "petty offences" in the Federal Republic of Germany from the sphere of criminal law and include them among "regulatory offences" (Ordnungswidrigkeiten).[369] Regulatory offences should thus no longer be part of German criminal law, but the ECtHR concluded that Article 6 was applicable under its criminal-head.[370] The ECtHR reached this conclusion by first making two preliminary observations with respect to the first Engel-criterion, which gave German traffic law a penal colour:

First, the ECtHR noted that there was no absolute partition that separated German criminal law from the law of regulatory offences, and particularly not in situations where there continued to exist a close connection between the regulatory offences and criminal offences. Generally, the German administrative authorities would remit the subject matter to the public prosecutor when there existed reasons to suppose that a criminal offence had been committed. The public prosecutor could then return the matter if the prosecutor was not convinced about taking proceedings. However, in situations of a close connection between the regulatory and criminal offences, the public prosecutor also had the authority to extend the criminal proceedings in order to cover the regulatory offences, unless the administrative authorities had not already imposed and fixed the amount of the fine.[371] The involvement of public prosecutor established a close procedural connection between the regulatory and criminal offence and was indicative of the criminal nature of the offence. The involvement of the public prosecutor is thus one of the criminal classification factors applicable under the Engel-test.[372]

[368] Öztürk v. Germany, para. 53.
[369] Öztürk v. Germany, paras. 17 and 50-51.
[370] Öztürk v. Germany, para. 54.
[371] Öztürk v. Germany, paras. 20 and 51.
[372] Section II(3)(A)(III)(1).

Second, the ECtHR also noted that the German provisions of ordinary law that governed criminal procedure applied by analogy to the regulatory proceedings, notably to the judicial stage, which attributed jurisdiction to the District Courts, to the chambers of the Courts of Appeal (Oberlandesgerichte) and then to the Federal Court of Justice (Bundesgerichtshof). Unless the 1968/1975 Act stated otherwise, the District Court would, if it found the objection admissible, examine the objection against a penal order (Strafbefehl), hold a hearing unless it was not deemed necessary, and deliver a judgement (Urteil) where it could impose heavier sanctions according to Code of Criminal Procedure. The public prosecutor could also attend the hearing, when the District Court considered it appropriate.[373] The fact that German criminal courts were involved and German criminal procedural law applied by analogy were also one of the classification factors that gave the regulatory offence a criminal colour.[374]

The ECtHR nonetheless considered these preliminary observations as indications furnished by national law (criminal factors) and as having only a relative value.[375] Instead, the ECtHR emphasised the autonomous character of the second Engel-criterion: "the very nature of the offence, considered also in relation to the nature of the corresponding penalty[,] represents a factor of appreciation of greater weight."[376] In accordance therewith, the ECtHR very often either conducts an analysis on the basis of, or indirectly imply or adhere to, the two key cumulative 'Öztürk-criteria': (I) the scope of the norms violated, and (II) the purpose of the sanctions. The two Öztürk-criteria has allowed the ECtHR over time to draw a fundamental distinction between disciplinary offences and sanctions on the one side, and criminal offences and sanctions on the other. While Section (I) focuses on the scope of the essential norms governing the laws violated to distinguish between disciplinary and criminal *offences*, Section (II) focuses on the purposes of the sanctions that either were imposed or risked being imposed to distinguish between criminal and non-criminal disciplinary *sanctions*.

(I) The scope of the norms violated

With respect to the scope of the norm, the ECtHR stated in the Öztürk case that the applicant had violated "a rule that is directed, not *towards a given group possessing a special status* – in the manner, for example of disciplinary law –, but *towards all citizens in the their capacity as*

[373] Öztürk v. Germany, paras. 21-23, 28 and 51.
[374] Section II(3) (A)(III)(1).
[375] The criminal classification factors is discussed in more detail in Section II(2).
[376] Öztürk v. Germany, para. 52.

road-users."[377] This statement provided what was to become the key distinction between laws governed by disciplinary norms and criminal norms. In a more updated version, the main and fundamental distinction is one where norms that protects the general interests of the society, and which have a general binding character and/or are directed at the public at large, they belong to criminal law and classifies here as: *'criminal norms'*. On the other hand, where the norms only are addressing a specific group of subjects or another closed or restricted circle of natural and/or legal persons, the norms belong to disciplinary law and classifies here as: *'disciplinary norms'*. However, it is not the number or other quantitative aspects of the addressees that are important for the determination and classification of the norms. Rather, it is the specific qualities of the members of the particular group and the nature of their interests that are protected by the law applicable to them, which are decisive.[378] Therefore, the starting point of the assessment is whether the applicable rules, from the relevant law provisions, applies and affects a restricted group of addressees or the general public or interests of the society.[379] This binary distinction has resulted in a legal position in the case-law of the ECtHR under Article 6 where the laws and the associated violations either are governed by criminal and general binding norms (1) or disciplinary and specific binding norms (2). Where the laws violated are governed by a mixture of (1) and (2), the ECtHR has also established some guiding principles to determine the nature of the norms (3). Each to be discussed separately in the following.

(1) Criminal and general binding norms

The first question is therefore which areas of laws that may be considered as governed by criminal and general norms? – The ECtHR has not given a direct and specific answer to this question, but those areas that falls into the hard core of traditional criminal law as well as the areas of law which falls into periphery criminal law seems mostly to be governed by criminal norms, and thus to be of a general binding nature. Norms and rules that governs violations and crimes like murder, theft, rape and violence seems to be a fair attribution and exemplification of the traditional scope of criminal law.[380] Rules that protects the life, liberty, bodily safety and property essential to every human being are thus governed by criminal norms of a general

[377] Öztürk v. Germany, para. 53. Italics added. The ECtHR also argued: "It matters little whether the legal provision contravened by Mr. Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic."
[378] Pieter and others (n 2) 528.
[379] ECtHR, Guide on Art. 6, criminal, para. 24, p. 11.
[380] William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2017) 279. The Engel-test is also not directly intended nor designed to examine those traditional areas, because its purpose is to determine which areas of law that belongs to the more untraditional (periphery) area of criminal law.

binding nature. These crimes will often also trigger the application of Articles 6-7 and 4-P7 in accordance with the first Engel-criterion, because there are hardly any doubt associated with whether such crimes belongs to the traditional scope of criminal law. Therefore, it is rather the areas of periphery criminal law which requires an assessment by the Engel-test.

Which other areas of law may then be considered belonging to periphery criminal law by virtue of being governed by general binding norms? – The ECtHR has also not given a direct and specified answer in this regard. However, the case-law seems to have settled that penalties imposed for violations of tax and VAT law and traffic law are areas of law that are governed by criminal norms.[381] As such penalties often are imposed under administrative or other civil proceedings, these areas of laws often also marks the references to periphery criminal law under which administrative but punitive sanctions are imposed against the offenders. Accordingly, competition law and the regulation of free markets and anti-competitive behaviour is by the ECtHR considered to affect the general interests of society that normally are protected by criminal law.[382] The area of securities law that prohibits market abuse in the form of insider trading and market manipulation seems also to be considered as norms governed by criminal law. In Grande Stevens and Others v. Italy, the Italian government argued that the rules on market manipulation violated by the defendants they governed interests other than those usually protected by criminal law because the prohibition of market manipulation aimed at investor protection and to protect the investors against any potential risk that might influence their choices. The Italian government had also argued that the violation was based on a behaviour and conduct of mere negligence, "which was likely to provide erroneous signals or information to investors, without it being necessary that this be likely to trigger a significant change in the financial markets."[383] The ECtHR dismissed these arguments in total and stated more generally that: "the provisions of which the applicants were accused of breaching were intended to guarantee *the integrity of the financial markets and to maintain public confidence in the security of transactions."*[384] It also observed that the CONSOB, which was the Italian administrative body that imposed the sanctions, had "the task to protect investors and to ensure the effectiveness, transparency and development of the stock markets."[385] The ECtHR concluded that the rules were governed by interests that were "general interests of the society [and]

[381] See, Section III(3) which attempts to provide for an overview of the legal areas in which the Engel-test has resulted in a positive result, and thereby found the criminal law-guarantees applicable.
[382] Menarini Diagnostics S.r.l., v. Italy, para. 40; Société Stenuit v. France, para. 62; and the references and comments made by the ECtHR in Grande Stevens and Others v. Italy, para. 96.
[383] Grande Stevens and Others v. Italy, para. 90.
[384] Ibid, para. 96. Italics added.
[385] Ibid.

usually protected by criminal law."[386] Hence, the first Öztürk-criterion was satisfied and comparative criminal law thereby seems to have made its influence on the conclusion.

(2) Disciplinary and specific binding norms

The second question is then which areas of law that the ECtHR considers to be governed by disciplinary norms of a specific binding character? – On this question, the ECtHR has been more elaborative because it has often held that the disciplinary norms typically are found in rules that governs certain professions. In a recent key case of Ramos Nunes de Carvalho e Sá v. Portugal, the ECtHR also pointed out certain areas of law that typically exemplifies some of the areas of laws that are governed by disciplinary norms:

> "123. The Court has, in a variety of cases, examined the applicability of the criminal limb of Article 6 § 1 to disciplinary proceedings. It has long held that *disciplinary proceedings as such* cannot be characterised as "criminal" [...]. The cases concerned several professional categories: lawyers [...]; notaries [...]; civil servants [...]; doctors [...]; members of the armed forces; liquidators [...]; and, as in the circumstances of the present case, judges [...]. Of course, this may not hold good for certain specific cases, for instance where a deprivation of liberty is at stake."[387]

A number of cases dealing with the violations of rules of professional standards and duties were referred to within the brackets ([...]).[388] These cases are characterised by their overwhelmingly disciplinary character and generally falls outside the criminal scope of Article 6, except, for instance, as in the Engel case, "where a deprivation of liberty is at stake [...]."[389]

One of the cases referred to was Müller-Hartburg v. Austria concerned the profession of lawyers, and which proved to be very illustrative of conducts and behaviours that amounted both to a disciplinary and criminal offence, but prosecuted in separate proceedings. The

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[386] Ibid.

[387] Ramos Nunes de Carvalho e Sá v. Portugal, para. 123. Italics added. See, for instance, also Le Compte, Van Leuven and De Meyere v. Belgium, para. 42; Müller-Hartburg v. Austria, para. 39, Peleki v. Greece, para. 35; Xhoxhaj v. Albania, para. 244; and Grosam v. the Czech Republic, para. 88-99. In Ramos Nunes de Carvalho e Sá v. Portugal, with respect to the second Engel-criterion, the ECtHR stated: "the statutory provisions authorising the imposition of penalties were not aimed at the public in general but at a specific category, namely judges. Such provisions are designed to protect the profession's honour and reputation and to maintain public trust in the judiciary [...]. Hence, the offences of which the applicant was accused were purely disciplinary rather than criminal in nature [...]," cf. para. 125.

[388] In addition to the case of Ramos Nunes de Carvalho e Sá v. Portugal, the case of Müller-Hartburg v. Austria is very illustrative of disciplinary proceedings involving the violation of disciplinary norms.

[389] Ramos Nunes de Carvalho e Sá v. Portugal, para. 123. In the case of Ramos Nunes de Carvalho e Sá v. Portugal, the applicant, a judge, was due to start her maternity leave. Before her departure, she had asked for her performance appraisal. The High Council of the Judiciary, the "CSM," instructed another Judge to conduct the performance appraisal. During a telephone conversation between the applicant and the Judge, approximately a half year later, she still had not received her performance appraisal and made some insulting remarks about the Judge. The CSM decided to open (three) disciplinary proceedings against the applicant for violations such as insult and breach of her duty of propriety. Among other sanctions, she was ordered to pay twenty day-fines, which corresponded to twenty days without pay, cf. paras. 10-32. With respect to the second Engel-criterion, the ECtHR noted: "the statutory provisions authorising the imposition of penalties were not aimed at the public in general but at a specific category, namely judges. Such provisions are designed to protect the profession's honour and reputation and to maintain public trust in the judiciary [...]. Hence, the offences of which the applicant was accused were purely disciplinary rather than criminal in nature [...]," cf. para. 125.

applicant was a practicing lawyer living in Vienna. In 1995, he had entered into a trusteeship agreement in connection with real estate transactions with an Austrian bank. According to the agreement, one of the applicant's tasks was to transfer ATS 20,000,000 (EUR 1,450,000 at that time), which he held as a trustee, to the company X in exchange for a loan guarantee. On 10 May 1996, the bank complained to the Vienna Bar Association that the applicant contrary to the agreement had transferred ATS 20,000,000 to company X without handing over the guarantee. Without the knowledge of the bank, he had also made some personal investments. On 26 August 1996, criminal proceedings were opened by the Vienna Regional Criminal Court initiating preliminary investigations, which on February 2003 ended with a criminal conviction for fraudulent conversion. The applicant was sentenced to six years of imprisonment, which he served until 2005. On 15 February 2005, the Disciplinary Council had found the applicant in breach of his professional duties and for having caused damage to his profession's honour and reputation. He was therefore disbarred (struck off the register).[390] The applicant claimed that Article 6(1) applied under its criminal-head in the disciplinary proceedings before the Disciplinary Council. The ECtHR therefore applied the Engel-test.

With respect to the first Engel-criterion, the ECtHR observed that under national law section 1(1) of the Disciplinary Act belonged to the sphere of disciplinary law. That provision prescribed that: "A lawyer who negligently or intentionally breaches his or her professional duties or whose professional or private conduct adversely affects the reputation or standing of the profession shall be deemed to have committed a disciplinary offence."[391] The ECtHR then observed whether any relevant of the criminal classification factors were involved under the disciplinary proceedings and found that neither the public prosecutor nor the criminal courts were involved, only the disciplinary authorities under the supervision of the Constitutional Court. Despite a number of the provisions from the Criminal Code also were applicable in the disciplinary proceedings in conjunction with the Disciplinary Act, then it did not suffice to alter the classification of the proceedings, as they were overwhelmingly disciplinary.[392]

With respect to the second Engel-criterion and the first Öztürk-criterion, the ECtHR then observed that section 1(1) of the Disciplinary Act was addressed towards the members of a professional group possessing a special status as lawyers and not addressed at the general public. Even though the facts of the case, which gave rise to the disciplinary proceedings, also

[390] Müller-Hartburg v. Austria, paras. 5-34.
[391] Müller-Hartburg v. Austria, para. 33.
[392] Müller-Hartburg v. Austria, para. 43.

constituted a criminal offence, then the offences brought against the applicant solely related to the professional misconduct. The ECtHR considered this aspect of the proceedings to be in line with its case-law, where it had previously held that "[t]he fact that an act which can lead to a disciplinary sanction also constitutes a criminal offence is not sufficient to consider a person responsible under disciplinary law as being "charged" with a crime."[393] The second Engel-criterion by the first Öztürk-criterion were thus not satisfied, and just as the violated rules were disciplinary in nature and therefore governed by norms of a specific binding nature, the interests protected by the rules violated were those associated with the profession of lawyers as contrasting with interests of the general society governed by criminal norms.

(3) Laws governed by a mix of general and specific norms

Between the two kinds of governing norms there obviously exists a more grey domain where the law in question may be found governed by both criminal and disciplinary norms. The relevant cases relates mostly to situations where there has been a violation of general norms but committed by certain specific subjects. Three early cases of Weber v. Switzerland, Ravnsborg v. Sweden, and Putz v. Austria illustrates the main distinction on the basis of procedural law and the rules that governs good and proper conduct during court proceedings.

In Weber v. Switzerland, the applicant, Mr Weber, had disclosed information to the public about ongoing defamation proceedings, which was a complaint Mr Weber himself had lodged against another person. Under Swiss law, breach of confidentiality with respect to judicial investigations amounted to a "procedural offence," which was considered "disciplinary in nature, since they were designed to ensure that the investigation proceeded normally."[394] Mr Weber was then investigated for breach of confidentiality of a judicial investigation by giving "information about the investigating proceedings."[395] In this respect, the ECtHR distinguished between: (1) persons bound by confidentiality of a judicial investigation, for instance judges, lawyers, and other persons associated with the proper functioning of courts, and (2) the parties subject to the jurisdiction of the courts. With respect to the former, (1), the ECtHR argued that these persons are liable to such procedural offences, "independently of any criminal sanctions, to disciplinary measures on account of their profession,"[396] while the parties, (2), "only take

[393] Müller-Hartburg v. Austria, para. 44.
[394] Weber v. Switzerland, para. 17.
[395] Weber v. Switzerland, para. 15.
[396] Weber v. Switzerland, para. 33.

part in the proceedings as people subject to the jurisdiction of the courts, and they therefore do not come within the disciplinary sphere of the judicial system."[397] The ECtHR therefore concluded that the offence, which Article 185 defined, "potentially affects the whole population, [...], and to which it attaches a punitive sanction, is a "criminal" one for the purposes of the second criterion."[398] The first Öztürk-criterion was thus satisfied.

The Weber distinction was later upheld and applied in two very similar cases, Ravnsborg v. Sweden and Putz v. Austria. In the former, Mr Ravnsborg was fined for making improper statements in his written observations, thereby violating Article 5 of the Code of Judicial Procedure which prescribed the good order of court proceedings.[399] The ECtHR argued that Article 5 only applied to "improper statements made orally or in writing to a court by a person attending or taking part in the proceedings, but not to such statements made in a different context or by a person falling outside the circle of people covered by that provision."[400] In the light of the principle established in the Weber case, Mr Ravnsborg was, just like Mr Weber, a party, subject to the jurisdiction of the court, (2). However, where Mr Weber had violated a rule that potentially affected the whole population, then Mr Ravnsborg (and Mr Putz) violated rules that only were applicable to the parties subject to the court proceedings.[401] The ECtHR therefore concluded that "the kind of proscribed conduct for which the applicant was fined *in principle* falls outside the ambit of Article 6."[402] The first Öztürk-criterion was not satisfied.

The cases of Steininger v. Austria and Özmat Insaat Elektrik Nakliyat Temizlik San. Ve. Tlc. Ltd. Sti. v. Turkey are two other important cases that also reflects on those areas of law governed by both disciplinary and criminal law features. In Steininger v. Austria, it followed from the Austrian Agricultural Market ('AMA') Act that companies or individuals operating establishments for the slaughtering and butchery of cattle, calves, pigs, lambs and sheep are liable to agricultural marketing charges. The duty to pay those marketing charges arose at the time when the animals were slaughtered, and the amounts were calculated on the basis of the number of animals slaughtered. The charges was then paid to Agrarmarkt Austria, which

[397] Weber v. Switzerland, para. 33.
[398] Weber v. Switzerland, para. 33. Emphasis maintained. After the Öztürk case, the ECtHR has, for instance, often argued for the criminal attribution that the provision "potentially affects the whole population," cf. Demicoli v. Malta, para. 33, or "as directed towards all citizens and not towards a given group possessing a special status," cf. Ziliberberg v. Moldova, para. 32. See also Mariusz Lewandowski v. Poland, para. 29.
[399] Ravnsborg v. Sweden, paras. 9 and 19.
[400] Ravnsborg v. Sweden, para. 34.
[401] In this particular aspect, the Ravnsborg case, as well as the Putz case, was different from the Weber case, cf. Ravnsborg v. Sweden, para. 34; Putz v. Austria, para. 33.
[402] Ravnsborg v. Sweden, para. 34. See also Putz v. Austria; Veriter v. France; Schreiber and Boetsch v. France; Kubli v. Switzerland; Toyaksi and Others v. Turkey; Zugic v. Croatia. Compare also to: T. v. Austria; Kyprianou v. Cyprus; Gestur Jónsson and Ragnar Halldór Hall v. Iceland.

financed its activities by levying these charges. On the basis of outstanding contributions, the applicant company was imposed a surcharge amounting to 60 % of unpaid contributions.[403] In the assessment of the first Öztürk, the ECtHR observed that the surcharge was "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."[404] The norm governed by Section 21g of the AMA Act thus had a disciplinary colour. The ECtHR nonetheless concluded otherwise as Section 21g of the AMA Act did not:

> "[aim] 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 payment of taxes and other contributions due as a result of economic activities, to specific circumstances in order to make that obligation foreseeable. This does not therefore exclude the classification of section 21g of the AMA Act as "criminal" in the autonomous sense of the Convention."[405]

Accordingly, the first Öztürk-criterion was satisfied. A variation of the same principle contained in the Steininger case was applied in Özmat Insaat Elektrik Nakliyat Temizlik San. Ve. Tlc. Ltd. Sti. v. Turkey.[406] The applicant company had obtained a licence to operate a mine on a plot land, which the company owned. On the basis of an audit commission, the applicant was imposed an administrative fine at TRY 131,250 (EUR 82,000 at that time) for quarrying substantial amounts of sand in the neighbouring plots outside of its licenced area.[407] The fine was imposed under Article 19 of the Regulation Concerning Group A Mines, which under national law was classified as administrative law. The ECtHR noted that Article 19 "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,"[408] wherefore the first Öztürk-criterion was satisfied. In the light of the latter case, the 'Steininger principles' may thus be determined as considering a violation of a general and foreseeable obligation attached to specific circumstances to qualify as a violation of laws that are governed by criminal rather than disciplinary norms. Where the violation consisted of breaching the general obligation to pay charges on the basis of a result obtained through certain specific economic activities (equivalent to a tax duty) in the Steininger case, then the violation consisted of breaching a general negative obligation (prohibition) of not to conduct economic activities outside the licensed area in the Özmat case.

[403] Steininger v. Austria, paras. 6 and 37.
[404] Steininger v. Austria, para. 36.
[405] Steininger v. Austria, para. 36.
[406] In Özmat Insaat Elektrik Nakliyat Temizlik San. Ve. Tlc. Ltd. Sti. v. Turkey, the ECtHR specifically referred to paragraph 36 of Steininger v. Austria.
[407] Özmat Insaat Elektrik Nakliyat Temizlik San. Ve. Tlc. Ltd. Sti. v. Turkey, paras. 5-17.
[408] Özmat Insaat Elektrik Nakliyat Temizlik San. Ve. Tlc. Ltd. Sti. v. Turkey, para. 25.

In these cases, like any other cases where the violated rules are governed by criminal norms of a general binding character, there is presumption for classifying the offence as criminal.[409]

(II) The purposes of sanctions

As the Öztürk-criteria are cumulative, it is not enough that the first Öztürk-criterion has been satisfied so that the laws violated were governed by criminal norms. By the second Öztürk-criterion the sanctions also needs to qualify as criminal sanctions by virtue of their purpose. As the case-law has developed and certain purposes have been attributed to the concept of 'criminal sanctions', other purposes have also gradually been attributed with the concept of 'disciplinary sanctions' or other similar non-criminal sanctions. Therefore, in the following, we will mainly focus on a discussion of those key cases of which the ECtHR has expressed its views on the purposes of the sanctions and other legal powers in question to describe the meaning of these purposes and which the ECtHR continues to adhere to in order to justify its conclusions. In this regard, it is important to point out that the ECtHR is not always consistent in its approach, because the assessment of the purpose of the sanctions may quite often be conducted together with an assessment of the nature of the sanctions, which as a matter of principle generally is the assessment conducted under the third Engel-criterion. However, this matters very little as the assessment and principles that makes up the purpose (i), nature (ii), and severity (iii) of sanctions gradually have become possible to identify by taking a coherent view on its case-law. Nonetheless, we focus here on the different purposes that all sanctions may be pursue, including, first, the purposes attributed to criminal sanctions.

(1) Retribution as the main purpose pursued by all legal sanctions

Seražin v. Croatia has turned out to be an important case, because the principles that follows therefrom allows to draw a fundamental distinction between the concept of a legal 'sanction' as one form of a legal power and the concept of 'preventive measures' as another type of legal power.[410] Some attention much therefore be given thereto. In Seražin v. Croatia, the Zagreb Minor Offences Court found the applicant, a supporter of Dinamo Zagreb Football Club, on 9 August 2012, guilty of hooliganism related to a disorder that he during a football match had conducted the previous day. Under the Prevention of Disorder at Sports Events Act (referred

[409] Steininger v. Austria, paras. 36-37, and Özmat Insaat Elektrik Nakliyat Temizlik San. Ve. Tlc. Ltd. Sti. v. Turkey, para. 25.
[410] See further Section III(1)(C)(II).

to as 'the Act'), the applicant was sentenced to 25 days in prison and suspended for a year. In addition, under the section 32(1) of the Act, a 'protective measure' was imposed on the applicant. The protective measure prohibited the applicant from attending Dinamo Zagreb matches and all other matches taking place at the home stadium of Maksimir Stadium for a period of one year. The protective measure also included an obligation to report to the police station nearest to his residence two hours before every relevant football match to provide information about his whereabouts during the football match and two hours after the match ended. A number of violent incidents followed between October 2012 and April 2014. Among them was typically the arrest following the fighting between supporters of Dinamo Zagreb a number of other football clubs. On 1 April 2014, the police asked the Zagreb Minor Offences Court to apply section 34a(1) of Act for an application of so-called "exclusion measures." A similar request was made again approximately one year later on 19 July 2015. Zagreb Minor Offences Court allowed both requests of the police. The exclusion measure included a prohibition imposed on the applicant from attending all football matches of Dinamo Zagreb and the Croatian national team in Croatia and abroad, and an obligation to report to the police station nearest to his place of residence two hours before every relevant football match to provide information about his whereabouts during the relevant football match and two hours after it ended. Zagreb Minor Offences Court relied on the information provided by the police, including the previous incidents and that he previously had been found guilty of hooliganism. Because the applicant previous had been convicted of hooliganism, the main question before the ECtHR was whether the subsequent proceedings for the two applications of the exclusion measures, in which the Zagreb Minor Offences Court took into account the previous conviction of hooliganism and the other violent incidents, was in contravention of the guarantees enshrined in Article 4-P7. This result would require that the exclusion measure qualified as a criminal sanction.[411]

The ECtHR applied the Engel-criteria. Under the first Engel-criterion, the ECtHR observed that the exclusion measure had a legal basis within Section 34a of the Prevention of Disorder at Sports Events Act ('the Act') and it could be applied in criminal proceedings or minor offences proceedings under national law by the Zagreb Minor Offences Court, and its decisions could be appealed to the High Minor Offences Court. In this respect, the ECtHR stated that "despite the an explicit indication of its nature in the text of section 34a of the Act, the consistent approach taken by the High Minor Offences Court and the Constitutional Court

[411] Seražin v. Croatia, paras. 3-62.

has been to consider the measure to be a *sui generis* preventive measure and not a penalty."[412] Under these circumstances, the ECtHR concluded that it would "proceed under the assumption that the measure in question is not classified as a "criminal penalty" under national law,"[413] and it proclaimed in accordance with its established case-law that the classification in national law "is not, however, decisive for the purposes of the Convention, having regard to the autonomous and substantive meaning to be given to the term "criminal" charge and penalty."[414] Therefore, the ECtHR went on to examine the exclusion measure for itself according to the principles of the second Öztürk-criterion under the second Engel-criterion.[415]

First, the ECtHR noted that it so far had not had the opportunity to examine whether such an exclusion measure or similar amounted to a criminal charge and/or criminal sanction.[416] Therefore, the ECtHR adhered to relevant international materials and comparative law and noted by way of a general observation that all this legal and comparative material had "a strong emphasis on the preventive nature and purpose of the exclusion measures in the context of suppression and prevention of spectator violence."[417]

Second, more crucially, in order to determine the essential nature and purpose of the exclusion measure under section 34a of the Act, the ECtHR found it useful to observe the manner in which the Croatian legal system differentiated between 'exclusion measures' as opposed to 'protective measures', which was an approach and methodology the ECtHR previously had applied in Escoubet v. Belgian for distinguishing between the legal power of 'an immediate withdrawal of a driving licence', i.e. a precautionary measure and therefore not a legal sanction, and a 'disqualification of driving', i.e. criminal sanction.[418]

In this regard, the ECtHR observed that section 32 of the Act provided legal basis for the 'protective measures', and which could be "imposed in the context of a minor offence or criminal prosecution as a supplementary sanction to a fine or imprisonment."[419] These protective measures could be applied in three ways by way of imposing a ban on attending certain sports competitions in Croatia with either (1) an obligation to report to a police station or (2) an obligation to remain at a police station, or (3) a ban on travelling to certain sports

[412] Ibid, para. 67, italics and emphasis maintained. See also paras. 38-41.
[413] Ibid, para. 68.
[414] Ibid, para. 68, referring also to Escoubet v. Belgium, para. 33, and Becker v. Austria, para. 26. See also the discussion of the first Engel-criterion in Section II(2)(A).
[415] Rather than referring to the nature of the offence, the ECtHR referred to the "Very nature of the measure."
[416] However, in para. 69, the ECtHR also noted that it in Ostendorf v. Germany examined the effects of a preventive detention (arrest and confinement) of hooligans under Article 5(1) ECHR and the right to liberty.
[417] Seražin v. Croatia, para. 70, and paras. 42-55 and 71. See also Section II(3)(B).
[418] Ibid, para. 72, in conjunction with Escoubet v. Belgium, para. 37. See further Section III(1)(C)(II)(3)(a).
[419] Ibid, para. 73.

competitions abroad with an obligation to report to a police station and turn in any travel documents. The protective measures could also be imposed for a period of no less than one year and no more than two years, and the failure to comply with the protective measure may result in a fine or imprisonment.[420] The ECtHR further observed that the application of the protective measure followed the same procedural rules for criminal and minor offences, and "its imposition amounts to a "sanction" following the conclusion of the criminal or minor offences proceedings."[421] Hence, despite the label of being "protective," these qualified as legal *sanctions*.

The question was nevertheless whether the exclusion measures qualified as a sanction and classified as criminal. The ECtHR re-emphasised according to national law and practice that the national courts considered exclusion measures to be a sui genesis preventive measure and not a legal sanction;[422] pursuant to section 43a of the Act it may be applied in respect of any person "for whom there is information of previous unlawful conduct when going to, during or when leaving sports competitions;"[423] and the exclusion measure is applied by the minor offences court on the application by the police without a conviction nor in the context of a minor offence or criminal prosecution.[424] However, similar to the protective measures, the exclusion measures also imposed a ban on attending sports competitions and an obligation to report to the police station when the relevant sports competition is taking place in order to inform the police of her or his whereabouts during the event and until two hours after it ends. A fine or imprisonment could also be imposed for the failure to comply with the exclusion measure (ban). On this background, the ECtHR observed that there were at least two important distinctive features following the comparison of the exclusion measures with the protective measures qualifying as a legal sanction. The first distinctive element related to an assessment of the purpose of the exclusion measure and particularly whether the exclusion measure pursued the purpose of 'retribution' and 'deterrence' as opposed to 'prevention'.[425] The second distinctive element examined under the second Engel-criteria related to the duration of the exclusion measures and the more specific manner of its application,[426] which usually, as a matter of principle, is an assessment conducted under the third Engel-criterion.

[420] Ibid, para. 74, and paras. 33 and 37.
[421] Ibid, para. 73, and para. 77, where the ECtHR stated that it "undoubtedly amounts to a sanction, even in terms of the domestic law."
[422] Ibid, para. 75, and referring to para. 67.
[423] Ibid, paras. 36 and 75.
[424] Ibid.
[425] Seražin v. Croatia, paras. 77-84.
[426] Seražin v. Croatia, paras. 85-88.

The first distinctive feature was "that the exclusion measures could be applied independently of a criminal or minor offence prosecution and conviction of an individual."[427] Unlike the protective measures, the exclusion measures could also not be applied as an ancillary sanction for the commission of an offence or as part of the sentencing procedure for minor offence or criminal prosecution. The exclusion measure did also not have to meet the standard of proof for the conviction of an offence, because the police only had to demonstrate that there was "information of previous unlawful conduct."[428] More generally, the ECtHR could therefore conclude that "unlike the sanctions, which imply, to a greater or lesser degree, *retribution* and *deterrence* [...], the application of the exclusion measure under section 34a does not pursue any such aim and accordingly falls under the preventive limb of the general aims of the Act."[429] In comparison, the exclusion measure thus amounted to "a *preventive measure* aimed at the protection of other spectators and participants at sports events from a threat of violence."[430]

The ECtHR continued the description of the distinction between the 'exclusion measure' as opposed to the 'protective measures', hence more generally 'preventive measures' as opposed to 'sanctions'. In particular, the ECtHR was not ignorant of the fact "that the application of the measure [...] followed his conviction in the minor offences proceedings and that it might have been seen by him as a punishment, particularly [as] he was obliged to report to his nearest police station in the relevant periods."[431] However, the application of the exclusion measure "was not *a direct consequence* of the applicant's conviction as it remained open to the relevant minor offence court to, irrespective of his previous conviction, apply or refuse the application of the measure."[432] The exclusion measure was not pursuing the purpose of retribution, because it would require that the it had been imposed as a direct consequence of the applicant's conviction. Instead, the applicant's previous convictions "merely lends the evidentiary support to the determining of whether there was "information of previous unlawful conduct,""[433] and thereby satisfying the main requirement under section 34a of the Act for its application. Despite the previous conviction increased the likelihood of the application of an exclusion measure, then it "does not affect the fact that the measure was applied to prevent a future threat of possible violence and not subject to the applicant so a second punishment for

[427] Ibid, para. 78.
[428] Ibid.
[429] Ibid, para. 79. Italics added. The preventive purpose was to "create an environment which prevents ... improper behaviour, disorder and violence before, during and after a sports competition or sports even," cf. paras. 30 and 79.
[430] Ibid, para. 79. Italics added.
[431] Ibid, para. 80.
[432] Ibid, para. 81. Italics added.
[433] Ibid.

the same offence."[434] Furthermore, the duty to report to a police station was much more in accord with a positive preventive purpose as it "aimed at ensuring the safety of the public from a threat of violence rather than punishing the applicant for his previous conduct."[435]

The second distinctive feature of the exclusion measure, "when compared to the protective measure as a sanction under section 32 of the Act, [related] to its duration and the manner of its application."[436] With respect to the duration, the exclusion measure could be imposed for no less than six months or no more than one year, while the protective measure could be imposed for no less than one year and of no more than two years.[437] Hence, the minimum period for the protective measure was the same and thus identical to the maximum period for the exclusion measure. With respect to the manner of their application, the exclusion measure, unlike the protective measure, did not require the confiscation of travel documents or an individual to remain at a police station during sports event, but only to report to a police station. Therefore, in respect of the second distinctive feature, the ECtHR could also conclude that "these important differences also supported its finding above as to the distinct nature of the protective measure [...] as a sanction, and the exclusion measure [...] as a sui generis preventive measure in domestic law which does not have a penal connotation.[438]

Overall, in respect of the second Engel-criteria, the ECtHR concluded that the very nature "of the exclusion measure under section 34a leads to the conclusion that its application did not amount to the application of a "criminal penalty" within the autonomous meaning of the Convention.[439] The essential nature of the exclusion measure "was chiefly preventive in nature in the sense that it aimed at removing the possibility of violent behaviour for the benefit of public safety [...] rather than inflicting a retributive or deterrent penalty on the applicant for his previous violent behaviour at sports events."[440] The ECtHR was also well-aware from its own case-law that "it may be difficult in practice to draw a clear distinction between *deterrence*, as an element of a penalty, and *prevention*."[441] However, the ECtHR also stated that

[434] Ibid.
[435] Ibid, para. 82. In comparison, see also Timofeyev and Postupkin v. Russia, paras. 70-82, where an administrative surveillance for preventive purposes, after convicted persons had served their sentences, as well as subsequent restrictions on their freedom of movement and reporting obligations, qualified as preventive measures.
[436] Seražin v. Croatia, para. 84.
[437] Ibid, paras. 33 and 36.
[438] Ibid, para. 85.
[439] Ibid, para. 84, and para. 88.
[440] Ibid, para. 82. Contrast with Velkov v. Bulgaria, paras. 46-52.
[441] Ibid. Italics added.

"[in] the Court's case-law, in various other contexts, the [...] punitive and deterrent purpose of a measure [...] are the elements customarily recognised as the two aspects of a penalty."[442]

The principles that follows from Seražin v. Croatia are less related to the elements of deterrence and punishment. These elements are discussed in the following Section. Instead, Seražin v. Croatia concerns the main *minimum* conceptual requirement for the concept of a legal sanction, which is that all sanctions must pursue the purpose of retribution. By this requirement another much broader and more nuanced sub-category of legal powers can be distinguished, that is 'preventive measures'. The discussion of this distinction will be continued in Section III(1)(C)(II). However, because this distinction is a fundamental one and not only applies for the purpose of distinguishing the positive preventive measures from the criminal sanctions,[443] but also from the concept of 'disciplinary sanctions' and / or other non-criminal sanctions,[444] the distinction stays more or less directly as an ongoing theme throughout this entire Chapter. By the concept of 'retribution' is generally meant that the sanction must be imposed as a direct consequence on the offender by a sanctioning authority due to the offender's personal liability for the commission of the violation. Personal liability for the violation is therefore the element which justifies the imposition of sanctions. The offender may be either a natural person or legal person responsible for the commission of the violation. The sanctioning authority may be the criminal courts or some other court or authority having statutory powers to establish personal liability for the illegal conduct. Therefore, the ECtHR also now rather generally reiterates as a standard-phrase under its general principles:

> "For the purposes of the Convention there can be no "conviction" unless is has been established in accordance with the law that there has been an offence – a criminal or, if appropriate, a disciplinary offence. Similarly, there can be no penalty unless personal liability has been established (see [Varvara v. Italy, para. 69; G.I.E.M S.R.L. and Others v. Italy, para. 251])."[445]

When personal liability for the violation has been established, the requirement of personal liability will function as a rather logical and objective justification, similar to an automatic mechanism, for the imposition of direct consequences.[446] The consequences imposed on

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[442] Ibid, para. 83.
[443] In respect of the criminal context, see further Section III(1)(A)(II)(2) and the discussion of the case-law. In Nilsson v. Sweden, the ECtHR also applied the concept of retribution. The applicant was convicted of aggravated drunken driving and the unlawful driving had occurred on 21 November 1998. However, it was not before 5 August 1999 that the Administrative Authority (Board) withdrew the applicants driving licence. The ECtHR stated: "Therefore, prevention and deterrence for the protection of the safety of road users could not have been the only purposes of the measure: *retribution* must also have been a major consideration," cf. p. 11. Italics added. Thus, the very long time between the commission of the offence and the imposition of the sanction revealed the retributive function or purpose of the withdrawal. The sanction was a 18 month withdrawal of the driving licence, and it was so severe "that it could ordinarily be viewed as a criminal sanction," cf. p. 11.
[444] In respect of the disciplinary and non-criminal context, see further Section III(1)(B)(I)(1) and, in particular, the cases of Storbråten v. Norway, p. 20; Mjelde v. Norway, p. 20; Haarvig v. Norway, p. 20.
[445] Balsamo v. San Marino, para. 58; Ulemek v. Serbia, para. 46, and the case-law referred to therein.
[446] Chapter 2, Section II(1)(A)(III) and Section II(1)(C)(I), in particular the views by Quinton.

the offender they will qualify as one or more legal sanctions due to the offender's personal liability for the violation(s) committed. Thus, the concept of retribution is functioning as a logical expression and inherent requirement that governs the concept of a legal sanction.[447] Therefore, the concept of retribution is also the initial and fundamental legal requirement for distinguishing the concept of a legal sanction from any other sub-category of legal powers.

(2) The purposes of criminal sanctions

Returning to Öztürk v. Germany, the applicant, Mr Öztürk, was in the year of 1978 imposed a regulatory fine (Bussgeld) equal to DM 60 at that time for causing a traffic accident. The ECtHR therefore had to assess the nature of the regulatory fine. Under German law at that time, the threshold for the minimum and maximum amount of regulatory fines was fixed between DM 5 and DM 1000, and the actual amount imposed was fixed in each specific case on the basis of certain sanctioning factors, such as, the seriousness of the offence, the degree of misconduct attributable to the offender, and, save for minor offences, the offender's financial circumstances.[448] In its submission, the German Government compared the regulatory fines with the criminal fines (Geldstrafen). For the regulatory fines, imprisonment (Ersatzfreiheitsstrafe) was not an alternative sanction as it was for the criminal fines, and the coercive sanction of default imprisonment (Erzwingungshaft) could only be ordered, if the person liable had failed to pay the sum due.[449] Neither was the regulatory fine entered into a judicial criminal record, it could only be entered into the central traffic register to the extent the fine exceeded a level set to DM 39 at that time.[450] However, none of these arguments justified the disciplinary nature of the regulatory fine. Even though the regulatory fines were less burdensome in comparison to the criminal fines, the regulatory fines had "nonetheless retained a punitive character, which is the customary distinguishing feature of criminal penalties," and its purpose was, accordingly, "to punish as well as to deter."[451] It followed that "the general character of the rule [the first

[447] In Nilsson v. Sweden, the ECtHR was most explicit of what it meant by retribution. The applicant was convicted of aggravated drunken driving and the unlawful driving had occurred on 21 November 1998. However, it was not before 5 August 1999 that the Administrative Authority (Board) withdrew the applicants driving licence. The ECtHR stated: "Therefore, prevention and deterrence for the protection of the safety of road users could not have been the only purposes of the measure: *retribution* must also have been a major consideration," cf. p. 11. Italics added. Thus, the very long time between the commission of the offence and the imposition of the sanction revealed the retributive function or purpose of the withdrawal. The sanction was a 18 month withdrawal of the driving licence, and it was so severe "that it could ordinarily be viewed as a criminal sanction," cf. p. 11. In contrast, see also R. v. the United Kingdom with respect to a warning (and reprimand) by the police, where the ECtHR found that "the purpose of the warning is, largely, preventative and does not pursue the aims of retribution and deterrence," cf. p. 7.
[448] Öztürk v. Germany, paras. 18 and 52.
[449] However, without having established his inability to pay.
[450] Öztürk v. Germany, paras. 33 and 52.
[451] Öztürk v. Germany, para. 53.

Öztürk-criterion] and the purpose of the penalty [the second Öztürk-criterion], being both *deterrent and punitive*, suffice to show that the offence in question was, in terms of Article 6 [...], criminal in nature."[452] The first and second Öztürk-criteria had thus resolved the matter, and as the second Engel-criterion was an alternative criterion there was "no need to examine [the severity of the sanctions] also in the light of the final [third Engel] criterion."[453]

The principles here following from the key case of Öztürk v. Germany is still as decisive today as they were back then (1984). Ever since the Öztürk case, the ECtHR has almost consistently maintained that "criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence."[454] The question that follows is nevertheless: what defines the legal concepts of 'punishment' and 'deterrence'?

(a) Punishment

1) Infliction of a punishment or other punitive effects

It was argued in Chapter 2 that the concept of punishment was closely connected to means resulting in the imposition of an evil or the affliction of pain, where an 'evil' and 'pain' obviously should be understood widely. For the purposes of Articles 6-7 and 4-P7, criminal sanctions have not by the ECtHR been considered as legal powers that directly results in any imposition of evil or affliction of pain, despite criminal sanctions by virtue of the concept of 'punishment' still maintain a logical and historical relationship with an evil and pain.

On the other hand, there are arguments in the case-law where the logical relationship to an evil and pain manifests more or less directly. First, there are cases where the ECtHR has expressed that the measure was imposed with the intention "to inflict a punishment."[455] This is not only a statement of retribution but also one that cannot entirely be disassociated from the

[452] Öztürk v. Germany, para. 53.
[453] Öztürk v. Germany, para. 54.
[454] Ezeh and Connors, para. 102. Italics added. For instance, see also: Öztürk v. Germany, para. 53; Lutz v. Germany, para. 54; Weber v. Switzerland, para. 33; Bendenoun v. France, para. 47; Demicoli v. Malta, paras. 33-34; A. P., M. P. a. T. P. v. Switzerland, para. 41; E.L., R.L. and J.O.–L. v. Switzerland, para. 46; Lauko v. Slovakia, para. 58; Kadubec v. Slovakia, para. 52; J.B. v. Switzerland, para. 48; Jussila v. Finland, para. 32; Janosevic v. Sweden, para. 68; Västberga Taxi Aktiebolag and Vulic v. Sweden, para. 79; Ziliberberg v. Moldova, para. 33; Sergey Zolotukhin v. Russia, para. 55; Nadtochiy v. Ukraine, para. 21; Luchaninova v. Ukraine, para. 39; Rola v. Slovenia, para. 64; Scoppola v. Italy, para. 112; Kasparov and Others v. Russia, para. 43; Zaja v. Croatia, para. 88; Tsonyo Tsonev v. Bulgaria (No. 2), para. 49; Blokhin v. Russia, paras. 179-181; Michalache v. Romania, para. 62; Häkkä v. Finland, para. 39; Pirttimäki v. Finland, para. 47; Simkus v. Lithuania, para. 43; Kiiveri v. Finland, para. 32; Paykar Yev Haghtanak Ltd v. Armenia, para. 35; Milenkovic v. Serbia, para. 35; Milenkovic v. Serbia, para. 35; Melgarejo Martinez de Abellanosa v. Spain, para. 25; Seražin v. Croatia, para. 83; Tsonyo Tsonev v. Bulgaria (No. 2), para. 49; Mikhaylova v. Russia, para. 64; Pantalon v. Croatia, para. 31; and Cecchetti v. San Marino, para. 23.
[455] Van der Velden v. the Netherlands, p. 7. See also Adamson v. the United Kingdom, p. 4, Valico S.r.l. v. Italy, p. 12, and Gardel v. France, para. 46.

idea of imposing an evil and to afflict pain. Second, as shown above in respect Seražin v. Croatia, the ECtHR was not ignorant of the fact "that the application of the measure [...] followed his conviction in the minor offences proceedings and that it might have been seen by him as a punishment, particularly [as] he was obliged to report to his nearest police station in the relevant periods."[456] This statement related to the concept of retribution as opposed to that of preventive measures which followed, but was not imposed as a direct consequence of, the applicant's previous conviction. Conversely, if the measure had been imposed as a direct consequence of his conviction, the argument suggests that it could be seen (and perhaps *felt*) as a punishment. Third, the ECtHR has also stated that certain types of disciplinary sanctions, particularly disciplinary fines, that they have a "punitive effect."[457] Here, the obvious question nevertheless is: what is such a punitive *effect*, if it is not similar to an evil or pain?

These three aspect carries two points. The first point is that the concept of 'criminal sanctions' as identical to the term of 'punishment' in Article 7 and 4-P7 maintains a conceptual relationship to the history of other forms of punishment regarded as an evil or pain,[458] because punishment is something that is intended to be *inflicted*. The second point is that the ECtHR, in a few cases, has emphasised that the assessment of what is a punishment is based on an objective assessment, and thereby ruled out subjective associations with what more or less rightly so may be seen or felt as an evil or pain by the individual. Such arguments have never been approved by the ECtHR. Under Article 7, the ECtHR has often stated that the severity factor is not "in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned." [459] Thus, it is rather the objective aspects of the nature, purpose and severity of the sanctions that are decisive for the determination, not the fact that the offender feels the effects of sanctions as punitive and / or severe.[460]

[456] Ibid, para. 80.
[457] In a few cases, the ECtHR has considered fines punitive because of its relationship to an substantial amount or size, and thereby to its severity. For instance, in Müller-Hartburg v. Austria, the ECtHR stated that "[a]lthough the size of the potential fine [ATS 500,000] is such that it must be regarded as having *punitive effect*, the severity of this sanction in itself does not bring the charges into the criminal sphere," cf. para. 47. In Ramos Nunes de Carvalho e Sá v. Portugal, the ECtHR stated: "Although the amount of the fine may be substantial and it is therefore punitive in nature [...]," cf. para. 126.
[458] See further Section II(2)(C)(I).
[459] With respect to the severity assessment under the Welch factors, the ECtHR has often stated that the severity factor is not "in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned," cf. Welch v. the United Kingdom, para. 32. See also, inter alia, Del Rio Prada v. Spain, para. 82; M. v. Germany, para. 120; Bergmann v. Germany, para. 150; Ilnseher v. Germany, para. 203.
[460] Pieter and others (n 2) 657–658.

2) Repression and coercion

In the case-law, besides 'retribution', the purposes of 'repression' and 'coercion' have also more or less directly been argued as distinguishing objectives that are attributed to criminal sanctions. However, the ECtHR has only in a very few cases adhered to such objectives and in no case have they played any decisive role or had any observable or logical influence. The terms might be used very commonly to refer to the function of criminal law more generally, but it is questionable whether any of these terms contains an ability and utility to be used as concepts for the purposes of distinguishing one type of legal power or sanction from another category. While the concept of 'retribution' already have been argued to be a logical expression or function of the concept of a legal sanction, including punishment, then 'repression'[461] seems to be an expression of the deterrent function that follows from the threat of punishment, i.e. the threat from available criminal sanctions. On the other hand, and rather than the threat from sanctions, 'coercion' seems to deals with aspects of force and enforcement of sanctions, and the term is directly involved in what qualifies as 'coercive sanctions'.[462] Repression and coercion, including coercive sanctions, are thus concepts and purposes that are more useful for characterising a "regime of punishment,"[463] the institutional aspect of punishment.

3) The principle of restitution

In the case of Öztürk v. Germany, the ECtHR made another statement of principle with respect to the concept of punishment: "according to the ordinary meaning of terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, *to be deterrent and usually consisting of fines and other measures depriving the person of his liberty*."[464] From this statement and case-law more generally it follows as a first principle that sanctions resulting in a 'deprivation of liberty' and 'fines' are considered as the archetypical and essential nature of criminal sanctions. As a rather logical

[461] Engel and Others v. the Netherlands, para. 79; Janosevic v. Sweden, para. 68; Menarini Diagnostics S.r.l., v. Italy, para. 41; Västberga Taxi Aktiebolag and Vulic v. Sweden, para. 79; and Timofeyev and Postupkin v. Russia, para. 76. See also Sud Fondi Srl and Others v. Italy. In Engel and Others v. the Netherlands, the ECtHR stated that the sanctions (which were different forms of arrests that resulted in deprivation of liberty) "they had the aim of *repressing* through penalties offences alleged against the applicants, an objective analogous to the general goal of the criminal law," cf. para. 79. Italics added. In Västberga Taxi Aktiebolag and Vulic v. Sweden, the ECtHR stated that a tax surcharge "are not intended as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer's conduct. Rather, the main purpose of the relevant provisions on surcharges is to *exert pressure* on taxpayers to comply with their legal obligations and to punish breaches of those obligations," cf. para. 79. Italic added. A function of sanctions is thus to repress and exert pressure for compliance, which is the threatening and deterrent function of punishment under the negative prevention theory.

[462] The purpose of *coercion* has mainly been referred to with respect to coercive sanctions. See Section II(3)(A)(II)(3).

[463] Section II(3)(A).

[464] Öztürk v. Germany, para. 53. Italics added.

consequence of the first principle, it follows as a second principle that when the ECtHR under the application of the Engel-test is conducting an assessment of whether any type of legal power and / or sanction contained under a different legal label qualifies as a criminal sanction, the ECtHR will often compare and adhere to whether the essential nature of the legal powers and sanctions in question are similar to the imposition of a 'fine' or a 'deprivation of liberty'.[465] Moreover, because these are regarded as the archetypical criminal sanctions, the concepts of 'deprivation of liberty' and a 'fine' each serves as a standard for comparing and assessing any other type of legal power and sanction. Therefore, these represents the two main legal categories of today of "evils" and "pains" imposed on a retributive basis for an offence.

Particularly in this respect, it should already be noted that deprivations of liberty and fines, as the archetypes of criminal sanctions, mostly relates to what should be regarded as the 'essential nature' of sanctions. However, the essential nature of the sanctions are also very closely connected with the purposes of sanctions. This is most evident in respect of the Welch factors, where the ECtHR rather consistently assesses the nature and purposes together. This is sometimes also the (inconsistent) reality when the ECtHR applies the Engel-criteria, although the nature of the sanctions mostly is assessed under the third Engel-criterion. Because the ECtHR mostly applies the Engel-criteria,[466] and we intend to stay true to its original categorisation, the discussion of the nature of the sanctions is thus reserved for the discussion of the third Engel-criterion.[467] However, as we deal with the purposes attributed to criminal sanctions, it is necessary here to point to two aspects of deprivations of liberty and fines.

When the ECtHR refers to 'deprivations of liberty' it also stipulates and clarifies the essential nature of those types of sanctions which generally are imposed as 'imprisonment', 'prison sentence', or other similar types of custodial or incarcerating sanctions. Although it may be obvious to the ECtHR, and perhaps to everyone, that deprivations of liberty is a punishment per se, the ECtHR almost never specifies what is the more specific purpose of such sanctions, except from acknowledging that such sanctions are in pursuit of the more general purposes of punishment and deterrence.[468] Under such circumstances of imprisonment and similar, it is nevertheless rather obvious that the offenders are excluded from access to the normal society and ordinary life, and thereby also excluded from the ordinary and general circulation among other ordinary people. Hence, the archetype of 'deprivation of liberty' very

[465] Seražin v. Croatia, para. 89. In particular, see also Section III(1)(A)(I) and -(II).
[466] For other arguments, see Section II(1)(A)-(B).
[467] Section II(2)(C)(I).
[468] Section III(1)(A)(I)(1).

well captures the meaning of all such sentences of physical restraint. The essential nature of deprivation of liberty is therefore also goal-oriented, which includes a view towards the purpose of depriving the offender of her or his ordinary and general liberty or liberties.

What the essential nature of a 'fine' is, is discussed in Section II(C)(I). However, that discussion is depending upon the following observation in respect of fines as an archetypical criminal sanction and the more specific purposes pursued by fines. While deprivation of liberty is one of the main examples of a punitive non-pecuniary sanction, a fine is the main example of a punitive pecuniary / monetary sanction. What is rather self-evident in this context and the case-law is the fact that a fine affects the total value of the offenders' personal fortune and wealth in a decreasing manner, irrespective of whether the offender is a natural or legal person / entity. However, this view accords very well with what Chapter 2 discussed as Aquinas' principle of restitution. In the case-law, this principle reveals itself most evidently where the fine imposed is depending on a loss to some type of victim, such as, a 'tax surcharge' or similar fines. In numerous occasions, the ECtHR has expressed that such fines and surcharges are criminal pecuniary sanctions, because they are: "intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending,"[469] and even more generally that: "fines, are not intended as pecuniary compensation for damage but are essentially punitive and deterrent in nature."[470] Conversely, any amount that are equal to the mere loss or compensation would not qualify as a punitive and deterrent amount of money. Rather, such an amount would be a reparatory amount similar to a repayment or return of pecuniary advantage. Accordingly, when the concept of a fine functions as an archetypical criminal pecuniary sanction, it is thus required, per se, that the amount imposed on the offender goes beyond the level of reparation or compensation, referred to more generally in the following as the *'level of restoration'*. Otherwise it would qualify as some sort of a repayment. In Goulandris and Vardinogianni v. Greece, this fundamental criterion also manifested in respect of fine imposed by the urban-planning authorities for an unlawful construction as the ECtHR noted that the fine "was not dependent on the restoration of lawfulness and of the status quo ante. It thus could not be intended as pecuniary compensation for the damage caused, but rather as a form of punishment of offenders. It had a deterrent character [and] a punitive one."[471] As a consequence thereof, then any amount imposed on an offender for an offence that has not resulted in any loss,

[469] E.g. Bendenoun v. France, para. 47; and Kadubec v. Slovakia, para. 52. In the case-law, when the sanctioning authorities have imposed a tax surcharge or fine, it is evident that it is the surcharge and fine that leads to conclusion that the criminal guarantees apply, cf. e.g. Melgarejo Martinez de Abellanosa v. Spain, para. 25, and the cases referred to therein.
[470] E.g. A. P., M. P. a. T. P. v. Switzerland, para. 41; and J.B. v. Switzerland, para. 48.
[471] Goulandris and Vardinogianni v. Greece, para. 57.

damage, or harm, to some victim, therefore goes beyond the level of restoration and must thus be regarded as a punitive and deterrent amount.[472] Whether such an amount of money also is a severe amount is another question addressed by the third Engel-criterion. However, the level of restoration functions as a fundamental requirement for determining whether any type of pecuniary sanction are in pursuit of the purposes of punishment and deterrence, or in pursuit of reparation or compensation. The essential nature of a fine thus embarks and carries the two main purposes characterising the constitutive elements of criminal sanctions, i.e. punishment and deterrence. Reversely, the ECtHR reserves 'reparatory' and 'compensatory' amounts of money imposed on a retributive basis for a category of non-criminal pecuniary sanctions. With respect to confiscations, forfeitures and seizure of assets, the ECtHR therefore also takes into account whether any of these legal powers may result in, or are restricted to, the actual enrichment of the offender, or they are carrying an inherent potential to go beyond the level of restoration, and therefore also whether they were comparable to a fine.[473]

A final question needs to ask whether the fundamental criterion of the level of restoration only is a suitable criterion for pecuniary sanctions and / or sanctions that result in consequences that can be converted into some sort of estimation and / calculation of money, thereby affecting the offenders' property, or the level of restoration is a criterion that can be applied in respect of non-pecuniary sanctions like deprivations of liberty? – The discussion of this question will need to continue in different parts and sections of this Chapters.[474]

(b) Deterrence

1) Negative prevention

With respect to the concept of 'deterrence', then for quite some time it seems often to be the situation that if a sanction was deemed punitive it was automatically also deemed deterrent, without providing any substantive specification of what the ECtHR meant by deterrence. In this way, the objectives of punishment and deterrence was considered as inseparable twins. Hints were nonetheless gradually provided. In some cases, the ECtHR expressed that the purpose of the surcharge essentially was intended "as a punishment to *deter reoffending*."[475] In

[472] Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, para. 45.
[473] See further Section II(1)(C)(I)(1) and Section III(1)(A)(II)(2).
[474] See further Section II(2)(B)(II)(3)((c)), Section III(1)(A)(I) and Section III(1)(B)(I).
[475] Bendenoun v. France, para. 47. Italics added. See also Öztürk v. Germany, para. 53; Lauko v. Slovakia, para. 58; Kadubec v. Slovakia, para. 52; Jussila v. Finland, para. 38; Valico S.r.l. v. Italy, p. 12; Häkkä v. Finland, para. 39; Pirttimäki v. Finland, para. 47; Kiiveri v. Finland, para. 32; Milenkovic v. Serbia, para. 35.

Ezeh and Connors v. the United Kingdom, the ECtHR had to assess the character of disciplinary rules and sanctions imposed on prisoners in a prison and detention regime, where the applicant was awarded additional days in prison. The ECtHR then stated:

> "The Court considers that awards of additional days were, from any viewpoint, imposed after a finding of culpability [...] to punish the applicants for the offences they had committed *and to prevent further offending by them and other prisoners*. It does not find persuasive the Government's argument distinguishing between the punishment and deterrent aims of the offences in question, these objectives *not being mutually exclusive* [...] and being recognised as characteristic features of criminal penalties [...]."[476]

From this statement it is first of all re-confirmed that punishment and deterrence are sanction objectives that are not mutual exclusive. Recalling from above, they are in fact the twin-objectives recognised as the characteristic features of criminal sanctions.[477] From the statement it also follows that 'prevention' was disguised as 'deterrence' in the way that the punishment had the ability "to prevent further offending by them and other prisoners." This provides some evidence for confirming that the ECtHR applies the deterrence theory viewed as 'negative prevention' under Chapter 2, because its arguments are aligned with both of the elements of 'specific deterrence' and 'general deterrence'.

The evidence for the application of the deterrence theory became much stronger in a later case of Grande Stevens and Others v. Italy. The Italian Government attempted to convince the ECtHR about the reparatory and restorative purpose of the sanctions imposed and available in the sanction regime administered by Italian sanctioning authority, CONSOB, including: fines, prohibitions on exercising managerial functions, and a potential confiscation of assets. The ECtHR dismissed the arguments, and stated with respect to the fines:

> "In addition, the Court considers that the fines imposed were essentially intended to punish, in order to prevent repeat offending. They had therefore been based on rules whose purpose was both deterrent, namely to *dissuade* the applicant from resuming the activity in question, and punitive, since they punished unlawful conduct [...]. Thus, they were not solely intended, as the Government claimed [...], to *repair* damage of a financial nature. In this respect, it should be noted that the penalties were imposed by CONSOB on the basis of the gravity of the impugned conduct, and not of the harm caused to investors."[478]

Hence, it followed that the ECtHR applied the concept of specific deterrence because the fines aimed to punish as well as to dissuade the offender from repeating the offence and thereby resuming the illegal activity. It also followed that sanctions that aim for punishment and deterrence are imposed on the basis of the gravity of the impugned conduct and not on the harm caused to investors which is a characteristic reserved for sanctions that aim at

[476] Ezeh and Connors v. the United Kingdom, para. 105. Italics added.
[477] If otherwise, it would also contradict the previous case-law.
[478] Grande Stevens and Others v. Italy, para. 96. Italics added. See also Georgouleas and Nestoras v. Greece, para. 38.

compensation and reparation.[479] Thus, it is now also already implied that restoration, reparation and compensation are purposes that characterises the non-criminal sanctions and that these hardly in any meaningfully sense can be characterised as deterrent sanctions, because sanctions in pursuit of restoration, reparation, and compensation are not inflicting a punishment.

From the case of Grande Stevens and the case-law more generally it not only follows that deterrence and punishment are the twin-objectives reserved for criminal sanctions. The case-law also affirms that punishment and deterrence are inseparable objectives so that whenever *sanctions* are punitive they are automatically also deterrent.[480] However, the ECtHR has also stated that the "fine imposed on the applicant was intended as a punishment to deter reoffending. It has a punitive character, which is the customary distinguishing feature of criminal penalties.[481] In this statement, there is at least some explicit evidence for considering only the punitive purpose to be the distinguishing feature of criminal sanctions. The problem with this and other similar statements is that the ECtHR often contradicts itself in another sentence or in a following remark as in the quote just given, because the ECtHR also considered the punishment (fine) "to deter reoffending."[482] Therefore, the case-law seems to have fully settled that punishment and deterrence are the two main inseparable and distinguishing objectives of criminal sanctions. The logic of this view entails that non-criminal sanctions cannot consistently be considered as punitive and deterrent in their purposes without deserving a reclassification as criminal sanctions. However, as we shall see, the case-law provides for an exception in respect of 'disciplinary fines', where the ECtHR considers such fines as punitive without also marking the fines as deterrent,[483] perhaps because it would make such disciplinary fines classify as criminal sanctions according to principles established in its case-law. Although this view is not logically consistent and quite paradoxical, the view is a consequence of the first Öztürk-criterion and the concept of a disciplinary offence. The view also brings along another question of to which extent punishment can be preventive in a non-deterrent manner?

[479] In the last sentence, the ECtHR also referred to the "penalties." The statement was thus not restricted to the fines, but also the other sanctions. However, the ECtHR's conclusion is not entirely clear.
[480] With respect to other deterrent measures than sanctions, the opposite does not apply. See Section III(1)(B). The twin and inseparable objectives of criminal sanctions is a function of measures that qualifies as *sanctions*.
[481] Lauko v. Slovakia, para. 58, referring to: Öztürk v. Germany, para. 53 and A.P., M.P and T.P. c. Switzerland, para. 41.
[482] E.g. Öztürk v. Germany, para. 53; A.P., M.P and T.P. c. Switzerland, para. 41; Balsytė-Lideikienė v. Lithuania, para. 58; Ziliberberg v. Moldova, para. 33; Janosevic v. Sweden, para. 68; Jamil v. France, para. 32; M. v. Germany, paras. 127-130; Gardel v. France, paras. 42-44; Valico S.r.l. v. Italy, p. 12. E.g. in A.P., M.P and T.P. c. Switzerland, the ECtHR expressly stated that the "penalties, which in the present case take the form of fines, are not intended as pecuniary compensation for damage but are essentially punitive and deterrent" (para. 33).
[483] Section III(1)(B)(I)(1).

2) Positive prevention and reparation as complementary purposes

In Chapter 2, a criticism against the reform and rehabilitation theories was that these theories are essentially not dealing with and / or justifying punishment but other consequences of law breaking.[484] Aligned therewith, if it should be accepted that these theories do not deal with punishment, then we may ask, while at it, which other forms of good and / or legitimate aims the society should promote and perhaps allow for once punishment is already inflicted in order to make up for and outweigh its criminal charges. Any sort of treatment that will prevent the offender from reoffending might be an example of such a good and / or legitimate aim. The question here pursued is thus to what extent punishment can be used for such purposes?

In Welch v. the United Kingdom, the applicant, Mr Welch, was arrested for suspected drug offences and charged with the offences of possession of cocaine and conspiracy to obtain cocaine with the intent to supply. Mr Welch was found guilty and sentenced to twenty-two years of imprisonment. In addition thereto, he was imposed a confiscation order amounting to GBP 66,914, and in default of payment he would be liable to serve a consecutive two years' prison sentence (default imprisonment).[485] Before the ECtHR it was not disputed whether the confiscation order, introduced later by the so-called '1986 Act', amounted to a retrospective imposition of a sanction against Mr Welch.[486] However, for Article 7(1) to apply, it was disputed whether the confiscation order was a criminal sanction.[487] In the case, the ECtHR not only introduced the Welch factors but also applied them in its assessment of the sanction.

In the assessment of the nature and the purpose of the sanction, the ECtHR first examined the background of the 1986 Act and observed that the confiscation order was introduced because of the inadequacy of the forfeiture powers. The UK courts did not have the power to order the forfeiture of the proceeds of an offence once they have been converted into assets, for instance, such as a house, stocks and shares, or other valuables of any sort. The 1986 Act aimed to remedy those defects, so that the courts also had the power to confiscate proceeds after they had been converted into assets.[488] The UK Government had argued that the confiscation order was merely a 'preventive measure' that deprived the offender of illegal gains in order to prevent that these gains remained within the system in use for further drug-dealing

[484] Chapter 2, Section II(1)(C)(I).
[485] Welch v. the United Kingdom, paras. 7-10. In the Court of Appeal, the sanctions were nonetheless reduced to twenty years in prison and the confiscation order to GBP 59,914.
[486] Welch v. the United Kingdom, paras. 26, 34-35.
[487] Ibid, paras. 22-26.
[488] Ibid, paras. 11 and 29-30.

enterprises.[489] The ECtHR acknowledged that the confiscation order had a preventive purpose as the confiscation of property could be useful for "future drug-trafficking operations as well as [for the] purpose of ensuring that crimes do not pay."[490] However, this was not convincing to the ECtHR, because it could not be excluded that such a broad confiscation power also pursued the aim of punishing the offender. By comparing the confiscation order with what the ECtHR referred to as "a regime of punishment,"[491] it concluded that the confiscation order qualified as a criminal sanction and Article 7 became applicable.[492] The idea of a regime of punishment and the ECtHR's arguments are discussed in detail in Section II(3)(A). The point to be discussed here is the following statement by the ECtHR:

> "Indeed the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment."[493]

The idea here expressed is that punitive sanctions may at the same time also aim at prevention and reparation without mutually excluding the punishment. In this way, prevention and reparation may be constitutive elements of the very notion of punishment and thereby to consists of complementary purposes and aims. This statement is therefore fundamental for characterising the autonomous concept of a criminal sanction and for establishing the ECtHR's sanction theory. It is thus necessary to determine how reparation and prevention can be considered as constitutive elements of the very notion of punishment.

Considering *'reparation'* as one of the constitutive element of the notion of punishment, the ECtHR has further elaborated on this view in respect of fines. In Göktan v. France and Jamil v. France, the ECtHR reflected on the concept of 'a fine' and referred to it as a 'hybrid measure', because "it constitutes both civil reparation and criminal punishment,"[494] and: "Like fiscal fines, customs fines have always been regarded as hybrid measures, with elements of both compensation and punishment."[495] The ideas and principles stemming therefrom are in line with the case-law in general, in particular with respect to tax fines.[496] It also perfectly conforms with Aquinas principle of restitution and the fundamental criterion of the level of restoration, because a pecuniary sanction, in order to qualify as a fine, the amount of

[489] Ibid, para. 24. The applicant argued that confiscation order had been recognised as having a punitive character in various domestic court decisions and by several decisions of the US Supreme Court concerning similar legislation cf. Austin v. the United States and Alexander v. the United States, decisions of 28 June 1993, 125 Led 2d 441 and 488, cf. Welch v. the United Kingdom, para. 23.
[490] Welch v. the United Kingdom, para. 30.
[491] Ibid, para. 33.
[492] Ibid, para. 35.
[493] Ibid, para. 30.
[494] Göktan v. France, para. 48.
[495] Jamil v. France, para. 14.
[496] For instance, J.B. v. Switzerland, paras. 47-48; Janosevic v. Sweden, paras. 68-69; Lauko v. Slovakia, para. 58; Västberga Taxi Aktiebolg and Vulic v. Sweden, paras. 79-80; Ruotsalainen v. Finland, para. 46; Tomasovic v. Croatia, paras. 22-25.

the fine must be higher than the amount that would equal pecuniary reparation or compensation. Hence, when a fine is imposed on the basis of some loss or damage, the amount of the fine inherently carries with it an amount that equals a reparation or compensation. In this regard, the purposes reparation and compensation can be seen as a constitutive element of the fine which, per se, is a punitive and deterrent pecuniary sanction. Furthermore, when a confiscation order is allowed to confiscate property beyond the illegal enrichment of the offender, the confiscation follows the exact same logic of that principle.[497] Fines and punitive confiscation orders are therefore *'hybrid'* (pecuniary) sanctions in pursuit of multiple purposes, and in their DNA they are carrying the very blueprint that defines a criminal pecuniary sanction.

When a fine also is reparatory, the next question therefore is how are we supposed to understand *'prevention'* as a complementary purpose to punishment? – So far it has been argued that the ECtHR in its case-law has settled that punishment and deterrence are the two-objectives pursued by criminal sanctions. According to Chapter 2 and the deterrence theory then 'deterrence' is essentially just another word for 'negative prevention'. The reference to prevention as complementary to punishment in the Welch case is thereby consistent with the case-law, if prevention is considered as 'negative prevention', because it would thus just confirm that deterrence is the other twin-objective to punishment.

We must nevertheless entertain the question of whether the ECtHR in the Welch case referred to prevention in a different meaning than negative prevention and thereby in a more positive sense. In the case, the ECtHR stated more precisely that the "preventive purpose of confiscating property that might be available for use in future drug-trafficking operations as well as the purpose of ensuring that *crimes does not pay* are evident from the ministerial statements."[498] When a confiscation order is used for the purpose of ensuring that proceeds from crime not circulates and is use for further drug-trafficking or other crime violations, then the amount of such a confiscation order is no more than a reparatory amount and in that sense positively preventing that crimes do not pay. Thus, for such a confiscation order, there is full confluence between reparation and positive prevention. However, if the legal basis limits the confiscation order to the proceeds from crime, the confiscation order would not qualify as a criminal sanction, because it would be allowed to pursue the purposes of punishment and deterrent. Therefore, while punishment and deterrence (negative prevention) also may embrace

[497] Section III(1)(A)(II)(2). E.g., in the Welch v. the United Kingdom, para. 29, the ECtHR also observed that "the court order may affect proceeds or property which *are not directly related* to the underlying criminal conviction." Italics added.
[498] Welch v. the United Kingdom, para. 30. Italics added.

the purposes of reparation and positive prevention, the reverse principle does not apply, because reparation and positive prevention does not embrace punishment and deterrence. Again, the principle of restitution and fundamental criterion of level of restoration are here decisive. And, finally, just like punishment and deterrent are the twin-objectives pursued by criminal sanction, so it is now also implied that reparation and positive prevention are twin-objectives pursue by non-criminal sanctions, at least for the con-criminal pecuniary sanctions.

(3) The purposes of non-criminal and disciplinary sanctions

"The purpose of the penalty, as the other aspect of the second [Engel-]criterion, mainly serves to distinguish criminal sanctions from purely reparatory or compensatory sanctions."[499] The validity of this quotation is evident from the case-law and the discussion so far. However, because the Engel-test allows the ECtHR to go beyond the appearances of the legislation to determine on the basis of the autonomous notion of a criminal sanction whether the defendant risked to be imposed a criminal sanction, it is not surprising that the case-law of the ECtHR are much less comprehensive on what characterises non-criminal sanctions. Nonetheless, the case-law also contains statements by the ECtHR where it applies a logic that lays down some more or less obvious general principles that governs its views on non-criminal sanctions. In addition, the ECtHR has also under the Engel-test as well as in cases under the civil-limb of Article 6 where it has not applied the Engel-test, used certain criteria that rather points out the nature of disciplinary sanctions than their purposes. This will be discussed in detail in Section III(1)(B), while the objective here is to present an overview of the purposes attributed to all non-criminal sanctions, including disciplinary sanctions, and their governing principles.

(a) Reparation and compensation

While the principle of restitution and the fundamental criterion of level of restoration may be very useful to distinguish criminal pecuniary sanctions from the non-criminal pecuniary sanctions, it is not fully illuminated in the case-law what the concepts of 'compensation' and 'reparation' exactly means, and how, and if, these two concepts differ. In some cases, the ECtHR has nevertheless shed some light on the meaning of these two concepts:[500]

[499] Pieter and others (n 2) 529. See also Valico S.r.l. v. Italy, p. 12, and the cases referred to therein.
[500] D'Ambrosio R (note 34) confirms this view and writes in fn4, p. 317, that: "In the Court's view, administrative measures do not deserve the same set of safeguards as sanctions due to their reparatory rather than punitive aim."

> "tax surcharges are not intended as pecuniary *compensation for any costs* that may have been incurred as a result of the taxpayer's conduct. Rather, the main purpose of the relevant provisions on surcharges is to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties are thus both deterrent and punitive."[501]

The compensatory and reparatory constitutive elements of tax surcharges seems often to manifest in sanctions referred to as a correction tax or "supplementary tax,"[502] which imposes an obligation to pay the amount owed in taxes for the violations of not having paid the taxes in due time or in the correct amount. In this way, the purposes of reparation or compensation manifests as a sanctioning principle that aims at compliance with the law by either repairing (for the costs) or compensating (for the loss) that followed as a direct consequence of the law violation. The same sanctioning principle has also manifested in other cases. For instance, in Grande Stevens and Others v. Italy, the ECtHR rejected the argument of the Italian Government that the fines imposed only intended "to repair damage of a financial nature,"[503] and in Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, the ECtHR stated in respect of a fine provided for in the Slovenian Competition Act that: "It was essentially intended to punish the unlawful conduct, in order to prevent reoffending, and not to compensate any damage caused by the applicant company."[504] All these views allows to establish a legal category of *'reparatory sanctions'* that aim at ensuring compliance with the applicable laws. The reparatory sanction may be considered as a *'reparatory pecuniary sanction'*, when it compensates or repairs for the pecuniary consequences that were caused by the law violations.

The concept of 'reparatory pecuniary sanctions' are thus identical to any form of *'repayment of a pecuniary advantage'*. This may be evidenced by Pierre-Bloch v. France. In that case, the French Constitutional Court could disqualify any candidate from standing for election for a period of one year, where the court found that the candidate during the campaign had exceeded the maximum permitted amount of election expenditure. Where this was the situation, the national commission then had to assess a sum equivalent to the excess amount, which the disqualified candidate was required to pay to the Treasury. The ECtHR stated:

> "This would appear to show that *it is in the nature of a payment to the community of the sum of which the candidate in question improperly took advantage to seek the votes of his fellow citizens* and that it too forms part of the measures *designed to ensure the proper conduct of parliamentary elections and, in particular, equality of the candidates*. [...]. In view of its nature, the

[501] Janosevic v. Sweden, para. 68. Italics added. E.g. see also Bendenoun v. France, para. 47; Kadubec v. Slovakia, para. 52. A. P., M. P. a. T. P. v. Switzerland, para. 41; E.L., R.L. and J.O.–L. v. Switzerland, para. 46; J.B. v. Switzerland, para. 48.
[502] J.B. v. Switzerland, para. 47. Quite some cases relating to tax violations are very illustrative of the obligation to pay the amount owed as compensation or reparation. In J.B. v. Switzerland, the ECtHR also stated the proceedings "served the various purposes of establishing the taxes due by the applicant and, if the conditions therefore were met, of imposing on him a supplementary tax and a fine for tax evasion," cf. para. 47. See also Ponsetti and Chesnel v. France, para. 5; Ferazzini v. Italy, para. 29; Västberga Taxi Aktiebolag and Vulic v. Sweden, para. 75.
[503] Grande Stevens and Others v. Italy, para. 96. See also Georgouleas and Nestoras v. Greece.
[504] Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, para. 45.

> obligation to pay the Treasury *a sum equal to the amount of the excess cannot be construed as a fine*."[505]

Accordingly, the amount in excess of the ceiling could not be regarded as a (true) fine.[506] Whether the removal of the pecuniary advantage in reality is a reparatory pecuniary sanction or reparatory non-pecuniary sanction is not self-evident. There were not really any costs to repair or loss to compensate. However, the removal of the competitive advantage obtained by the candidate aimed at restoring the legal situation back into the legal status quo before the commission of the violation, thus the pre-misconduct legal position before the offence, and to replace the candidates back on an equal footing as prescribed and protected by the applicable laws that aimed to ensure the proper conduct during parliamentary elections. Neither was the nature of the excess amount a true surcharge, because a surcharge would have been an additional amount imposed on top of the excess amount of the election expenditures. The excess amount of expenditures thus lacked a punitive and deterrent purpose.

The reasoning of the ECtHR more or less directly revealed an underlying and operative distinction between punishment and deterrence on the one side and reparation in its pecuniary form on the other. The arguments in favour of reparation also revealed an aim towards compliance with the rules on proper parliament elections.[507] The authorities could intervene into the election by repairing the process and result of the election and thereby also prevent in the positive sense that any competitive pecuniary advantage had a real influence on the election. The legal position is therefore very similar to that of tax corrections as the tax authorities' generally are equipped with legal powers that ensures the proper tax collection.

When an interest rate have been added to the reparatory or compensatory amount, then the total amount of the interests added to the reparatory pecuniary sanction does not entail that the total amount imposed goes beyond the level of restoration and thereby requiring a requalification as a punitive and deterrent pecuniary sanction.[508] Interest rates are not imposed as any legal sanction and do not resemble a punitive and deterrent surcharge. They are thus added to

[505] Pierre-Bloch v. France, para. 58. Italics added. The Paris Administrative Court had considered the repayment of the amount in excess of the limit of election expenditures as an administrative sanction. More precisely, it stated: " [...] *even if* it is accepted that the requirement to pay the State a sum equivalent to the amount by which the maximum permitted amount of election expenditure has been exceeded represents a penalty, that penalty is only an administrative penalty. It cannot be regarded as criminal in nature or intended to punish an offence. It does not therefore come within the scope of Article 7 of the Convention [...]," cf. para. 36. Italics added. See also, paras. 35 and 50.
[506] Perhaps, it may more generally be considered comparable to a disciplinary fine, cf. Estrosi v. France.
[507] Pieter and others (n 2) 531.
[508] Therefore, fiscal sanctions or measures that aim at recovering unpaid taxes and collection of default interests, regardless of their amount, are not criminal in nature. See more generally, Finkelberg v. Latvia, and Mieg de Boofzheim v. France.

either the reparatory and preventive pecuniary sanction (non-criminal sanctions) or added to the punitive and deterrent pecuniary sanctions (criminal pecuniary sanctions).

(b) Ensuring compliance

A sanction may thus repair the law broken by the imposition of pecuniary sanctions. When conduct of the offender has caused some loss and / or other costs, the legal position of the victim should be restored in such a way that the financial position of the victim is similar or at last equivalent to the pre-misconduct legal position before any violation has occurred. In this way, reparatory pecuniary sanctions can also be said to aim at compliance. The oppositive notion to reparatory pecuniary sanctions is *'reparatory non-pecuniary sanctions'*, which is just another word for sanctions that also aims at ensuring compliance. The only difference is that the reparation consist of imposing non-pecuniary sanctions of whatever nature and type.

Admittedly, because the case-law of the ECtHR is focused at criminal sanctions under Articles 6-7 and 4-P7, there are to my knowledge not many cases before the ECtHR where it has directly assessed or reflected on the concept of '*reparatory non-pecuniary sanctions'* and the non-pecuniary remedies and corrective measures that any sanctioning authority may employ. First and foremost, the validity of this legal category of sanctions is therefore mainly one of logical consistency following from the legal categories already existing and applied in the case-law and the binary construction that follows from the pecuniary and non-pecuniary types of reparatory sanctions. However, except from this logical observation considering reparatory *non-pecuniary* sanctions and reparatory *pecuniary* sanctions as the two subspecies of the concept of *'reparatory sanctions'*, the case-law of the ECtHR can provide some evidence for the existence and exemplification of the reparatory non-pecuniary sanctions.

The ECtHR has defined the concept of 'disciplinary sanctions' in the following way: "Disciplinary sanctions are generally designed to ensure that the members of particular groups *comply* with specific rules governing their conduct."[509] From this statement it should be noted that there is full confluence between the concept of 'disciplinary sanctions' and the definition of reparatory sanctions, including the non-pecuniary reparatory sanctions. It should also be noted that the statement does not stipulate by which pecuniary or non-pecuniary sanctions that compliance may be ensured. More generally, it can therefore also be argued that there is full confluence between disciplinary sanctions and reparatory sanctions. However, whether *all*

[509] Weber v. Switzerland, para. 33. Italics added. See also Çelikateş and Others v. Turkey.

types of disciplinary sanctions also pursues the purpose of reparation is a question saved for the conclusion to address once the case-law on disciplinary sanctions has been discussed.[510]

(c) Positive prevention

The sanctioning philosophy of the ECtHR has so far revealed that all sanctions pursued the purpose of retribution. It has also revealed that the concept of 'criminal sanctions' also pursue the purposes of punishment and deterrence, which are two twin-objectives that distinguishes criminal sanctions from non-criminal sanctions. This philosophy also includes arguments that considers the concept of punishment by its very constitutive elements to pursue complementary purposes of reparation and positive prevention, which was most evident in respect of the criminal pecuniary sanctions, because a fine is, per se, defined as going beyond the level of restoration, wherefore a fine not only contains a punitive and deterrent amount, it also contains an amount that can pursue the purpose of reparation and positive prevention as when a part of its total amount is depending on the proceeds derived from crime in order to ensure that crime does not pay. In the latter regard, there is thus also full confluence between the purposes of reparation and positive prevention, because the reparatory element and purpose ensures and prevents that the illegal behaviour does not pay off. Therefore, reparation and positive prevention seems to manifest as twin-objectives attributed to the non-criminal sanctions.

Another case is indicative of this interpretation. In competition law with respect to anti-competitive and monopolistic behaviour, a legal person risked the imposition of a simple warning to terminate monopolistic behaviour and a compulsory division of the company. According to the ECtHR, these types of sanctioning powers "belong to the regulatory field."[511] Albeit the ECtHR did not provide any explicit reasons justifying its conclusion, the warning to terminate monopolistic behaviour seems to be a reparatory sanction in the sense that the monopolistic behaviour is called-out to be terminated and thus also positive preventive in the sense that warning further prevents the continuation of the illegal monopolistic behaviour. Because the warning only are signalling that more punitive and deterrent sanctions can be employed if the illegal behaviour is not to be terminated, the warning seems to require no more than the mere termination of the violation and therefore aiming at restoring compliance. Similarly with respect to the compulsory division, if it only requires the termination of the monopolistic

[510] Section III(1)(D).
[511] OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service v. Russia, p. 10.

behaviour. If this interpretation is correct, the purposes of reparation and positive prevention have a complementary function and can hardly be distinguished for such types of sanctions.

There are nevertheless cases where the ECtHR has considered the disciplinary sanctions in question to pursue the purpose of positive prevention and where the reparatory purpose is less evident.[512] In these regards, the purpose of positive prevention reveals itself in the form of a sanction that is imposed on a retributive basis and takes the form of a prohibition to exercise the rights pursued by some specific profession. However, this prohibition not only restricts the offender's possibility to continue the violation or similar violations, but it also prevents the offender from causing any further harm to that profession. In these regards, the question is whether such a prohibition only are positive preventive or reparatory, or if they in some way are going beyond the level of restoration and not only restoring the pre-misconduct legal position? – This question is discussed together with the concept of disciplinary sanctions.[513]

Nevertheless, because disciplinary sanctions generally are pursuing the complementary purposes of reparation and positive prevention, the case-law is thus often indicative of a confluence between the purposes attributed to non-criminal and disciplinary sanctions. The question that arises therefrom is whether there in reality only exists two governing classes of sanctions, that is, of 'criminal sanctions' and 'disciplinary sanctions' where the latter thus makes up the class of non-criminal sanctions. This may in fact be the reality of the legal situation on the basis of a full and comprehensive view of the entire case-law of the ECtHR. Further support for this interpretation is the observation that there seems to be no case before the ECtHR where it has concluded that the particular sanction (also not of an offence) were 'administrative *in nature*', wherefore they are either criminal or, de facto, disciplinary in nature. Therefore, in Section III, the result of the classification and qualification of the sanctions will often either conclude that the sanction is criminal or disciplinary in nature. This result entails that there essentially is no reality in the administrative label.[514] The nature, purpose and severity of the disciplinary sanctions is discussed in more detail in Section III(1)(B).

C. The nature and severity of the sanctions

[512] See further Section III(1)(B)(I)(1) and Storbråten v. Norway; Mjelde v. Norway; and Haarvig v. Norway.
[513] Section III(1)(B). It is the question asked above in Section II(2)(B)(II)(2)(a)(3)).
[514] This phenomenon very commonly referred to as 'administrative punitive law' or 'administrative criminal law'. See e.g. Guisset v. France, para. 59; Menarini Diagnostics S.r.l v. Italy, para. 44; Grande Stevens and Others v. Italy, para. 101; Georgouleas and Nestoras v. Greece, para. 42. Messier v. France; Didier v. France; and Lilly France S.A. v. France.

The ECtHR has often expressed the view that "[t]he relatively lack of seriousness of the penalty at stake [...] cannot divest an offence of its inherently criminal character."[515] This proposition stresses the alternative character of the second Engel-criteria. Trechsel has remarked that "it is interesting to note that this element [the punitive and deterrent character of the sanction] is not usually referred to in order to qualify the severity of the sanction, the consequences it may entail for the person concerned, but it is used as a criterion to qualify the character of the offence itself."[516] This has nonetheless remained the legal position under the Engel-test. However, the opposite proposition of the introductory statement is also true: the relative lack of seriousness of the offence cannot divest a sanction of its inherently criminal character.

The ECtHR has often stressed the individual assessment of each of the Engel-criteria by arguing that the supervision of the ECtHR cannot stop with the assessment conducted under the second Engel-criterion: "Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring."[517] National authorities would otherwise be allowed under a disciplinary or administrative label to inflict severe and serious sanctions without respecting the criminal guarantees provided by Articles 6-7 and 4-P7.[518] The ECtHR even stated in the Engel case: "The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect the physical liberty of the person all require that this should be so."[519] Because the ECHR provides for autonomous concepts, the substantive rather than the formal determination must thus continue in accordance with the third Engel-criterion.

In cases where the second Engel-criterion does not become decisive, the ECtHR therefore applies the third Engel-criterion, which it generally refers to as: "the nature and severity of the sanctions." It has been noted that the 'nature' of the sanctions should not be confused with the 'purpose' of the sanctions,[520] the latter one being one of the two cumulative Öztürk-criteria applicable under the second Engel-criterion. At least formally, the Engel-criteria have for a long time provided for a split assessment divided between the purpose of sanctions (second Engel-criterion) and the nature and severity of the sanctions (third Engel-criterion), while the Welch factors assesses the nature and purpose of the sanctions together. Therefore, it is

[515] Ramos Nunes de Carvalho e Sá v. Portugal, para. 123; Öztürk v. Germany, para. 54; Ziliberberg v. Moldova, para. 34; Jussila v. Finland, para. 31; Routsalainen v. Finland, para. 43; and Nicoleta Gheorghe v. Romania, para. 26.
[516] Trechsel (n 85) 26–27.
[517] Engel and Others v. the Netherlands, para. 82. For identical or similar statements, see also Lutz v. Germany, para. 55; Garyfallou AEBE v. Greece, para. 33; Lauko v. Slovakia, para. 57; Ezeh and Connors v. the United Kingdom, para. 86.
[518] Sergey Zolotukhin v. Russia, para. 56; Asadbeyli and Others v. Azerbaijan, para. 150.
[519] Engel and Others v. the Netherlands, para. 82.
[520] Pieter and others (n 2) 532.

often also the situation that the third Engel-criterion has become a criterion that is entirely devoted to the severity of the sanctions,[521] whereby the Engel-criteria also resembles more the Welch factors.[522] This matters little under the Engel-test, because as the case-law has evolved it is possible to identify the arguments that makes up the nature of the sanctions as opposed to those arguments that makes up the purposes and severity of the sanctions. Thus, we will also continue in accordance with the traditional distinction.

In Escoubet v. Belgium, the ECtHR took into account certain elements from its case-law and outlined the third Engel-criterion accordingly:

> "36. With regard to the nature and severity of the measure, the Court reiterates that "according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty" [the Öztürk case, para. 53], *except "those which by their nature, duration or manner of execution cannot be appreciably detrimental"* [the Engel case, para. 82]."[523]

From this statement, as well as the case-law more generally, it follows that the nature (I) and severity (II) of the certain sanctions, when the duration or manner in which they are executed are appreciably detrimental, can result in a conclusion whereby the sanctions either qualifies as criminal or the sanctioned person is subject to a criminal charge.

(I) The nature of sanctions

The first element of the statement in Escoubet v. Belgium was a reiteration of the principle that has been applicable since the Öztürk case: "according to the ordinary meaning of terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, *to be deterrent and usually consisting of fines and other measures depriving the person of his liberty*."[524] This statement more or less directly still plays a decisive role today. With a view towards the case-law, it contains two key principles: (i) sanctions that results in a 'deprivation of liberty' and 'fines' are considered the archetypical criminal sanctions, and (ii) these two archetypes are used in the assessments to compare whether any other type of legal power and / or sanction contained under a different legal label may qualify as a criminal sanction.[525] For example, the ECtHR has stated in respect of an

[521] Sometimes, the ECtHR does not even refer to the nature of sanctions in its presentation of the third Engel-criterion, cf. e.g. Ramos Nunes de Carvalho e Sá v. Portugal, para. 122. See also ECtHR, Guide on Art. 6, criminal, para. 22, p. 10.
[522] Section II(1)(B).
[523] Escoubet v. Belgium, para. 36. Emphasis and references maintained.
[524] Öztürk v. Germany, para. 53. Italics added.
[525] Seražin v. Croatia, para. 89. In particular, see Section III(1)(A)(I)-(II).

assessment of an exclusion measure that it "did not involve the imposition of a fine or deprivation of liberty, which is normally an indication of a criminal sanction."[526]

It follows more generally that the nature of the sanction in reality is a question of their *'essential nature'*. In turn, the essential nature of sanctions is a question that relates to the concept of a *'deprivation'* in relation to a particular *'right'* that is or will be subject to the deprivation. While 'deprivation' thus is the concept use to signify the sanction, the 'right' points to what essentially is at stake, here: some loss of liberty and / or liberty rights. Previously, it was thus also argued that 'deprivation of liberty' was well-articulating the essential nature of all the different types of non-pecuniary criminal sanctions that typically are labelled as imprisonment, prison sentence, and other forms of incarceration.[527] Therefore, 'deprivation of liberty' is also the archetype that governs these types of sanctions. The question that then follows is which other archetypes that there may exist?

The essential nature of a fine has not yet been characterised, and it is not a self-evident matter in the case-law. When the concept of a 'fine' serves as an archetype, it is nonetheless necessary to stipulate what the essential nature of a fine is.[528] In the discussion of its purpose, it was argued that a fine pursues the purposes of punishment and deterrent, and that a fine therefore, per se, must go beyond the level of restoration. Hence, the level of restoration functioned as the fundamental criterion which separated punitive and deterrent pecuniary sanctions from reparatory and compensatory pecuniary sanctions (repayments). Thereby, the criterion also separated the criminal pecuniary sanctions from non-criminal pecuniary sanctions.

The level of restoration is also fundamental in another important regard. The criterion contains the ability to determine whether the offender by the imposition of the pecuniary sanction is personally affected on her or his fortune and wealth (property), or just has to return or repay an amount of money, which the offender was not entitled to, because the offender obtained the money (profit, proceeds) in an illegal way. By this criterion, it becomes possible to further stipulate that there is full confluence between the purposes of punishment and deterrence and the essential nature of a fine: *deprivation of property*. Only property over which the offender has legitimate ownership can be subject to a true deprivation. Conversely, any

[526] Seražin v. Croatia, para. 89. The case is discussed in Discussed in Section II(2)(B)(II)(1). The ECtHR also referred to Sergey Zolotukhin v. Russia, para. 56, and M. v. Germany, paras. 126-129 and 132. See also Ulemek v. Serbia, para. 51, comparing to a criminal fine, and more generally Section III(1)(A)(II)(1).
[527] Section II(2)(B)(II)(a)(3)).
[528] For instance, an obligation to pay an amount due to a violation of the French election code has also been compared "criminal fines in a strict sense," cf. Pierre-Bloch v. France, para. 58. This also allowed the ECtHR to take into consideration some, and other, of the criminal classification factors discussed in Section II(3).

reparatory or compensatory amount of money represents property over which the offender does not have legitimate property rights to and will thus not result in any true and real deprivation of her or his property. Mere repayments that compensates for a loss or repairs for the damage caused or harm done, might be seen to affect the accumulated total illicit wealth and fortune of the offender, but not her or his legitimate wealth and fortune. Accordingly, a fine must, per se, ultimately result in a deprivation of her or his personal right to property. The same argument also applies for confiscations, forfeitures and seizures of property of another kind than money, such as, other forms of tangible and intangible instruments, items and / or assets, like plots of land, buildings, etc., because the ECtHR has also adhered to whether the sanctions in question resembled a fine or a restitution for unjustified enrichment under civil law.[529]

Besides deprivations of liberty and property, the same question remains: which other forms of archetypes exist? Within the scope of Articles 6-7 and 4-P7, the case-law allows us to conclude that 'deprivations of civil rights' and 'deprivations of political right' also exists.[530] Outside the scope of Articles 6-7 and 4-P7, there may also be other governing archetypes, because the concept of '*deprivation'* of other forms of *'rights'* are also subject to the rule of law under other Articles of the ECHR. Article 2 on the "Right to life" is one example. The ECHR also prohibits certain types of very severe and detrimental forms of punishment. For example, Article 3 provides a prohibition against being subjected to torture or inhuman or degrading treatment or punishment, and Article 4 prohibits slavery and forced labour. Despite these Articles and their related case-law lay outside the scope of this Chapter, the reference thereto serves here the more fundamental purpose of pointing out that the essential nature of a 'deprivation of a right' and other archetypes may be embodied in the logic that governs other provisions of the ECHR more generally. However, in respect of the case-law under Articles 6-7 and 4-P7, and the fact that the specific essential nature of the right deprived to a very far extent determines the classification of the sanctions under the Engel-test, it follows therefrom that there exists a *legal hierarchy of rights*. Moreover, some of the archetypes are more important than others for purposes of Articles 6-7 and 4-P7. This discussion will continue.[531] Section III(1) is categorised in accordance with the essential nature of sanctions.

(II) The severity of sanctions

[529] See further Section III(1)(A)(II)(2).
[530] Section III(1)(B).
[531] Section III(1)(D) and Section IV.

By the words of the ECtHR in Muslija v. Bosnia and Herzegovina, the degree of severity of the sanction "is determined by reference to the maximum potential penalty for which the relevant law provides. The actual penalty imposed is relevant to the determination, but it cannot diminish the importance of what was initially at stake."[532] The severity of the sanctions is thus a reference to their maximum level of severity of what the defendant a priori is liable to and risk to incur on the basis of the relevant national legal framework.

It thus follows from the case-law that the concept of 'severity' relates to the "seriousness of what is at stake,"[533] and that the severity assessment is oriented towards the potential maximum level prescribed by the relevant law provisions.[534] Therefore, the assessment of the seriousness of what is at stake must also take into account the nature and severity of all the sanctioning powers available to the sanctioning authority for sanctioning the offender for the particular violation(s) committed.[535] This principle is not only a logical consequence following from the third Engel-criterion, but also of the seriousness of what is at stake.

In Ezeh and Connors v. the United Kingdom, the ECtHR stated with respect to 'deprivations of liberty' that there exists a presumption for the charge being criminal within the meaning of Article 6, which can only be rebutted entirely exceptionally, if the deprivations of liberty pass the "appreciably detrimental test," meaning that the deprivation of liberty is not appreciably detrimental given its nature, duration or manner of execution.[536] Even though the appreciably detrimental-test stricto sensu only applies to sanctions that results in the deprivation of liberty, a similar principle of a "too low degree of severity" equally applies to other

[532] Muslija v. Bosnia and Herzegovina, para. 29. See also ECtHR, Guide on Art. 6, criminal, para. 26, p. 11, and Campbell and Fell v. the United Kingdom, para. 72; Weber v. Switzerland, para. 34; Demicoli v. Malta, para. 34; Garyfallou AEBE v. Greeze, paras. 33-34; Escoubet v. Belgium, para. 36; Ezeh and Connors v. the United Kingdom, para. 120; Sergey Zolotukhin v. Russia, para. 54; Tomasovic v. Croatia, para. 23; Michalache v. Romania, para. 61.
[533] Engel v. the Netherlands, paras. 82 and 85. See also, for instance, Weber v. Switzerland, para. 34; Ezeh and Connors v. the United Kingdom, para. 120; Simkus v. Lithuania, para. 44; and Milenkovic v. Serbia, para. 36.
[534] Campbell and Fell v. the United Kingdom, para. 72; Weber v. Switzerland, para. 34; Demicoli v. Malta, para 34. Ezeh and Connors v. the United Kingdom, para. 120; Benham v. United Kingdom, para. 56; Garyfallou AEBE v. Greece, paras. 33-34.
[535] Mikhaylova v. Russia, para. 62, and Grande Stevens and Others v. Italy, paras. 89-101. See also, inter alia, Dubus S.A. v. France, para. 37; Galina Kostova v. Bulgaria, para. 52; Müller-Hartburg v. Austria, paras. 37-49; Biagioloi v. San Marino, paras. 47-57; Ramos Nunes de Carvalho e Sá v. Portugal, paras. 119-128; Simkus v. Lithuania, paras. 43-45; Milenkovic v. Serbia, paras. 35-37. In a number of cases before the ECtHR it is revealed that national courts or other national sanctioning authorities have in one court order, ruling, or sanctioning decision imposed more than one sanction on the applicants. For instance, in Welch v. the United Kingdom a confiscation order and imprisonment was ruled (paras. 7-10); in Jamil v. France, a court order imposed imprisonment, permanent exclusion from French territory, confiscation of goods, and a customs fine (paras. 7-10); and see also the cases referred to in the previous footnote. Where the national sanction regimes establishes a legal framework where the sanctioning authority or court may choose to impose one or more sanctions among multiple different sanctions available in order to repair the damage caused by the violation and to punish the perpetrator, then it is a logical consequence of the third Engel-criterion that the severity of what is at stake must be determined on the basis of the most severe of the available sanctions, including their potential combination and interplay, and not only the potential severity of the sanction actually imposed.
[536] Ezeh and Connors v. the United Kingdom, para. 126; Simkus v. Lithuania, para. 44; Milenkovic v. Serbia, para. 36; and Blokhin v. Russia, paras. 179-182.

non-pecuniary and pecuniary sanctions. The ECtHR is thus generally charged with a task to establish the threshold of severity that determines when sanctions meet the level of severity required for criminal sanctions so the guarantees in Articles 6-7 and 4-P7 apply.[537] In accordance therewith, which has followed since the Welch case, the ECtHR generally states under Article 7 that "the severity of the order [/ measure] is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned."[538] The same also holds true under the case-law of Article 6 and 4-P7.

3. Criminal classification factors for a regime of punishment

In all situations where the ECtHR applies the Engel-criteria and the Welch factors and has found the criminal guarantees applicable under Article 6, 7 and 4-P7, the content of each the Engel-criteria and Welch factors and the applicable principles thereunder entails that they always provides for the most decisive arguments that justifies the conclusions adopted by the ECtHR. This is particularly true when the ECtHR applies the Engel-criteria in respect of their alternative character. As argued in Section II(1)(A)-(B), the Engel-criteria and Welch factors not only provides the governing structures and applicable principles that makes up the autonomous notions of a 'criminal charge', 'criminal offence', and 'criminal proceedings' applicable under Articles 6-7 and 4-P7, they are also providing the governing structures and principles that makes up the autonomous concept of a 'criminal sanction', because this concept depends on three constitutive elements, that is: the (i) purpose, (ii) nature, and (iii) severity of the sanctions. At the same time, it was also argued that the concept of a criminal sanction is not always fully identical with the three concepts of a criminal charge, offence, and proceedings. One way in which this is revealed is when the ECtHR adheres to certain elements that do not strictly concern the principles that are characterising the purpose, nature, and severity of criminal sanctions, but these elements still provides for *'criminal colours'* to the charge, offence, and proceedings having a legal basis within the national legal system in question. Therefore, this section, II(3) and Chapter, and following Chapters, will refer to these elements as *'criminal classification factors'*, because depending on the specific factors, they are elements by which the concepts of a criminal charge, offence, and proceedings may turn out to be broader concepts than the concept of a criminal sanction as they all relates to the autonomous notion of

[537] See Section II(2)(II)(a)(2)).
[538] Welch v. the United Kingdom, para. 32. See e.g.: Dassa Foundations and Others v. Liechtenstein, p. 18.

'criminal'.[539] However, some of the factors also relates to the concept of sanctions, and *all* of the criminal classification factors are nevertheless captured within the meaning of what the ECtHR has referred to as a "regime of punishment," which fully accords with what Chapter 2 argued to be the institutional aspect of the concept of punishment.[540] Because the criminal classification factors do not have any alternative character, it is clear that they will usually not play any decisive role and thus only carries a relative weight.[541] However, as they are relating to the criminal charge, offence and proceedings and these may lead to the imposition of criminal sanctions, the existence of the criminal classification factors points to legal elements in which the legal regime question may correspond and resemble a regime of punishment.

A final point on the terminology. Because the notions of criminal charge, offence, and proceedings they correspond, I will refer to them all by reference to the term 'charge' in the following. I will refer to the concept of a 'sanction regime' in the following within the meaning that the existence of the criminal classification factors may provide criminal colours to the sanction regime in question and thus resemble a regime of punishment (criminal sanction regime). These notions are further elaborated and discuss in Chapter 5.[542]

A. A regime of punishment

The case of Welch v. the United Kingdom is a key case from which follows a number of elements and principles that the ECtHR subsequently has adhered to and further elaborated. Recalling the conclusion from the discussion above,[543] the ECtHR found the confiscation order to qualify as a criminal sanction on the basis of these factors:

> "However, there are several aspects of the making of an order under the 1986 Act which are in keeping with the idea of a penalty as it is commonly understood even though they may also be considered as essential to the preventive scheme inherent in the 1986 Act. The sweeping statutory assumptions in section 2 (3) of the 1986 Act that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise [...]; the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit [...]; the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused [...]; and the possibility of imprisonment in default of payment by the offender [...] – are all elements which, when considered together, provide a strong indication of, inter alia, *a regime of punishment*."[544]

[539] Gestur Jónsson and Ragnar Halldór Hall v. Iceland, paras. 75-83.
[540] Chapter 2, Section III.
[541] ECtHR, Guide on Art. 6, criminal, para. 25, p. 11.
[542] Chapter 5, Section III.
[543] Section II(2)(B)(II)(2)(b)(2)).
[544] Welch v. the United Kingdom, para. 33. Italics added. See also paras. 12-14.

The ECtHR considered all these to be "punitive elements,"[545] and the combination of these punitive elements not only justified why the confiscation order qualified as a criminal sanction, but also made up a regime of punishment. In the case-law, these punitive elements have each served the ECtHR in a number of occasions where they formed part of the punishment regime of a state. Each element is therefore in need of further characterisation. Among the punitive elements was: (i) "that all property passing through the offender's hands over a six-year period is the fruit of drug-trafficking unless he can prove otherwise." This element of burden of proof was very specific to the UK confiscation order in question at that time, and there seems to be no general principle to be deduced from this element in the case-law.

A second punitive element was the fact that the confiscation order: (ii) "is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit." This element is in accordance with the discussion of the principle of restitution and the fundamental criterion applicable for pecuniary sanctions to go beyond the level of restoration. Therefore, it is rather one of the governing principles that makes up the purposes that characterises the concept of criminal sanctions than it is a punitive *element* and criminal classification *factor*.

The third punitive element was that fact that: (iii) "the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused." This element is not only a factor that may characterise the sanction as punitive, but it is also a more general factor in the sense that it is one of those criminal classification factors that may characterise the charge as criminal.[546]

Finally, the fourth of the punitive element was: (iv) "the possibility of imprisonment in default of payment by the offender." The sanction of default imprisonment qualifies as one type of those sanctions that are referred to as 'coercive sanctions', which therefore also may be one of those factors referred to as the criminal classification factors as they may provide for some criminal colours to the sanctions (primarily) and charge in question.[547]

The references in the footnotes and the discussions of each of these punitive elements makes it clear that they often form part of the punishment regime or sanction regime of the particular legal system of the state in question. Although, these criminal classification factors often more expressly are discussed in cases that concerns legal powers such as confiscations,

[545] Ibid, para. 33.
[546] Section II(3)(F).
[547] Section II(3)(I).

forfeiture and seizures of property,[548] the ECtHR generally observes whether any of these criminal classification factors are present as part of the sanction regime in question. The criminal classification factors may therefore also be relevant for the severity assessment conducted under the third Engel-criterion, and they may also provides the legal elements which makes it possible to identify whether the laws in question pursues the purpose of repression.[549]

(I) Criminal classification factors for the charge

(1) The general interests of the society usually protected by criminal law

As a matter closely related to the first Öztürk-criterion under the second Engel-criterion certain norms and interests of the society are generally protected by criminal law while other more specific interests are protected by disciplinary law. Therefore, the ECtHR adheres to whether the laws and its applicable rules and norms seeks to protect the general interests of the society or the more specific interests of a particular group.[550] In this regard, it is the interests protected by the rule in combination with the quality of the members of a particular group that provides the distinguishing feature.[551] The ECtHR has not specified which general interests of the society it usually considers to be protected by criminal law, but below in Section III(2)(A) there is an overview of the areas of law where the ECtHR has applied the Engel-test and found the criminal law guarantees applicable. These areas of law *may* provide for rules and norms that are in the general interests of the society and therefore usually protected by criminal law.

A few examples should here be mentioned. First, from the two very similar cases of Grande Stevens and Others v. Italy and Georgouleas and Nestoras v. Greece, it now seems to be more generally settled that market abuse in the form of market manipulation and insider dealing are general interests of the society usually protected by criminal law:

> "As to the nature of the offence, it appears that the provision which the applicants were accused of breaching was intended to guarantee the integrity of the financial markets and to maintain public confidence in the security of transactions. The Court notes that the [Hellenic Capital Market Commission], an independent administrative body, has the task of supervising compliance with stock exchange legislation, and thus protecting investors and ensuring the effectiveness, transparency and development of the stock markets [...]. These are general interests of society, usually protected by criminal law."[552]

[548] See further Section III(1)(A)(II)(2). In particular, see also the cases of Ulemek v. Serbia, paras. 51-54; Dassa Foundations and Others v. Liechtenstein, pp. 18-19
[549] Section II(2)(B)(II)(2)(a)(2)).
[550] ECtHR, Guide on Art. 6, criminal, para. 24, p. 11.
[551] Pieter and others (n 2) 528.
[552] Georgouleas and Nestoras v. Greece, para. 38, and Grande Stevens and Others v. Italy, para. 96.

Second, the ECtHR has reached the same conclusion with respect to competition law and the regulation of free markets and anti-competitive behaviour.[553] The effective exercise of official duties of agents charged with the responsibility of supervision and inspection within the area of competition law is also in the general interest of the society.[554] In contrast thereto, a number of professions referred to in the discussion of the nature of disciplinary offences above were usually considered protected by disciplinary law.[555] In these regards, the ECtHR often considers disciplinary norms to aim at protecting the profession's honour and reputation and at maintaining the public trust in that profession.[556]

(2) Seriousness of the violation and concurrent liability

The seriousness of an offence and the concurrent disciplinary and criminal liability are two factors indicative of an underlying criminal offence. In Öztürk v. Germany, the ECtHR expressed the view that minor offences are not, per se, outside the scope of Article 6, and that "[t]here is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness."[557] The main rule is therefore that "the criminal nature of an offence does not require a certain degree of seriousness."[558] However, as the ECtHR stated in Ezeh and Connors v. the United Kingdom: "*It was also true that the extreme gravity of the offence may be indicative of its criminal nature*, as indicated in Campbell and Fell [v. the United Kingdom, para. 71]."[559] In both the Campbell and Fell case and the Ezeh and Connors case, the ECtHR also considered the fact that the relevant violation could result in both disciplinary and criminal liability, and therefore be prosecuted in both disciplinary and criminal proceedings, as indicative of a criminal offence.[560] It followed from both cases that these factors gave the offences "a certain colouring which does not entirely coincide

[553] Menarini Diagnostics S.r.l., v. Italy, para. 40; Société Stenuit v. France, para. 62.
[554] Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, paras. 42 and 45.
[555] Section II(2)(B)(I)(1). See, in particular, Ramos Nunes de Carvalho e Sá v. Portugal, para. 123; Müller-Hartburg v. Austria, para. 39; Biagiloi v. San Marino, para. 55; and Le Compte, Van Leuven and De Meyere v. Belgium, para. 42.
[556] E.g. Grosam v. the Czech Republic, para. 95.
[557] Öztürk v. Germany, para. 53. On the basis of the Öztürk case, the seriousness of the offence refers to the two Öztürk-criteria combined, because the very nature of the offence was also considered "in relation to the nature of the corresponding penalty," cf. para. 52. The seriousness of the sanctions is therefore included in this statement, but it also follows more directly from the third Engel-criterion that the serious of the sanctions are indicative of a criminal offence or criminal sanction.
[558] Pieter and others (n 2) 529.
[559] Ezeh and Connors v. the United Kingdom, para. 104. Italics added. For instance, mutiny and gross personal violence to a prison officer was the violation in Campbell and Fell v. the United Kingdom, cf. paras. 13, 27, 71 and 73, and the threat to kill a probation officer and assaults on a prison officer were the violations in Ezeh and Connors v. the United Kingdom, cf. paras. 17, 25, 33-36 and 104.
[560] In Ezeh and Connors v. the United Kingdom, para. 104, the ECtHR stated that: "Accordingly, and even noting the prison context of the charges, the theoretical possibility of concurrent criminal and disciplinary liability is, at the very least, a relevant point which tends to the classification of the nature of both offences as "mixed" offences." See also Payet v. France, para. 97

with that of a purely disciplinary matter."[561] However, as any of the other criminal factors, they were not sufficient for concluding that Article 6 applied under its criminal-head.

(3) Aggravating and mitigating circumstances

Ziliberberg v. Moldova seems to be the only case, where the ECtHR adhered to aggravating and mitigating circumstances in order to provide further evidence for the criminal character of the offence. The circumstances were "indicative of the criminal nature of the administrative offences."[562] Among the mitigating [1] and aggravating [2] circumstances contained in the Moldavian law ('CAO'), were:

> [1] "1) repentance of the offender; 2) prevention by the offender of the negative effects of the offence and voluntary compensation for the damage caused; 3) committing the offence under influence of strong emotions or amidst difficult personal or family circumstances; 4) committing the offence as a minor; 5) committing the offence as a pregnant woman or as a woman who has a child aged under one year."[563]

> [2] "1) the continuation of illicit behaviour in spite of the demand to refrain from it, made by an authorised person; 2) the commission of a similar administrative offence for the second time within one year or the commission of an offence by a person who had earlier committed a criminal offence; 3) involving a minor in an activity contrary to CAO; 4) the commission of an offence by a group of people; 5) the commission of an offence during natural calamities; 6) the commission of an offence while under influence of alcohol."[564]

These mitigating and aggravating factors were indicative of a criminal offence for the purposes of Article 6.[565] However, how much weight the ECtHR attached to mitigating and aggravating factors for the classification of the offence was unclear.[566]

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[561] Campbell and Fell v. the United Kingdom, para. 71; Ezeh and Connors v. the United Kingdom, paras. 104 and 106.
[562] Ziliberberg v. Moldova, para. 34. On the basis of the two Öztürk-criteria, the ECtHR concluded that that the general character of the Code of Administrative Offences ('CAO') (the applicant was convicted under Article 174(1) of the CAO for participating in an unauthorised demonstration, which the ECtHR regarded as offences against public order, cf. para. 32) and the deterrent and punitive purpose of the sanctions (fine) sufficed to show that the applicant was charged with a criminal offence. However, in accordance with the terminology of the third Engel-criterion, the ECtHR went on to provide further evidence for the criminal character of the offence, where it adhered to the mitigating and aggravating factors, cf. para. 34.
[563] Ziliberberg v. Moldova, para. 22. In A. P., M. P. and T. P. v. Switzerland, para. 40, and E.L., R.L. and J.O.–L. v. Switzerland, para. 45, the ECtHR also emphasised that the authorities took into account the "cooperative attitude" of the applicant in setting the fine.
[564] Ibid.
[565] Ziliberberg v. Moldova, para. 33.
[566] As the ECtHR, in the particular case, also adhered to the fact that the applicant was taken to the police and held for a few hours and interrogated by criminal investigators as well as heard by the criminal chambers of the court, cf. Ziliberberg v. Moldova, para. 34. This is the next classification factor.

(4) Guilt, culpability and other subjective elements

The establishment of personal liability on either objective or subjective grounds constitutes a precondition for a conviction of a criminal offence and imposition of a criminal sanction.[567] The attribution of personal liability for the offence has already been argued to function as the main (logical) requirement of retribution for the imposition of sanctions, which distinguished the concept of sanctions from the concept of preventive measure, and which therefore also constitutes the main purpose pursued by all types and classes of sanctions.[568] However, the finding of guilt or culpability in the form of gross or simple negligence for the commission of the violation is only a factor indicative of the criminal character of the offence or the sanctions.[569] In Janosevic v. Sweden, the ECtHR observed that a tax surcharge was imposed on objective grounds without the need to establish any criminal intent or negligence. The ECtHR then stated more generally: "However, the lack of subjective elements does not necessarily deprive an offence of its criminal character; indeed, criminal offences based solely on objective elements may be found in the laws of the Contracting States."[570] The lack of subjective elements will thus not deprive the offences or sanctions of their criminal character,[571] but their presence may nonetheless point towards a criminal classification.[572]

(II) Criminal classification factors for the sanctions

[567] Varvara v. Italy, paras. 70-71. Paragraph 70: "[...] Article 7 of the Convention does not explicitly demand any "psychological", "intellectual" or "moral" link between the substantive element of the offence and the person deemed to have committed it. The Court in fact recently found that there had been no violation of Article 7 in a case where a fine had been imposed on an applicant party which had committed a proven offence without intention or negligence on its part [Valico S.r.l. v. Italy]. *The finding of liability was sufficient to justify implementing the sanction*." Italics added. Paragraph 71: "The "penalty" and "punishment" rationale and the "guilty" concept (in the English version) and the corresponding notion of "personne coupable" (in the French version) support an interpretation of Article 7 as requiring, in order to implement punishment, *a finding of liability by the national courts enabling the offence to be attributed to and the penalty to be imposed on its perpetrator. Otherwise the punishment would be devoid of purpose* [...]." Italics added.

[568] Section II(2)(B)(II)(1).

[569] In Benham v. the United Kingdom, para. 56, the ECtHR undertook the cumulative approach and noticed with respect to the second Engel-criterion that the proceedings could be brought by the public authority under statutory powers of enforcement, which had some punitive elements, including, for instance, the power to commit the accused to prison on a finding of culpable neglect or wilful refusal to pay the community charge. Article 6(1) was applicable. In Ezeh and Connors v. the United Kingdom, para. 105, the ECtHR also observed with respect to the second Engel-criterion that the award of additional days in prison "were, from any view point, imposed after a finding of culpability to punish the applicants for the offence they had committed and to prevent further offending by them and other prisoners." Article 6(1) was also applicable after the cumulative approach. See also A. P., M. P. and T. P. v. Switzerland, para. 42; and E.L., R.L. and J.O.–L. v. Switzerland, para. 47.

[570] Janosevic v. Sweden, para. 68; Västberga Taxi Aktiebolag and Vulic v. Sweden, para. 79; Valico S.r.l. v. Italy, p. 12. In Salabiaku v. France, para. 27, reiterated in Janosevic v. Sweden, para. 100, the ECtHR also stated more principally that: "the Contracting States may, under certain circumstances, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States."

[571] The mere fact that an administrative sanction is imposed on a person without any personal guilt in the subject matter does also not alter the deterrent and punitive purpose of the sanctions, cf. A. P., M. P. and T. P. v. Switzerland, para. 42; E. L., R. L. and J. O.–L. v. Switzerland, paras. 42 and 46.

[572] Welch v. the United Kingdom, para. 33.

(1) Fines based on income or earnings and the upper level of fines

The amount of fines may be set by a variable factor, such as, an income-based percentage. In Ravnsborg v. Sweden it was noticed with respect to fines under Swedish law that "ordinary criminal-law fines [...] were income-based."[573] The ECtHR considered this factor solely as a specific feature of the fines under Swedish criminal law and stated that "this [factor] is not decisive, since in many criminal systems fines are not necessarily based on earnings."[574] The fact that a fine is set according to an income-based percentage is not necessarily a criminal classification factor.[575] In Västberga Taxi Aktiebolag and Vulic v. Sweden, the ECtHR observed with respect to Swedish tax law that the tax surcharges could amount to 20-40 % of the tax avoided, and that they had "no upper limit and may come to very large amounts."[576] The weight and significance of this observation was unclear, but the ECtHR seems nonetheless to have pointed out the key problem: where fines do not have an upper limit, their criminal character can be further evidenced.[577] This result is also a logical consequence of the third Engel-criterion in its focus on the potential maximum severity.

(2) The sanction actually imposed and its severity

It is a logical consequence of the third Engel-criterion that it is not the severity of the sanctions actually imposed that must be determined, but their potential maximum severity. With respect to pecuniary sanctions, the ECtHR has nonetheless observed the actual amount imposed on the perpetrator, and in some cases also expressed its view on the severity of the amount.[578] From

[573] Ravnsborg v. Sweden, para. 20.
[574] Ravnsborg v. Sweden, para. 33. As the fines imposed on Mr Ravnsborg was not income-based, then this factor was rather "an indication that under Swedish law the fines in question are not viewed as an ordinary criminal-law sanction," cf. ibid.
[575] In Ziliberberg v. Moldova, the ECtHR observed that the fine actually imposed, MDL 36, equivalent to EUR 3.17 at that time, constituted 60 % of the applicants monthly income, and that the applicant faced a maximum fine of MDL 90, the equivalent of EUR 7.94 at that time. The ECtHR stated in this respect that in "the present case, however, the severity and the actual and potential penalty could in principle be considered as another argument in favour of the applicability of Article 6," cf. para. 34. In Zugic v. Croatia, the ECtHR noted that the fine imposed for the violation of good conduct during court proceedings "is not entered in the criminal record and that its amount does not *depend on income as in criminal law*, cf. para. 65. Italics added.
[576] Västberga Taxi Aktiebolag and Vulic v. Sweden, para. 80.
[577] Goulandris and Vardinogianni v. Greece, para. 62. According to Judge Karakas and Judge Pinto de Albuquerque in their partly dissenting and concurring opinion in the case of Grande Stevens and Others v. Italy, "the punishment of administrative offences on the basis of the proceeds of the offence or the profit therefrom, without any fixed upper limit for the pecuniary sanction, raises per se an issue under Article 7 of the Convention in its limb of the principle of nullum poena sine lege stricta, the extremely wide range of the increased pecuniary penalty foreseen by Article 187 ter no. 5 of the TUF is even more problematic," cf. p. 48, para. 18. See in particular Gestur Jónsson and Ragnar Halldór Hall v. Iceland, paras. 84-98.
[578] For instance, in Bendenoun v. France, Mr Bendenoun was fined personally FRF 422,534 and his company FRF 570,394 amounting to around 1 million French francs (EUR 150,000), and in Janosevic v. Sweden, Mr Janosevic was imposed a tax surcharge amounting to SEK 161,261. In both cases, the ECtHR regarded these amounts as *"very substantial,"* cf. Bendenoun v. France, para. 47; Janosevic v. Sweden, para. 69. In three other tax cases, (i) A. P., M. P. and T. P. v. Switzerland; (ii) E.L., R.L. and J.O.–L. v. Switzerland; and (iii) in J.B. v. Switzerland, the ECtHR also noticed the actual amount of the fines CHF: (i) 2,882.90 and 3,75.85; (ii) 5,513.80; (iii) 21,625.95, and regarded these amounts as: *"not inconsiderable."* See the cases in their respective orders and: (i) para. 40; (ii) para. 45; (iii) para. 48. Furthermore, in J.B. v. Switzerland, in considering the

the case-law it follows more generally that the actual amount of the fine incurred are not decisive for the determination of the severity of the pecuniary sanction.[579] The same can be said of non-pecuniary sanctions resulting in deprivation of liberty. The ECtHR has expressly stated about an award of additional days in prison that "the *actual* penalty imposed is relevant to the determination [...], but it cannot diminish the importance of what was initially at stake."[580] The actual sanction imposed may function as evidence for the severity of the sanctions.[581]

(3) Coercive sanctions and convertibility

In Welch v. the United Kingdom, one of the four punitive elements, which belonged to the punishment regime, was the possibility of imprisonment in default of payment by the offender. Not only with respect to orders for the confiscations of property, but particularly also with respect to fines, a number of cases have shown that the national sanction regimes have provided a legal basis for imposing 'coercive sanctions' on the offenders for their failures to comply with the confiscation orders, the actual fines imposed or even preventive measures applied. Coercive sanctions therefore deals with collateral issues in the way that the failure to comply with the requirement of the primary sanction imposed or the preventive measure applied can be converted into a fine or deprivation of liberty in the form of imprisonment. The failure to meet the requirements of the primary legal power thus functions as a conversion requirement that renders the offender liable to a fine or imprisonment. In respect of a primary legal sanction, the coercive sanctions are thereby threatening the offenders through their ability to convert failures to comply with a primary sanction into a secondary sanction. The coercive sanction are placed in a hybrid default position and, in principle, any type of sanction could be placed at this default and hybrid position, but in the case-law default fines and imprisonments have been the most examined and common types of coercive sanctions. Therefore, the concept of coercive sanctions distinguishes itself from the concept of 'alternative sanctions', which instead relates to the different sanctioning powers made available in the sanction regime and administered by some sanctioning authority. The concept of alternative sanctions not only captures the situations of which one sanction is imposed, but also where two or more ancillary or secondary sanctions are imposed by way of a combination or interplay between the available

deterrent and punitive nature of the fine and to the actual amount incurred, CHF 21,625.95, the ECtHR concluded that *"there can be no doubt that fine was "penal" in character,"* cf. J.B. v. Switzerland, para. 48. Italics added.
[579] Trechsel (n 85) 26.
[580] Ezeh and Connors v. the United Kingdom, para. 120. Emphasis added. See also Sergey Zolotukhin v. Russia, para. 56.
[581] Engel and Others v. the Netherlands, para. 82; Ezeh and Connors v. the United Kingdom, para. 126.

sanctions.[582] This seems to be a rather widespread enforcement and sanctioning style applied by the different courts and other sanctioning authorities of the Member States.[583] Coercive sanctions can thus also be attached to the imposition of one or more alternative sanctions.

"Even if the fine could not have been converted into imprisonment [...], that would not have been decisive for the classification of an offence as "criminal" under Article 6."[584] In accordance with the third Engel-criterion, the threat from the coercive sanction increases the level of what is at stake for the offender. Nevertheless, it follows from the case-law more generally that coercive sanctions rather functions as a criminal classification factor than as an available and alternative sanction to be assessed under the third Engel-criterion, because the threat from the coercive sanction can be reduced by certain more or less restrictive convertibility requirements. A few examples of the conversion requirements, which have formed part of the ECtHR's assessment are here provided: (1) fruitless recovery proceedings;[585] (2) culpability and negligence;[586] (3) non-payment of the fine;[587] and (4) refusal to hand over a driving

[582] The third Engel-criterion must thus take into account the maximum level of severity of the entire sanction regime of available alternative sanctions and coercive sanctions, because the level of severity increases even further, where the national sanction regimes not only allows for multiple sanctions to be imposed in one sanctioning decision or order, but also allows for multiple sanctions to be combined with coercive sanctions in one sanctioning decision or order.

[583] See, for instance: Welch v. the United Kingdom, paras. 7-10; Jamil v. France, paras. 7-10; Mikhaylova v. Russia, para. 62, and Grande Stevens and Others v. Italy, paras. 89-101; Dubus S.A. v. France, para. 37; Galina Kostova v. Bulgaria, para. 52; Müller-Hartburg v. Austria, paras. 37-49; Biagioloi v. San Marino, paras. 47-57; Ramos Nunes de Carvalho e Sá v. Portugal, paras. 119-128; Simkus v. Lithuania, paras. 43-45; and Milenkovic v. Serbia, paras. 35-37.

[584] Ziliberberg v. Moldova, para. 34. See also Lauko v. Slovakia, para. 58; Janosevic v. Sweden, para. 69; Västberga Taxi Aktiebolag and Vulic v. Sweden, para. 80. In Ramos Nunes de Carvalho e Sá v. Portugal, para. 122, the ECtHR stated: "The fact that an offence is not punishable by imprisonment is not by itself decisive for the purpose of the applicability of the criminal limb of Article 6 of the Convention since, as the Court has stressed on numerous occasions, the relatively lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character." For instance, where the violation of general norms are punishable by fines, Article 6 also applies it is criminal-head.

[585] The case of Weber v. Switzerland is an example of *rather strict* conversion requirements. In that case, a fine could amount to 500 Swiss francs and be converted into a term of imprisonment under certain circumstances fixed by Article 8 of the Swiss cantonal of 23 January 1942. Article 8(1) provided that "[i]f the person convicted has neither paid nor redeemed the fine and it appears *that the recovery proceedings would be fruitless*, the Prefect shall convert the fine into a term of imprisonment," cf. para. 22. Italics added. The conversion rate was fixed by Article 12: "The conversion rate shall be one day's imprisonment for every thirty francs of fine; fractions of less than thirty francs shall be left out of account; the length of imprisonment shall not exceed three months," cf. para. 22. Article 6 was applicable under its criminal-head.

[586] Benham v. the United Kingdom is an example of perhaps *less strict conversion requirements* and of which culpability was attached to the conversion. The ECtHR considered the first Öztürk-criterion satisfied as "the law concerning liability to pay a community charge and the procedure upon non-payment was of general application to all citizen," cf. para. 56. These proceedings was brought by the public authority under statutory powers of enforcement, which had some punitive elements, including, for instance, the power to commit the accused to prison on a finding of culpable neglect or wilful refusal to pay the community charge. Non-payment of the community charge entailed imprisonment up till three months, cf. paras. 16 and 56. Article 6 was applicable under its criminal-head.

[587] The case of Schmautzer v. Austria is an example of perhaps *the least restrictive conversion requirements*. Mr Schmautzer was not only imposed a fine of ATS 300, it was also the maximum amount of the fines, and they could be converted into twenty-four hours of imprisonment in default of payment, cf. para. 10. The conversion was not subject to other requirements. In fact, the fine imposed on Mr Schmautzer was "accompanied by an order for his committal to prison in the event of his defaulting on payment," cf. para. 28. Article 6 was applicable under its criminal-head. See also, inter alia, Bendenoun v. France, paras. 35, 37 and 47; Gradinger v. Austria, paras. 34-36; Jamil v. France; and Göktan v. France. The case of Garyfallou AEBE v. Greece is here brought as an example of different coercive sanctions attached to a legal person in the event of non-payment. The applicant company Garyfallou AEBE was ordered to pay a fine of 500,000 drachmas for having violated rules concerning import and export trade, when the company had imported glass panels from Romania of a total value of 15,050 German marks. The ECtHR observed that the company risked a maximum fine equal to the value of the imported goods, 15,050 German Marks, which was nearly three times the amount actually fined. In the event of non-payment of the fine, the

licence and prosecution in proceedings separate and distinct from the proceedings relating to the primary sanction.[588] Of all these coercive sanctions, the coercive sanction of 'default imprisonment for the non-payment of a fine' has itself been qualified as a criminal sanction.[589] However, for a very long time, the level of severity of the coercive sanctions was not totally clear from the case-law as a relatively high or low amount of the fine or other sanction in combination with a relatively high or low amount of days of default imprisonment and with some more or less restrictive conversion requirements blurred the legal position of coercive sanctions. From the case-law, it now seems rather settled that the imposition of fines or imprisonment as coercive sanctions must be a direct legal consequence for non-compliance with the primary sanction or preventive measure.[590] For instance, in Seražin v. Croatia, the ECtHR stated in respect of default fines and imprisonments attached as coercive sanctions to the exclusion measure, and which qualified as a preventive measure, that:

> "It is true that non-compliance with the exclusion measure may result in a fine and imprisonment but that would not be a direct consequence. Such non-compliance is treated as a separate minor offence and an entirely new set of minor offences proceedings would be needed in order to impose any of those sanctions [...]. According to the Court's case-law, such an indirect ability to apply the sanctions is not sufficient to determine the measure as "criminal."[591]

Furthermore, it also follows more generally from the case-law and the logic of the Engel-criteria that existence and availability of coercive sanctions plays a much lesser role in situations, where the second Engel-criterion and thus the first and second Öztürk-criteria are satisfied because the cumulative Öztürk-criteria under the second alternative Engel-criterion already have resolved the issue. The existence and relevance of coercive sanctions therefore often accounts of a higher weight in those situations in the case-law where primary (disciplinary) sanctions are imposed on the basis of infringements of disciplinary norms. Finally, where administrative proceedings resulted in the imposition of a fine threatening with default imprisonment if the fine is not paid, there *might be* a legitimate call for the hardcore criminal law-guarantees under Article 6 to apply to the administrative proceedings.[592]

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company risked seizure of the applicant company's assets "and, more importantly for the purposes of the Court's examination, the detention of its directors for up to one year," cf. para. 34. Article 6 applied under its criminal-head.

[588] The case of Escoubet v. Belgium here provides a last example of coercive sanctions with the threat of imprisonment *and fines*. The case is also the example of less restrictive convertibility requirements. The particular case concerned an immediate withdrawal of driving licence. The ECtHR observed that if the applicant refused to hand over his driving licence, then the applicant was liable to a term of imprisonment for a maximum of one month and to a fine ranging from 10 to 500 francs, cf. para. 19. However, for imprisonment or fines to be imposed, the applicant had to refuse to hand over the driving licence, and in addition thereto, referring to paragraph 35 of Ravnsborg v. Sweden, he would be prosecuted in proceedings distinct from the withdrawal sanction. The ECtHR stated that the "impact of such a measure, in scope and length, is not sufficiently substantial to allow it to be classified as a "criminal" penalty," cf. para. 38.

[589] Jamil v. France; Göktan v. France; and Section III(1)(A)(I)(1).

[590] Matijašić v. Croatia, para. 37, and Mikhaylova v. Russia, para. 63, and the caselaw referred to therein.

[591] Seražin v. Croatia, para. 89. See also Escoubet v. Belgium, para. 38, Gardel v. France, para. 44.

[592] Marčan v. Croatia, para. 38. See also Baischer v. Austria, paras. 9 and 19-30 and Marguč v. Slovenia, p. 8.

(III) Criminal classification factors for the sanctions and charge

(1) Statutory powers of criminal prosecution, conviction and enforcement

The first Welch factor examines whether the legal powers in question were imposed on the basis of a conviction of a criminal offence.[593] In G.I.E.M. S.R.L. v. Italy, the ECtHR held that a conviction "may constitute one criterion, among others, for determining whether or not a measure constitutes a "penalty" within the meaning of Article 7, the absence of a conviction does not suffice to rule out the applicability of that provision."[594] A conviction by the criminal courts can thus be indicative of the criminal nature of the offence and sanctions.

In Malige v. France, the ECtHR had to determine whether the deduction of points from a driving licence was a criminal sanction. The applicant was in the police court found guilty of a violation of the road traffic code as he had exceeded the speeding limit by over 30 kph. The court fined him 1,500 francs and disqualified him from driving for fifteen days.[595] Before the ECtHR, the question was nevertheless whether a deduction system of points for driving licences, and additional administrative sanction pursuant to national law, qualified as a criminal sanction triggering the application of Article 6 under it criminal-head. The system allowed for the automatic processing of points deductions under the responsibility of the Ministry of the Interior. Each driving licence had an initial allocation of twelve points, and points were automatically docked if the licence-holder commits offences listed in the road traffic code. The facts constituting the offence were assessed by the criminal court, which establishes and classifies them before imposing the appropriate criminal sanctions. On the basis of the facts that were established by the criminal court, the administrative authority (Minister of Interior), then took the decision to dock points from the offender's driving licence. The case-law of the Court of Cessation did not consider the docking of points "to have the character of a secondary criminal sanction triggered by a conviction, but of a purely administrative nature."[596]

In respect of the second Engel-criterion and first Öztürk-criterion, the ECtHR noted that deduction of points happened after the outcome of a criminal prosecution as an automatic consequence of the conviction by a criminal court, where the court had assessed and classified the facts constituting the offence given rise to the deduction and imposed whatever principal

[593] Welch v. the United Kingdom, para. 28.
[594] G.I.E.M. S.r.l. v. Italy, para. 217. See also Berland v. France, para. 42; Société Oxygène Plus v. France, para. 67; and Bowler International Unit v. France, para. 67.
[595] Malige v. France, paras. 7-16.
[596] Malige v. France, para. 20.

or secondary penalty on the offender as it deemed appropriate. It also noted that the Minister of the Interior then deducted the number of points corresponding to the type of the violation(s) committed. The ECtHR stated that the "sanction of deducting points is therefore an automatic consequence of the conviction pronounced by the criminal court."[597] In respect of the third Engel-criterion, the ECtHR further noted that the deduction of points may in time entail invalidation of the licence and that "the right to drive a motor vehicle is very useful in everyday life and for carrying on an occupation."[598] The ECtHR then concluded that, "although the deduction of points has a preventive character, is also has a punitive and deterrent character and is accordingly similar to a secondary penalty. The fact the Parliament intended to dissociate the sanction of deducting points from the other penalties imposed by the criminal courts cannot change the nature of the measure."[599] Article 6(1) was applicable under its criminal-head.

In contrast to the case-law discussed in Section III(1)(A)(I)(2), it seems very unlikely that the sanction of deduction of points would be classified as a (secondary) criminal sanction without the conviction by the criminal courts. If so, then the case is very representative of the very few cases in which a non-criminal sanction imposed by the criminal courts derived its criminal classification due to that fact. It is thereby also one example of which the elements making up the criminal charge may not be fully identical with the autonomous notion of a criminal sanction. Perhaps because of the alternative character of the first Engel-criterion, the ECtHR seems to attach much weight to this criminal classification factor. Indeed it seems to provide for further confluence between the Welch factor and the first Engel-criterion. In addition to whether the offender was convicted by the criminal courts, the ECtHR also quite often observes whether the police and / or criminal prosecutors are involved.[600] Therefore, more generally, "whether the proceedings are instituted by a public body with statutory powers of enforcement,"[601] is also another criminal classification factor.

[597] Malige v. France, para. 38.
[598] Malige v. France, para. 39.
[599] Malige v. France, para. 39.
[600] Müller-Hartburg v. Austria, para. 43; Ramos Nunes de Carvalho e Sá v. Portugal, para. 124; Pişkin v. Turkey, para. 105; Xhoxhaj v. Albania, para. 243; and Grosam v. the Czech Republic, para. 94.
[601] ECtHR, Guide on Art. 6, criminal, para. 25, p. 11, and Benham v. the United Kingdom, para. 56.

(2) Registration in criminal records

The ECtHR has often noted whether the sanctions or offences were recorded in a criminal record / (judicial) register.[602] In this respect, the ECtHR has, for instance, observed in Öztürk v. Germany that the offence "was not entered in the judicial criminal records but solely, in certain circumstances, on the central traffic register."[603] However, the fact an offence "is not entered on the criminal record are not decisive for the classification of the offence."[604] The criminal character of the offence or sanctions can thus be indicated by their registration in a criminal rather than some administrative record, such as, a central traffic register.[605]

(3) Stigmatisation

At least since Jussila v. Finland it has followed from the case-law under Article 6 that the applicant is entitled to fuller and a more stringent application of the criminal-head guarantees in criminal proceedings that belongs to the traditional areas of criminal law than those new areas of periphery criminal law, where the criminal-head guarantees have been broadened into on the basis of the Engel-test.[606] The ECtHR argued in Jussila v. Finland that as there are criminal proceedings "which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma." Therefore, "[there] are clearly "criminal charges" of differing weight."[607] Accordingly, the higher or lesser degree of stigma may thus determine the level of protection in criminal proceedings.[608] In many cases, it seems to be

[602] Öztürk v. Germany, para. 52; Ravnsborg v. Sweden, paras. 22, 33 and 35; Putz v. Austria, paras. 32 and 37; Pierre-Bloch v. France, para. 58; Lauko v. Slovakia, para. 58; Zugic v. Croatia, para. 65; and Gestur Jónsson and Ragnar Halldór Hall v. Iceland, para. 82. The ECtHR stated already in the Engel case that: "Disciplinary sentences, in general less severe, do not appear in the person's criminal record and entail more limited consequences. It may nevertheless be otherwise; [...]," cf. Engel and Others v. the Netherlands, para. 80.
[603] Öztürk v. Germany, para. 52.
[604] Lauko v. Slovakia, para. 58.
[605] See also Storbråten v. Norway, p. 19 and Mjelde v. Norway, p. 17 with respect to a "special public register."
[606] Jussila v. Finland, para. 43.
[607] Ibid.
[608] In Jussila v. Finland, para. 43, the ECtHR referred to certain cases, which represented certain areas of periphery criminal law that differed from the hard core of criminal law, and where it on the basis of the Engel-criteria had underpinned a gradual broadening of the criminal-head guarantees, e.g. administrative penalties [Öztürk v. Germany]; prison disciplinary proceedings [Campbell and Fell v. the United Kingdom]; customs law [Salabiaku v. France], competition law [Société Stenuit v. France]; penalties imposed by a court with jurisdiction in financial matters [Guisset v. France]; tax law [Bendenoun v. France and Janosevic v. Sweden]. From these areas of periphery criminal law it followed that "the criminal-head guarantees will *not necessarily* apply with their full stringency" as the ECtHR considers it compatible with Article 6(1) when criminal penalties are imposed, in the first instance, by an administrative or non-judicial body, if subject to subsequent control by a court that offers full and stringent protection of the criminal-head guarantees (under the civil-head of Article 6(1), decisions taken by administrative authorities that do not satisfies the requirements of Article 6(1) must be subject to subsequent control a judicial body with full jurisdiction, cf. e.g. Albert and Le Compte v. Belgium, para. 68; Credit and Industrial Bank v. the Czech Republic, para. 68). However, the opposite applies, e.g. Findlay v. the United Kingdom, where criminal sanctions had been

implied that the concept of *stigmatisation* and the *stigmatising effect* follows from the severity and imposition of sanctions rather than as a feature attached to the overall enforcement proceedings.[609] However, stigmatisation is not only a characteristic reserved for the criminal sanctions, because the ECtHR has also considered disciplinary sanctions to have a stigmatising effect.[610] Albeit the case-law does not provide full certainty in this regard, the notion of stigmatisation seems to be an attribute of sanctions as embedded in their severity. Nevertheless, the case-law does not indicate when sanctions have more or less stigmatic effect on the perpetrator, except from the rationale that the more serious the consequences are because of the imposition of the sanctions, the higher is the level of severity and stigmatising effect.

B. Comparative law and international criminal law

Another relevant element for the determination of the criminal charge, and thus also for the determination of the sanctions, is "how comparable procedures are classified in other Council of Europe member states."[611] For instance, where a rather new legal power or phenomenon, such as exclusion measures for hooliganism or spectator violence is to be examined and assessed under the Engel-test, the ECtHR may adhere to the most important international legal instruments, including European law and other comparative law and practices.[612] Such general material is very often part of the legislative materials providing background to the particular case, a numerous examples can be found. For example, in respect of confiscation orders the ECtHR has also adhered to the FATF Recommendations and EU Directive 2014/42 of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.[613] In relation to sanctions for the violations of securities laws, the 2003 Market Abuse Directive ('MAD I') [614] has also formed part of the legislative material of relevance.[615] A number of cases also reveals that

imposed in the hard core and traditional areas of criminal law. See also Kammerer v. Austria (para. 27); Sancakli v. Turkey (para. 44); Guisset v. France. See also with respect to EU competition law: T-99/04 – AC-Treuhand v. Commission, para. 113.

[609] For instance, in Lutz v. Germany, the ECtHR stated with respect to the German sanction regime applicable to German traffic rules that the 'minor offences' "are not so discreditable that the offenders deserve the stigma of a criminal penalty, [...],"cf. para. 57. See also Grande Stevens and Others v. Italy, para. 122; Ramos Nunes de Carvalho e Sá v. Portugal, paras. 196 and 203; Chap Ltd v. Armenia, para. 41; Compare to Jussila v. Finland, para. 43; Kammerer v. Austria, para. 27.

[610] Ramos Nunes de Carvalho e Sá v. Portugal, paras. 196 and 203.

[611] ECtHR, Guide on Article 6, criminal, para. 25, p. 11, referring to Öztürk v. Germany, para. 53.

[612] E.g. Seražin v. Croatia, paras. 42-55.

[613] G.I.E.M. S.r.l. and Others v. Italy, para. 146. On that EU Directive, see further Chapter 5, Section III((2)(A)(II). See also Balsamo v. San Marino, paras. 38-40; Gogitidze and Others v. Georgia, paras. 55-73; and Dassa Foundation and Others v. Liechtenstein.

[614] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). OJ L 96, 12.4.2003, p. 16–25.

[615] Grande Stevens and Others v. Italy, para. 34; and Georgouleas and Nestoras v. Greece, para. 22.

besides taking into account national law and national case-law, the ECtHR also takes into account EU law and practice by the EU institutions, for instance the EU commission and its statutory powers and practice in competition law on the basis of Article 102 TFEU,[616] and the case-law of the CJEU.[617] All these materials are thus guiding the ECtHR in its functions, but provides no more than guidelines under the Engel-test.

4. Conclusions

The Engel-test consists of three alternative Engel-criteria, where the second Engel-criterion consists of two cumulative Öztürk-criteria. The first Engel-criterion reads and interprets the black letters of the legislative text, i.e. the wording expressed in the legal provisions, and the national case-law interpreting these provisions for the purpose of determining the national legislative classification and further characterisation of the offence(s) committed and the available sanction(s) which the defendant(s) risked to be imposed. If the offences committed and sanctions available are classified as criminal offences or sanctions under national law, the outcome will in most cases already be determined, meaning that the criminal law-guarantees under Article 6-7 and 4-P7 are triggered and must be observed and afforded to the defendant. This is the main rule under the Engel-test and it stands strong so that in most situations the alternative character of the first Engel-criterion will stay decisive. However, this is not always the case, and an important exception exists. Where the legal power in question is claimed to qualify as a criminal sanction by the defendant and the legal basis for the power exercised against him is found within legislative acts or statutes which the Member State classifies or treats as acts or statutes of criminal law, the ECtHR has found a need to assess for itself whether the legal power in reality qualified as a criminal sanction. The case-law shows that this need typically arise when the legal power in question qualifies as a preventive measure, and therefore does not qualify as a criminal sanction, not even as a legal sanction. These cases therefore represents situations of which the autonomous notion of a criminal sanction and its functions becomes most visible as the national characterisation does not stay decisive.

The second Engel-criterion assesses the nature of the offence in accordance with the two Öztürk-criteria, where the first Öztürk-criterion assesses the scope of the norms violated by the offender. Either a violation consists of a breach of law provisions that are governed by

[616] Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, paras. 10, 18, and 25.
[617] Mihalache v. Romania, paras. 40-43; Sergey Zolotukhin v. Russia, paras. 33-38.

'general norms' or 'specific norms' as determined on the basis of the scope of the underlying governing norms. A violation of *'general norms'* entails that the offender in reality has breached '*criminal norms'*, because these are found in laws and requirements which protects the general interests of the society and in their scope are directed towards the general population or some broader capacity of specific groups or professions. A violation of *'specific norms'* entails that the perpetrator in reality has breached *'disciplinary norms'*, because these are found in laws and requirements which are directed towards a given group possessing a special legal status and thus only applies to certain specific natural or legal subjects or qualified groups, typically a closed of group of professionals. The specific norms protects the publics' interests and confidence in and reputation of that particular group. All violated norms seems in principle to fall in between the binary distinction between general and specific norms, but certain law violations do not always makes the essential nature of the norm violated evident wherefore the ECtHR has established certain principles that are falling in between the scope of the two opposites. Section II(1) has referred thereto as the 'Steininger principles'. It considers a violation of a general and foreseeable obligation applicable to certain specified subjects as amounting to a breach of criminal norms rather than a breach of disciplinary norms. Thus, where a specific natural or legal person has committed a violation that consists of breaching a general obligation to pay charges on the basis of an economic result obtained through certain specific economic activities, or where the violation consisted of breaching a general negative obligation (prohibition) of not to conduct economic activities outside a licensed or authorised area, the norms violated qualifies as a breach of criminal norms rather than of disciplinary norms. From a strict application of the first Öztürk-criterion it follows as a necessary consequence that there exists no category of violations that amounts to a breach of so-called 'administrative norms', because specific and general norms are either disciplinary or criminal in nature.

The second Öztürk-criterion assesses the purposes of the sanctions that the defendant was imposed and/or risked to be imposed due to the violation(s) of the legislative provisions. The case-law of the ECtHR reveals first of all that the purpose of *'retribution'* is pursued by all types of legal powers that qualifies as a legal sanction and irrespective of the whether the sanctions classifies as a criminal sanction or any other class of non-criminal sanctions. The purpose of retribution may be defined as: "the legal consequences directly imposed on the offender by a sanctioning authority for the offender's commission of a violation." The purpose of retribution therefore also functions as the main requirement for the imposition of sanctions on the offender, because it is the offender's personal liability for the commission of the

violation(s) that justifies the imposition of sanctions. Personal liability can be established on an objective or subjective basis for the commission of the violation(s) and may include criteria such as guilt and culpability, including intent and gross or simple negligence. In this way, the purpose of retribution accords with the logical doctrine on retribution,[618] because the sanctions imposed on the offender follows as a direct consequence of the offender's personal liability for the commission of the violation. Retribution may thereby also function as the main purpose and requirement used by the ECtHR to distinguish the concept of legal sanctions from other types of legal powers, in particular the category of 'preventive measures'. The offender can be a natural person or legal person. The sanctioning authority can be a court or other authority having statutory powers to impose sanctions and which typically is in charge of administering a sanction regime where one or more different types of sanctioning powers are made available. The specific types of sanctions manifests in the more specific consequences imposed on the offender as available in the sanction regime for one or more types of violations.

For 'non-criminal' and 'disciplinary sanctions', the purposes of 'positive prevention', 'reparation', 'compensation', 'restoration' and 'compliance' are considered as the objectives that governs this class and types of legal sanctions. All these different purposes are also imposed on a retributive basis as all legal sanctions and their application therefore depends on whether the offender can be held personally liable for the commission of the violation. They are closely connected in their meaning as they all in some form or another impose sanctions that have the ability to repair for consequences caused by the violation. Albeit the offender is held personal liable for the commission of the violation, the non-criminal class of sanctions rather targets the specific violation committed than to impose direct consequences on the offender for the offender's personal suffering. More generally, they aim to repair the law broken and prevents the offender from exploiting and obtaining competitive or other favourable advantages compared to the natural or legal persons that complies with the laws. When a sanction is pursuing the purpose of *'compensation'*, then it means that the offender shall compensate the loss caused to some victims due to the violation. Hence, compensation is almost fully identical with the concept of *'reparatory pecuniary sanctions'*, because the loss is similar to some other types of pecuniary / monetary costs caused by the violations and therefore also required to be paid in order to restore what amounts to be the pre-misconduct legal position of the victim(s). Reparatory pecuniary sanctions are therefore also equal to any type of *'repayment'*. When a sanction is pursuing the purpose of *'compliance'*, or *'ensuring compliance'*, then it

[618] Chapter 2, Section II(1)(A)(III) and Section II(1)(C)(I), in particular the views by Quinton.

means that the offender is required to terminate the violation and restore the legal position of the offender back into compliance with the laws applicable. Hence, compliance is often fully identical with the concept of *'reparatory non-pecuniary sanctions'*, because the restoration of the legal position of the offender can be done by the use any type of non-pecuniary means that equals and aims for a full satisfaction and compliance with the requirements prescribed by the applicable laws. The purpose of *'positive prevention'* is often revealed in the reparatory sanctions' pecuniary or non-pecuniary forms and consequences. When the offender is required to compensate or repair on a pecuniary basis for the loss caused to some victim (like the state), the loss is equivalent to the proceeds derived from the commission of the violation and the reparatory pecuniary sanction therefore also ensures that the crime or other any violation committed does not pay-off financially, because the proceeds does not stay as property belonging to the offender and can no longer be used for the commission of any future violations. Similarly in respect of reparatory non-pecuniary sanctions, because the termination of the violation and restoration into compliance prevents the offender from obtaining any competitive or other favourable advantages obtained by to the offender's lack compliance with the applicable laws. In all these regards, it turns out that the purpose of *'restoration'* mainly is another term expressing the reparatory purposes and functions of the non-criminal sanctions.

For the concept of 'criminal sanctions', the case-law reveals that the purposes of 'punishment' and 'deterrence' are the only two main purposes that are consistently attributed to the criminal class of sanctions. In fact, the ECtHR are considering punishment and deterrence as the two twin-objectives of criminal sanctions. This means that these two purposes goes hand-in-hand so that existence of the purpose of punishment also entails the existence of the purpose of deterrence, and vice versa. The case-law also reveals that the ECtHR considers criminal sanctions to have the inherent ability to pursue complimentary purposes with the non-criminal sanctions. In particular, this is evident for tax surcharges, because such fines consists both of a reparatory pecuniary sanction imposing an obligation to pay the amount owed in taxes due to the violation and thereby to ensure that the tax violation does not pay-off (positive prevention), but also the imposition of a punitive and deterrent pecuniary amount to deter against future tax law violations. The punitive and deterrent pecuniary amount can be identified by making use of what Chapter 2 argued to be Aquinas' principle of restitution, which manifests in the fundamental criterion of *'level of restoration'*.[619] Accordingly, any amount imposed on the offender which is higher than the amount of the loss or costs caused by the violation will reach beyond

[619] Chapter 2, Section II(1)(A)(I).

the level of restoration and therefore qualify as a punitive and deterrent amount and thereby also as a criminal pecuniary sanction. Where the amount imposed is not depending on the loss or costs caused by the violation, any amount will inherently reach beyond the level of restoration and therefore qualify and classify similarly. This entails that fines may be considered as the archetype of criminal pecuniary sanctions because in its very nature a fine carries the blueprint for a punitive and deterrent sanction. A fine is therefore also a *'hybrid'* pecuniary sanction, because in its constitutive elements it contains complementary purposes of punishment and deterrence by the amount it reaches beyond the level of restoration and reparation and positive prevention by the amount it remains below or equals the level of restoration. In this particular way, the 'level of restoration' proves to be the fundamental requirement that is crucial for determining when a pecuniary sanction tilt from the reparatory and preventive purposes (restorative element) to the punitive and deterrent purposes (punitive and deterrent element). As we shall see, the fundamental criterion of level of restoration is also used for other types of sanctions that are affecting the offenders' right to property like confiscations, forfeitures and seizures, but not for non-pecuniary sanctions. However, whether the level of restoration is a criterion that can be useful in the latter regard remains as a question for now?[620]

In order to define the concept of criminal sanctions and sufficiently account for the sanction theory more or less directly applied by the ECtHR as well to determine whether the defendant has been subject to a criminal charge, criminal offence or criminal proceedings, it is necessary to consult the third Engel-criterion, which assesses the nature and severity of the sanctions in the sanction regime made available in the legislative framework. In respect of the nature of the sanctions, it was argued that this criteria focused at the essential nature of sanctions. The essential nature of sanctions manifests as 'a deprivation of a right', where the concept of 'deprivation' signifies the legal sanction and the concept of a 'right' signifies what is at stake for the offender. From the case-law it follows that the essential nature of the right deprived functions as 'archetypes' by which all types of sanctions can be compared and respond to in order to determine what essentially is at stake for the offender. Under the Engel-test, and thus within the scope of Articles 6-7 and 4-P7, four archetypes have been identified, that is, deprivations of a right to (i) liberty, (ii) property, (iii) civil rights, and (iv) political rights. Deprivations of liberty and property (i)-(ii) are generally attributed as consequences which follows the imposition of criminal sanctions, while deprivations of civil and political rights (iii)-(iv) generally are attributed as consequences that follows from the imposition of

[620] See further Section III(1)(B), III(1)(D), and Section IV.

non-criminal sanctions and disciplinary sanctions. The archetypes and essential nature of sanctions are used as the criteria in Section III to categorise the different types of sanctions discussed in the case-law. In respect of the severity of the sanctions, the third Engel-criterion is used as a criterion for conducting an assessment of the maximum severity of the available sanctions in the sanction regime for the specific types of violations committed. The actual sanction or sanctions imposed are relevant for the assessment of the severity, but it cannot diminish the importance of what was initially at stake for the offender. Therefore, the severity assessment considers what a priori is at stake for the offender who may face and risk the imposition a number of varying types of sanctions for one or more law types of violations.

The Engel-test therefore consists in the application of three alternative Engel-criteria, where the second Engel-criterion consists of two cumulative Öztürk-criteria. When the Engel-test is satisfied the criminal guarantees provided in Articles 6-7 and 4-P7 will as become applicable, provided in respect of Article 4-P7 that the additional requirements also are satisfied.[621] In this way, the offender / defendant / applicant will also be considered as subject to a 'criminal charge', 'criminal offence', or 'criminal proceedings' within Articles 6-7 and 4-P7. It also follows from the case-law that the Engel-test provides the basis and applicable test of whether the offender was subject to a criminal sanction. In this regard, the Engel-test consists either of the application of the Engel-criteria or Welch factors. The application of the Welch factors corresponds to the Engel-criteria applied under a cumulative approach. From the case-law and the discussions above in Section II it follows that the concept of a legal sanction, including the autonomous concept of criminal sanctions, should be viewed as established on the following three constitutive elements: the purpose *(i)*, nature *(ii)*, and severity *(iii)* of the sanctions. These three constitutive elements can be derived from the common criteria and factors between the Engel-criteria and the Welch factors.[622] Therefore, it will also often follow from when the Engel-test is satisfied that the offender has been subject to or risked the imposition of a criminal sanction. However, it was argued that it will not always be the result. In particular, when the ECtHR adheres and attributes some relative weight to the some of the criminal classification factors under the application of the Engel-criteria or Welch factors, the result is that the corresponding concepts of a *criminal* charge, offence or proceedings, appears wider than the concept of a criminal sanction. This holds more true in respect of the factors

[621] I refer here to the discussion in Section II(1)(A).
[622] I refer here to the discussion in Section II(1)(B). In accordance with the first Engel-criterion, the Welch factors also looks into *(iv)* the characterisation, including the classification, of the legal powers under national law; and *(v)* the procedures involved in the making and implementation of the legal power. The first Engel-criterion and fourth and fifth Welch factors are therefore less involved in the autonomous concept of a criminal sanction, and the concept of a legal sanction.

discussed and referred to in Section II(3)(A)(I) albeit their existence and application under the legal regime in question often functions as requirements or preconditions for the imposition of rather severe sanctions that typically are classifying as criminal. In all regards, the criminal classification factors therefore blurs the attempt to provide for a clear distinction between the criminal charge, offence, and proceedings from the concept of criminal sanctions. This seems nevertheless to less of a problem for the classification of the sanctions discussed in the following Section, III, because the purpose (i), nature (ii) and severity (iii) of the sanction plays a more decisive role. Nevertheless, where the criminal classification factors is existing and applied under the national legal regime in question, their existence and application will lead the ECtHR towards an assessment of whether the legal regime resembles the idea of which the ECtHR in the Welch case has adhered and referred to as: *"a regime of punishment."* This entails that the more of the different criminal classification factors are present, relevant and applicable under the national legal regime, the more this legal regime will resemble a regime of punishment. Therefore, it will also be more likely that the offender has been subject to a criminal charge, offence or proceedings or risked the imposition of criminal sanctions. It will nonetheless depend on the context and design of the national legal justice system.

III. RESULTS OF THE ENGEL-TEST

Section III on the "Results of the Engel-test" concerns the results which can derived from the case-law on Articles 6-7 and 4-P7 and which relates to the purposes of this Chapter. On the basis of that case-law where the ECtHR has applied the Engel-test it becomes possible to establish certain categories of sanctions and other types of legal powers and measures. Section III(1) therefore initiates by providing an overview and discussion of the purpose *(i)*, nature *(ii)* and severity *(iii)* of the criminal sanctions and disciplinary sanctions found in the case-law of the ECtHR, and where relevant the criminal classification factors. On this background, we move towards the other types of legal powers and measures which in the case-law often less successfully have been argued to qualify as criminal sanctions to contrast these legal powers and measure with the concept of sanctions. Finally, Section III(2) attempts to provide for a non-exhaustive overview of the areas of law where the ECtHR has expanded the criminal-head guarantees into on the basis of the Engel-test. Because the CJEU now also applies the Engel-test within the EU legal order, the scope of the Engel-test and the scope of the concept of sanctions within the EU legal order as interpreted and applied by the CJEU are therefore also to be discussed before we can make the final conclusions in Section IV.

1. Classification and categorisation of sanctions and other legal powers

A. Criminal sanctions

Recalling from Öztürk v. Germany, where the ECtHR stated "that, according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of *fines* and of *measures depriving the person of his liberty*."[623] Two longstanding principles follows therefrom. First, the ECtHR has for a long time held that the fact an offence is not punishable by imprisonment is not decisive for the criminal classification.[624] Second, it also follows more generally from the case-law that *'fines'* and sanctions resulting in a *'deprivation of liberty'* are the two main archetypes of criminal sanctions, which makes Article 6, 7 and 4-P7 applicable. Therefore, the sanctions to be discussed in Section III(1)(A) is often also depending on the extent to which they are comparable and resembles these two archetypes.

(I) Deprivations of liberty

(1) Imprisonment and other custodial sanctions

Imprisonment and other custodial sanctions are the criminal sanctions par excellence and the main types of sanctions, which results in a deprivation of liberty.[625] The ECtHR has stated:

> "in a society subscribing to the rule of law, where the penalty liable to be and actually imposed on an applicant involves the loss of liberty, there is a presumption that the charges against the applicant are "criminal", a presumption which can be rebutted entirely exceptionally, and only if the deprivation of liberty cannot be considered "appreciably detrimental" given their nature, duration, or manner of execution."[626]

That imprisonment and other custodial sanctions amount to a criminal sanction is also one of the least disputable facts.[627] Almost irrespectively of whether imprisonment or other custodial sanctions have been imposed on the basis of criminal norms or disciplinary norms,

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[623] Öztürk v. Germany, para. 53. Italics added.
[624] Ibid, para. 53; Lauko v. Slovakia, para. 58; Kadubec v. Slovakia, para. 52; Tsonyo Tsonev v. Bulgaria (No. 2), para. 49.
[625] Campbell and Fell v. the United Kingdom, para. 72; Morris v. the United Kingdom, para. 38. Article 6-7 and 4-P7 are thereby closely connected to Article 5 ECHR governing the "Right to liberty and security." Pursuant to Article 5(1), everyone has the right to liberty and security of person. This provision guarantees that no one shall be deprived of his liberty, unless the person is convicted by a competent court in accordance with a procedure prescribed by law. Article 5 mainly considers deprivation of liberty to consists of detention and arrests, while Article 6-7 and 4-P7 often seems to take a more broad view on the notion of deprivation of liberty due to the purposes of the Engel-test.
[626] Sergey Zolotukhin v. Russia, para. 56. Emphases maintained. See also Asadbeyli and Others v. Azerbaijan, para. 154; and Maresti v. Croatia, para. 61.
[627] Mills v. the United Kingdom, para. 20; Moore and Gordon v. the United Kingdom, para. 18; Findlay v. the United Kingdom, para. 69; Wilkinson and Allen v. the United Kingdom, para.19; Smith and Ford v. the United Kingdom, para. 19; Kyprianou v. Cyprus, paras. 61-64.

the result is, as a strong rule of presumption, that Articles 6-7 and 4-P7 become applicable.[628] However, according to the rule of the exception, where deprivation of liberty does not have any substantial negative effects on the natural person concerned due to the nature, duration, or manner in which the deprivation of liberty is executed, the factual circumstances of the deprivation may entail that Articles 6-7 and 4-P7 will not become applicable.[629]

Where sanctions resulting in deprivations of liberty have been imposed on the basis of disciplinary norms, the Engel case are still the leading and standard-setting case, where only a four-day light *arrest*, in contrast to a two-day strict arrest and twelve days of aggravated arrest, imposed in Dutch military (disciplinary) proceedings was not considered severe enough and therefore of a too short duration (the servicemen was not locked-up and they continued to perform their duties) to belong to the criminal sanctions.[630] As an *arrest* under more usual circumstances is considered a preliminary measure,[631] then arrests do not amount to a (criminal) sanction,[632] unless it in reality, as in the Engel case, has been imposed as a sanction that aim to deprive the liberty of the perpetrator.[633] For similar reasons, *forfeiture and loss of remission* and the *award of additional days in prison* have been considered as "fresh deprivations of liberty"[634] imposed for punitive reasons (similar to additional sanctions rather than the execution or enforcement of the original sentence).[635] Deprivation of liberty thus proves to be the archetypical sanction and the essential nature *(ii)* of custodial and incarcerating sanctions.

In Nemtsov v. Russia, the ECtHR stated with respect to the purpose of detention (imprisonment and custodial sentences) that "the applicant was convicted of an offence which was punishable by detention, *the purpose of the sanction being purely punitive*;"[636] and similarly in

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[628] A replacement or conversion of a prison sentence with expulsion and a ten-year prohibition of residence is determined on the basis of the original prison sentence and its archetype of deprivation of liberty, cf. Gurguchiani v. Spain, para. 40.
[629] Pieter and others (n 2) 533.
[630] Engel and Others v. the Netherlands, paras. 61 and 85. A '*light arrest*' entailed that the serviceman, irrespective of rank, had to remain in his dwelling during off-duty hours, if he lived outside the barracks. Otherwise, the serviceman was confined to the barracks, cf. para. 18. A '*strict arrest*' covered the period of both duty and off-duty hours and was served in a locked cell and all ranks were excluded from performing their normal duties, cf. paras. 12, 20 and 63. An '*aggravated arrest*' was in off-duty hours served in a specially designed place which they could not leave in order to visit the canteen, cinema or recreation rooms, but they were not kept under lock and key. At that time the most severe form of "disciplinary" penalty was committal for three or four months to a 'disciplinary unit'. See further paras. 21-22 and 64.
[631] Section III(1)(C)(II)(3).
[632] Escoubet v. Belgium, para. 34. In that case, the ECtHR stated that Article 6 "does not apply to preliminary measures which may be taken as part of a criminal investigation before bringing a "criminal charge", such as an arrest or interviewing of a suspect." See also Fayed v. the United Kingdom, para. 61; and Saunders v. the United Kingdom, para. 67.
[633] In the Engel case, after the ECtHR had examined the disciplinary proceedings under Dutch military law and the sanctions pronounced, it then stated that the disciplinary proceedings aimed to repress offences, through penalties, which according to the ECtHR was "an objective analogous to the general goal of criminal law," cf. para. 79.
[634] Ezeh and Connors v. the United Kingdom, paras. 115 and 124. See further Ezeh and Connors v. the United Kingdom and Campbell and Fell v. the United Kingdom.
[635] Compare to Section III(1)(B)(II).
[636] Nemtsov v. Russia, para. 83; Menesheva v. Russia, para. 97; Malofeyeva v. Russia, para. 100. See also Kasparov and Others v. Russia, paras. 39-45.

Blokhin v. Russia that the "placement for thirty days in the temporary detention centre for juvenile offenders had clear elements of both *deterrence and punishment*."[637] Punishment and deterrence is therefore the main purposes *(i)* pursued by deprivation of liberty.

Where *imprisonment* has been imposed for the violation of criminal norms, there seems not to be any exemption to the conclusion that Articles 6-7 and 4-P7 applies. In the case-law, the minimum level of severity assessed by the ECtHR seems to have been fifteen days of imprisonment, where Article 6 were found applicable under its criminal-head.[638] The threat of longer imprisonments generally, and almost automatically, makes Article 6 applicable under its criminal-head.[639] The coercive sanction of *default imprisonment* has often been found applicable among the national sanctioning powers.[640] In Jamil v. France, the ECtHR considered default imprisonment itself for the non-payment of a fine to qualify as a criminal sanction, because it was an "order by a criminal court [that] was intended to be deterrent and could have led to a punitive deprivation of liberty."[641] This result was later re-confirmed in Göktan v.

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[637] Blokhin v. Russia, para. 180. Italics added.

[638] In Sergey Zolotukhin v. Russia, fifteen days of imprisonment was the maximum penalty and the applicant had actually served three days deprivation of liberty. 4-P7 applied (paras. 28 and 56-57); In Galstyan v. Armenia, fifteen days of imprisonment was also the maximum penalty and the applicant was actually deprived liberty for three days. Article 6 applied under its criminal-head (paras. 26 and 55-60); In Menesheva v. Russia, the applicant loss her liberty for five days of detention but she risked fifteen days of imprisonment. Article 6 applied under its criminal-head (paras. 44 and 97-99); In Asadbeyli and Others v. Azerbaijan, fifteen days of imprisonment was also the maximum penalty and the applicant actually served nine days in prison. Article 4 P7 applied (paras. 94 and 154-155). In the cases of Sergey Zolotukhin (para. 56) and Asadbeyli and Others v. Azerbaijan (para. 154), the ECtHR considered the Engel exception on 'the appreciably detrimental test' and explicitly stated that it did "not discern any such exceptional circumstances." See also Maresti v. Croatia, para. 61; Demicoli v. Malta, paras. 33-34. The threshold of severity for sanctions that results in deprivation of liberty must be considered very low and to follow the rule of the examples referred to. See thereto the threshold established with respect to arrests.

[639] Wilkinson and Allen v. the United Kingdom, para. 19; Mills v. the United Kingdom, para. 20; Moore and Gordon v. the United Kingdom, para. 18; Smith and Ford v. the United Kingdom, para. 19. The same principle often also applies even for the violation of disciplinary rules prescribing proper and orderly conduct during court proceedings, cf. Kyprianou v. Cyprus, paras. 18, 31, 61 and 64. The validity and meaningfulness of attaching the 'administrative' label to imprisonment is therefore certainly questionable. In Galstyan v. Armenia (para. 26) and Asadbeyli and Others v. Azerbaijan (paras. 18, 94 and 154), imprisonment was considered an "administrative arrest" and/or "administration detention." See also Igor Tarasov v. Ukraine, paras. 24-25; Milenkovic v. Serbia, paras. 31-37.

[640] In Welch v. the United Kingdom, one of the four punitive elements, which belonged to the "punishment regime" was "the possibility of imprisonment in default of payment by the offender," cf. para. 33. The ECtHR has expressed reservations about default imprisonment system because "it constitutes an archaic custodial measure available only to the Treasury," cf. Göktan v. France, para. 51. Article 1 of Protocol No. 4 cannot invalidated default imprisonment because that provision only prohibits imprisonment for debt arising from *contractual obligations*.

[641] In Jamil v. France, the question was whether a retrospective increase (prolongation) of the term of default imprisonment (twenty months) for the non-payment of a fine imposed on the convicted constituted a breach of Article 7(1), second sentence. However, for Article 7 to apply, the main question to be resolved was whether default imprisonment, as a coercive sanction for the non-payment of the fine, was a criminal sanction within the meaning of Article 7(1). The French Government had argued that default imprisonment was a mean of enforcement that enforced payment of a debt to the state directed against the debtor. It was not imprisonment as an alternative to the payment of the fine, because it did not punish the commission of an offence but the failure to comply with an pecuniary order. However, the ECtHR considered the default imprisonment as a criminal sanction for the following reasons. First, it was a sanction imposed on the applicant as an order in a criminal law context for the prevention of drug trafficking. Second, it is a mean to enforce debt to the Treasury, which can be attached to penalties for customs or tax offences and other than those partaking of the nature of civil damages. Third, the purpose of default imprisonment is to ensure payment of fines, and its object is to compel such payment by the threat of incarceration under a prison regime. In comparison to the imprisonment regime under the ordinary criminal law, this default prison regime was harsher mainly because it was not attenuated by measures such as parole or pardon. Fourth, default imprisonment is a survival of the ancient system of imprisonment for debt, which now only exists with respect of debts to the State, and it does not absolve the debtor from the obligation to pay the fine, which had led to committal to prison. Fifth, the applicant's goods

France, where the ECtHR reiterated that default imprisonment "was not a means of enforcing the fine, but a penalty, both within the meaning of Article 7 [ECHR] and Article 4 of Protocol No. 7."[642] Default imprisonment was in both cases the default sanction to the primary sanction of a customs fine, which had been imposed for the violation of criminal norms (drug trafficking). The only convertibility requirement seems to have been the failure to pay the fine.[643]

(2) Prohibitions on the right to drive

In Nilsson v. Sweden, the applicant was convicted of the criminal offence of drunk driving. Almost eight months later, the applicant's driving licence was withdrawn in administrative proceedings, which took into account the applicant's criminal conviction. However, irrespective of the criminal conviction, the ECtHR considered the *withdrawal* a criminal sanction because "the severity of the measure – *suspension* of the applicant's driving licence for 18 months – was in itself so significant, regardless of the context of his criminal conviction, that it could ordinarily be viewed as a criminal sanction."[644] In Boman v. Finland, the applicant was convicted of serious traffic hazard and operating a vehicle without a licence. The District Court therefore imposed a driving *ban* on the applicant, running from 22 April 2010 till 4 September 2010. On the basis of the conviction, the Police one month later imposed a new driving ban on the applicant for an additional two months, running from 5 September till 4 November, thereby resulting a driving ban for a total of six and a half consecutive months. The ECtHR considered the second driving ban of two months "issued by the police in the administrative proceedings [...] as criminal for the purposes of [4-P7]."[645] Other cases that have resulted in lower levels of

were still subject to distraint, even though he could no longer be compelled to pay by means directed against his person. Finally, by referring to the Engel and Öztürk cases, the ECtHR concluded that the default imprisonment was a sanction ordered by a criminal court that intended to be deterrent and could have led to a punitive deprivation of liberty. It was therefore a penalty within the meaning of Article 7(1). It is clear that much in the arguments of the ECtHR depended on the particular French legal and criminal context at that time, cf. paras. 25-33, but the result was later confirmed in Göktan v. France.

[642] Göktan v. France, paras. 44 and 48.

[643] Jamil v. France, para. 32 (conversion happened unless insolvency could be proven), and Göktan v. France, para. 14. Where a default imprisonment or default fine is a coercive sanction to a preventive measure, then the default imprisonment or default fine seems not to amount to a criminal sanction, cf. Van der Velden v. the Netherlands, p. 17; Gardel v. France, para. 44.

[644] Nilsson v. Sweden, p. 11. Italics added. Because the withdrawal was imposed 8 months later in administrative proceedings, the ECtHR stated that "retribution must also have been a major consideration," cf. p. 11.

[645] Boman v. Finland, para. 32. Both parties had also presumed that the additional ban was a criminal sanction. Much weight seems to be attached to the fact the administrative driving ban in reality was an extension of the criminal conviction, thereby depending on the criminal factor of conviction by the criminal courts. However, this aspect is not totally clear from the case.

severity have not amounted to a criminal sanction,[646] while withdrawals, bans, and annulment of similar rights with higher levels of severity seems to amount to a criminal sanction.[647]

In a comparison of these cases and their national terminology, it can be observed that there essentially and effectively is no difference in reality between a 'temporary withdrawal' and a 'suspension', the latter which per se also is 'temporary'. Similarly, there are hardly any conceptual difference between a temporary withdrawal, suspension, ban, disqualification and annulment. All can be provided in either a permanent or temporary form. In comparison to the cases on disciplinary sanctions this is not surprising, because the ECtHR has often held that withdrawals, suspensions and/or revocations all effectively results in the imposition of a *'prohibition'* on the offender.[648] The same argument also applies in this context, because the essential effect of all these nominally different types of sanctions on the right to drive is that the offender due to the violations were temporarily deprived and prohibited from continuing to exercise her or his right to drive. The question nevertheless is whether the essential nature of the right to drive qualifies as a liberty or civil right. It shares similarities with the civil rights, because the right to drive typically is licence-based so that the licence-holder has to satisfy certain requirements for holding a driving licence. On the other hand, the right to drive also shares similarities with liberty rights, because these are rather common to all humans as part of the ordinary liberties that are generally shared. In Malige v. France, the ECtHR noted that the deduction of points in time may entail invalidation of the licence and that "the right to drive a motor vehicle is very useful in everyday life and for carrying on an occupation."[649] This, at least, points to considering the right to drive as a liberty right, because the right has a general application (useful for all professions and occupations) and rather serves as some of those ordinary liberty rights that are commonly shared between members of the society and for the well-functioning of the society. This may also imply that civil rights, in the course time, may become and requalify as liberty rights when useful for everyday life.

[646] In Hangl v. Austria, the driving ban for two weeks was not of a criminal character (Hangl v. Austria is not available online, but see Boman v. Finland, para. 31) and similarly in Mulot v. France, where the temporary withdrawal of the driving licence could reach six months (for the same reason, see Boman v. Finland, para. 31). In Blokker v. the Netherlands, the applicant was subjected to an Educational Measure Alcohol and Traffic ("EMA") for driving car with exceeding alcohol levels. In addition thereto, the applicant was order to pay the costs of the EMA (NLG 500) and warned that failure to co-operate in respect of EMA would result in declaring his driving licence invalid. The ECtHR considered it a measure that aimed at securing safety and compared it to the procedure of issuing a driving licence, i.e. a procedure containing educational purposes for requiring the necessary skills and knowledge of driving on a public road. The EMA was not a criminal sanction, cf. p. 7-9.
[647] E.g. Mihai Toma v. Romania, para. 21; and Maszni v. Romania, para. 66.
[648] Compare with Section III(1)(B).
[649] Malige v. France, para. 39.

Finally, deprivations of the right to drive when imposed as a criminal sanction should be distinguished from the situation of which driving bans or similar have been exercised as one of those preventive measures that qualifies as a precautionary measure.[650]

(II) Deprivations of property

(1) Pecuniary sanctions

On the basis of the ECtHR's case-law, its statements, and the principles that governs the purpose (i), nature (ii), and severity (iii) of sanctions, it seems very difficult to dispute that fines, per se, is a criminal sanction. In fact, it functions as an archetypical criminal sanction for all those types of sanctions that affects, and therefore potentially may result in a deprivation of, property. The purpose (i) and nature (ii) of fines have already been discussed in many sections of this Chapter. The legal position of fines under the Engel-test, and therefore whether the imposition of a fine will result in triggering the criminal law-guarantees enshrined in Articles 6-7 and 4-P7, has become a question that to some extent is depending on the first Öztürk-criterion under the second Engel-criterion. Accordingly, the legal position of fines depends upon whether the fine was imposed on the basis of a violation that is governed by criminal norms (criminal offence) or whether the fine was imposed on the basis of a violation that is governed by disciplinary norms (disciplinary offence). Hence, when fines are imposed for a criminal offence, the fine will in the following be referred to as 'criminal fines', and when imposed for a disciplinary offence as 'disciplinary fines'. Criminal fines thus accords with the main rule that fines are criminal sanctions per se, while disciplinary fines provides the rule of the exception. Thus, up until some unsettled and undetermined level of maximum severity, the legal position and classification of the fine under the Engel-test remains split between two legal masters.[651] Therefore, we may focus on the severity (iii) of fines in our discussion here.

[650] Section III(1)(C)(II)(3)(a). For instance, such driving bans that are applied as a clear and foreseeable consequence for "repeated violations of road traffic regulations and jeopardising the life and limb of others," cf. Matijašić v. Croatia, para. 35. Such driving bans are general imposed due to a sanction system in which penalty points can be collected doing the course of time and previous violations and convictions. The ECtHR considers such driving bans to aim "primarily at road traffic safety and not punishment of the applicant," cf. ibid. In this regard, see also Nicolae Virgiliu Tănase v. Romania, para. 135.

[651] Öztürk v. Germany, para. 53; Escoubet v. Belgium, para. 36. See, for instance, also Luchaninova v. Ukraine, which concerned an "administrative offence" of "petty theft" and thereby governed by criminal norms. In that case, the ECtHR stated that "the fact that the applicant's punishment imposed [...] – the fine – was replaced by a reprimand cannot deprive the offence at issue of its inherently criminal character," cf. para. 39.

(a) Fines

1) Criminal fines

In accordance with the main rule, when a fine has been imposed on the basis of an offence governed by criminal norms, such as, inter alia, tax law, traffic law, anti-competition law, and market abuse under securities laws, then the ECtHR seems to have taken the (final) stance in Jussila v. Finland, concerning tax law offences, that even very small fines are deterrent and punitive and therefore classify as a criminal sanction.[652] In these situations, the criminal law-guarantees in Articles 6-7 and 4-P7 applies. The fact that the ECtHR has opened for a distinction between charges of different weight does not alter this result.[653]

2) Disciplinary fines

In accordance with the rule of the exception, where the violation qualified as a disciplinary offence, the situation instead calls for a severity assessment of the maximum amount of the fine that is actually at stake. This was the situation in Ramos Nunes de Carvalho e Sá v. Portugal, where the ECtHR stated in respect of a day-fine corresponding to the daily salary of a judge that could amount up to ninety day-fines, approximately EUR 43,750:

> "126. With regard to the third criterion – the degree of severity of the penalty – the Court notes that all the sanctions that the applicant could have incurred are purely disciplinary in nature [...]. Although *the amount of the fine may be substantial and it is therefore punitive in nature*, in the present case the severity of the sanction in itself does not bring the offence into the criminal sphere [...]."[654]

[652] In Jussila v. Finland, the ECtHR stated that even the "*minor nature* of the penalty [...] does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge," cf. para. 38. The tax surcharge actually imposed was equivalent to EUR 308.80 at that time, and the maximum tax surcharge could amount to 20 % of the tax liability. In the light thereof, and without the threat of default imprisonment as coercive sanction, the ECtHR has in Ioan Pop v. Romania considered an administrative fines amounting to EUR 50 as a criminal sanction. Ioan Pop v. Romania, No. 40301/04, 28 June 2011, is not available online, but in Michalache v. Romania, para. 62, the ECtHR refers to paragraph 25 of that case. See further Michalache v. Romania, paras. 53-64, and Igor Pascari v. the Republic of Modova, paras. 6 and 19-21. An administrative maximum fine at TRY 100 (EUR 62 at that time), which the actual imposed fine also amounted to, was also regarded as a criminal sanction in Sancakli v. Turkey, cf. paras. 15 and 30. In Michalache v. Romania, an administrative maximum fine at RON 1,000 (EUR 250 at that time) was a criminal sanction, cf. paras. 61-63. In Falk v. the Netherlands, a maximum fine at NLG 750 (EUR 340.34 at that time), but actually imposed a fine at 240 (EUR 108.91 at that time) was a criminal sanction, cf. pp. 2-3 and 7. In Fliaser v. Slovenia: EUR 625, cf. paras. 6, 17, 25-28. With respect to situations that involves default imprisonment as coercive sanction, the ECtHR considered, in Ziliberberg v. Moldova, an administrative maximum fine at MDL 90 (EUR 7.94 at that time), for which he was liable to default imprisonment of twenty days in the event of the non-payment, as a criminal sanction. The applicant was actually imposed MDL 36 (EUR 3.17 at that time, constituting 60% of monthly income), cf. para. 12 and 27-36. Similarly in Kammerer v. Austria, a fine amounting to EUR 72 and twenty days of default imprisonment, cf. paras. 8 and 26. See also, inter alia, Nykänen v. Finland, para. 40; Glanz v. Finland, para. 50; Rinas v. Finland, para. 42; Österlund v. Finland, para. 38; A and B v. Norway, paras. 107, 136 and 138; Johannesson and Others v. Iceland, paras. 43-44.

[653] See Section II(1)(B).

[654] Ramos Nunes de Carvalho e Sá v. Portugal, para. 126. Italics added.

In Müller-Hartburg v. Austria, where a more traditional fine could amount up to ATS 500,000 (EUR 36,000 at that time), the ECtHR concluded similarly; the fine was punitive, but its severity does not classify it as a criminal sanction.[655] It has previously been argued that punitive sanctions also are deterrent sanctions, but it remains the result of the case-law that the ECtHR is reluctant to qualify disciplinary fines as deterrent, perhaps because they would deserve a reclassification as a criminal sanction. This result therefore establishes a paradoxical situation that even very small fines for the violation of general norms results in a criminal classification while much higher and therefore much more severe and deterrent fines at stake for violations of specific norms do not result in a criminal classification. The legal position of fines under the Engel-test is therefore a rather political position than a legal position of logical consistency and coherency. Because fines are punitive and deterrent, they qualify as criminal sanctions, but they will not always classify as a criminal sanction.

With respect to disciplinary fines, the question therefore becomes how severe that the amount of the fines may be before they will return to their criminal classification. The scope of the exception for natural persons seems to be established for disciplinary fines at around EUR 43,750, but it is not an absolute amount, only an indicative one for when disciplinary fines so far have not resulted in a criminal classification.[656] The case-law of the ECtHR seems not to have provided a similar indicative amount in respect of legal persons.

When the imposition of fines do not result in a criminal classification, Article 6(1) ECHR instead typically becomes applicable under its civil-head.[657] The situation may nevertheless return back to the main rule when other elements of the sanction regime are present. For example: (i) when the fine can be combined in a interplay with other ancillary and secondary sanctions as this will further increase the maximum level of severity;[658] (ii) when disciplinary fines are attached with the hybrid threat from coercive sanctions such as default imprisonment (ten days);[659] or (iii) other criminal classification factors are present in the legal context

[655] Müller-Hartburg v. Austria, para. 47; and Grosam v. the Czech Republic, para. 96. A number of other cases follows the same principles. See, inter alia, Ravnsborg v. Sweden; Putz v. Austria; Biagioli v. San Marino; and Brown v. the United Kingdom. In the latter case, the ECtHR reached a similar conclusion and stated that "the severity of the penalty was not, of itself, such as to render the "charges" criminal in nature," cf. p. 5. Emphasis maintained.

[656] Compare to T. v. Austria, para. 67; Müller-Hartburg v. Austria, para. 48; Grosam v. the Czech Republic, para. 96; and Prina v. Romania, para. 58. In Müller-Hartburg v. Austria, the ECtHR also expressly stated that the maximum fine, ATS 500,000, had "punitive effect," cf. para. 48. The ECtHR concluded similarly in respect of "a fine of up to a hundredfold of the minimum monthly wage," cf. Grosam v. the Czech Republic, para. 96.

[657] Ramos Nunes de Carvalho e Sá v. Portugal, para. 128; Müller-Hartburg v. Austria, para. 49.

[658] This is a logical consequence of the third Engel-criteria. However, see also in that direction: Dubus S.A. v. France; Grande Stevens and Others v. Italy; Georgouleas and Nestoras v. Greece; Messier v. France; and Didier v. France.

[659] T v. Austria, paras. 59-67. In T v. Austria, the applicant was imposed a fine at ATS 30,000 but risked a maximum fine of ATS 400,000 at that time with ten days of default imprisonment. The ECtHR therefore concluded: "having regard to the punitive nature and the high amount of the penalty at stake and the possibility of converting it into a prison term without the

in which it is imposed,[660] however, it should be noted that any "absence of an upper statutory limit of the fine is not of itself dispositive of the question of the applicability of Article 6 under its criminal limb."[661] It may nevertheless point in the direction of a criminal classification.

(b) Reparatory pecuniary sanctions

In order to identify when a pecuniary sanction qualifies as a fine, the discussions in Section II and conclusions made in Section II(4) argued that the ECtHR used the fundamental criterion of level of restoration (utilizing the principle of restitution[662]). Hence, a pecuniary sanction only qualifies as a fine when the amount imposed reaches beyond the level of restoration. The pecuniary sanctions that do not reach beyond the level of restoration was qualifying and referred to as reparatory pecuniary sanctions. Therefore, reparatory pecuniary sanctions are the governing archetype for all non-criminal pecuniary sanctions. The applicability of this archetype is independent of whether it has been imposed on the basis of a criminal offence or disciplinary offence. Therefore, the concept of *'disciplinary pecuniary sanctions'* can not only capture disciplinary fines but also the concept of disciplinary reparatory pecuniary sanctions.

(2) Orders for the confiscation, forfeiture and seizure of property

(a) Confiscation of property

In a number of cases, the ECtHR has been called to determine whether orders for the confiscation, forfeiture and seizure of property (/ tangible and intangible assets), which all are very similar and interdependent powers, they qualify as a criminal sanction. Particularly, the legal position and classification of confiscation orders seems to have been quite troublesome in the history of the ECtHR's case-law, because there are cases where the ECtHR has qualified and classified the legal power to confiscate property as a (1) 'criminal sanction';[663] (2) 'preventive

guarantee of a hearing, finds that what was at stake for the applicant was sufficiently important to warrant classifying the offence as criminal within the meaning of [Article 6(1)]," cf. para. 67. See also Lázaro Laporta v. Spain, para. 25.

[660] Kyprianou v. Cyprus, para. 64; Gestur Jónsson and Ragnar Halldór Hall v. Iceland, para. 59. Compare to Ravnsborg v. Sweden; Putz v. Austria, Veriter v. France; Schreiber and Boetsch v. France; Kubli v. Switzerland; Toyaksi and Others v. Turkey; Zugic v. Croatia. With respect to fines, then its criminal character can be enhanced by, for instance, the criminal factors adhered to in the case of Pierre-Bloch v. France, which according to the ECtHR typically differentiated criminal fines *stricto sensu* from the obligation to pay: (i) the amount payable is not determined according to a fixed scale nor set in advance; (ii) entry or registration of the fine is made in the criminal record; (iii) the rule that consecutive sentences are imposed in respect of multiple offences; (iv) imprisonment is available to sanction failure to pay, cf. Pierre-Bloch v. France, para. 58. In particular, see also Zugic v. Croatia, paras. 66-68.

[661] ECtHR, Guide on Art. 6, criminal, para. 36, referring to Gestur Jónsson and Ragnar Halldór Hall v. Iceland, paras. 84-98.

[662] Section II(2)(B)(2)(a)(3)).

[663] Welch v. the United Kingdom; Sud Fondi Srl and Others v. Italy; Varvara v. Italy, G.I.E.M. S.r.l. and Others v. Italy; Sofia v. San Marino; and Vannucci v. San Marino.

measure';[664] and (3) 'reparatory and preventive sanction'.[665] Thus, the question is an obvious one: what justifies this schizophrenic legal position of the confiscation order?

In respect of (1), it follows from the cases of Welch v. the United Kingdom; Sud Fondi S.r.l. and Others v. Italy; Varvara v. Italy; and G.I.E.M. S.r.l. and Others v. Italy that the legal power to confiscate of property in many situations will qualify as a criminal sanction.[666]

In the key case of G.I.E.M. S.r.l. and Others v. Italy, the ECtHR again had to determine the classification of the confiscation of property imposed for unlawful site development. Of the four applicants, three were legal persons: G.I.E.M S.r.l., Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l. and Falgest S.r.l., and one a natural person: Mr F. Gironda. The applicants had essentially argued that the confiscation order deprived land beyond the land directly concerned by the unlawful development. For instance, in the respect of G.I.E.M. S.r.l., the confiscation order confiscated land of an area that was three times as large as that covered by the planning permission, and of Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l.: "the eighty-eight plots that were built upon totalled 15,920 sq. m., while the confiscation had affected an additional area that was 14.5 times as large."[667] Before the ECtHR, this was the third time a similar confiscation order had to be assessed under Article 7. In all cases, the ECtHR had applied the Welch factors, and it had previously concluded:

> "212. In the case of Sud Fondi S.r.l. and Others [...], the Court took the view that the confiscation for unlawful site development imposed on the applicants could be regarded as a "penalty" within the meaning of Article 7 of the Convention in spite of the fact that no criminal conviction had been handed down against the applicant companies or their representatives. For that purpose it relied on the fact that the confiscation in question was connected to a "criminal offence" based on general legal provisions; that the material illegality of the developments had been established by criminal courts; that the sanction provided for by section 19 of Law no. 47 of 1985 sought mainly to deter, by way of punishment, further breaches of the statutory conditions; that the 2001 Construction Code classified confiscation for unlawful site development among the criminal sanctions; and, lastly, that the sanction was one of a certain severity. In its Varvara judgment [...], the Court confirmed that finding."[668]

Many of the same facts and arguments turned out to be decisive this third time. In particular, in respect of the Welch factor considering whether the confiscation orders were

[664] E.g. M. v. Italy; and Balsamo v. San Marino.
[665] E.g. OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service v. Russia. See also the case-law discussed in respect of the second situation (ii).

[666] Welch v. the United Kingdom; Phillips v. the United Kingdom, para. 39; Varvara v. Italy, para 51; G.I.E.M. S.r.l. and Others v. Italy, para. 212. See also Balsytė-Lideikienė v. Lithuania, paras. 53-61; and M. v. Italy. In Welch v. the United Kingdom, Judge de Meyer argued in a concurring opinion that there could be no doubt that the confiscation order inflicted upon the applicant was a sanction that had the nature of a criminal sanction. This result was self-evident, and there was no need for other factors, cf. p. 14. The same conclusion seems also to be implied in Grande Stevens and Others v. Italy, paras. 96-101. See also Kadagishvili v. Georgia; Phillips v. the United Kingdom (para. 51).
[667] G.I.E.M. S.r.l. and Others v. Italy, para. 279. See paras. 204-209 in conjunction with paras. 278-282.
[668] G.I.E.M. S.r.l. and Others v. Italy, para. 212.

imposed following a conviction of a criminal offence, the ECtHR observed that albeit ""no prior criminal conviction [had been] handed down against the applicant companies or their representatives by the Italian courts," the impugned confiscation was nevertheless connected to a criminal offence based on general legal provisions."[669] Personal liability for the offence was therefore also established.[670] With respect to the purpose (i), the ECtHR considered the confiscation orders as a punitive and deterrent sanction,[671] and with respect to its nature (ii) and severity (iii), the ECtHR considered the sanction as "a particularly harsh and intrusive sanction,"[672] and the ECtHR stated:

> "Within the boundaries of the site concerned, it applies not only to the land that is built upon, together with the land in respect of which of the owners' intention to build or a change of use has been demonstrated, but also to all the other plots of land making up the site. Moreover, the measure does not give rise to any compensation."[673]

Therefore, the confiscation of the property was a criminal sanction.[674] The importance of this key case stresses beyond the result considering the confiscation order as a criminal sanction. The ECtHR also had the chance to establish the concept of personal liability,[675] which have already been argued to form an inherent part of the concept of retribution.[676] In G.I.E.M S.R.L. and Others v. Italy, the very application of the confiscation order without any (formal) conviction implied personal liability for the offence committed.[677]

In respect of (2), it also follows from a number of cases that orders for the confiscation of property can be applied and qualify as a 'preventive measure'.[678] In M. v. Italy, the applicant was subject to criminal proceedings involving a number of different charges and proceedings for the application of preventive measures. In relation to the criminal proceedings, the applicant

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[669] Ibid, para. 218.
[670] The ECtHR has generally held in its case-law that "for determining whether or not a "penalty" within the meaning of Article 7, the absence of a conviction does not suffice to rule out the applicability of that provision," cf. G.I.E.M. S.r.l. and Others v. Italy, para. 217; Balsamo v. San Marino, para. 60, and the case-law referred to therein. Accordingly, the application of the confiscation order carried an inherently establishment of personal liability for the violation committed, albeit no conviction was formally adopted. See also Sofia v. San Marino, paras. 63-64.
[671] G.I.E.M. S.r.l. and Others v. Italy, paras. 222-226.
[672] Ibid, para. 227.
[673] Ibid.
[674] Ibid, para. 233.
[675] See G.I.E.M. S.r.l.and Others v. Italy, paras. 235-275. The concept of 'personal liability' thus requires an element in which it can be established that the offender is liable for committing the offence, irrespective of whether this element is established on the basis of intent, negligence or objective liability, the latter operating through presumptions of liability, cf. para. 243.
[676] Section II(2)(B)(II)(1). The ECtHR stated in G.I.E.M. S.r.l.and Others v. Italy, para. 242, that: "This also means, in principle, a measure can only be regarded as a penalty within the meaning of Article 7 *where an element of personal liability on the part of the offender has been established*." Italics added. This is also a requirement that follows from the guarantee and "principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and sanctions by which they are punished, such as to be accessible and foreseeable in its effects," cf. ibid, para. 242.
[677] Therefore (now), "Article 7 precludes the imposition of a criminal sanction on an individual without his personal criminal liability being established and declared beforehand. Otherwise the principle of the presumption of innocence guaranteed by Article 6 § 2 of the Convention would also be breached," cf. G.I.E.M. S.r.l. and Others v. Italy, para. 251.
[678] M. v. Italy; Balsamo v. San Marino.

was first sentenced to two years of imprisonment for being a member of the Camorra gang ('NCO') by the Naples District Court on 10 December 1980. Again later, on 17 September 1984, because the membership of the criminal and mafia type organisation did not end, the Naples District Court convicted the applicant to eight years and four months of imprisonment, which by Naples Court of Appeal reduced to six years and six months. The applicant was also prosecuted for a number of other charges of which included lending money at an extortionate rate, and obtaining and demanding money with menaces. On 19 June 1987, the Salerno Court of Appeal sentenced him on these charges to five years' imprisonment.

On the basis of the evidence against the applicant, including that he was a member of the NCO, the Salerno prosecuting authorities opened proceedings for the application of preventive measures. The request was approved by the Salerno District Court on three separate dates, and included in total an order that made the applicant subject to special police supervision, compulsory residence and a seizure of property of the applicant's direct or indirect disposal with a view to their final confiscation. On 10 January 1985, the Salerno District Court ordered the confiscation of the property seized, some of which belonged to the applicant's wife and son. The confiscation order was justified on the basis of circumstantial evidence against the applicant, including his criminal record; that he belonged to the NCO; and he had a sizeable personal fortune obtained and accumulated with speed and ease and comprising a number of large urban and rural properties, a hotel complex and mineral water bottling plant. The court concluded that the applicant could not explain how he legitimately had made such fortune. Most of the property confiscated was upheld by the appeal courts.

The applicant claimed that the order for the confiscation of his property amounted to a criminal sanction within Article 6 and 7 of the ECHR, while the Italian Government claimed essentially that the confiscation order qualified as a 'preventive measure'. The ECtHR (Commission) first noted that in Guzzardi v. Italy, it had concluded that an order for compulsory residence did not amount to a criminal sanction because it was not imposed as a punishment for any specific offence and thus lacked a conviction.[679] In respect of the confiscation order, the Commission noted that the confiscation proceedings ended formally neither with the applicant being charged nor convicted of a criminal offence. However, this finding was not sufficient of itself to render Article 6 and 7 inapplicable. The commission had to decide, "looking

[679] Guzzardi v. Italy, para. 100. This case is before the Engel case. However, the approach was upheld and confirmed in Ciulla v. Italy, paras. 39-40, Raimondo v. Italy, para. 43; De Tommaso v. Italy, para. 143; Guzzardi v. Italy, para. 100; and Seražin v. Croatia, para. 90.

behind the appearances, whether the applicant acquired the status of an accused person and whether the confiscation of his property constituted "in substance" a penalty."[680] It also pointed out that: "Preventive measures must, in principle, be regarded as distinct not only from criminal penalties but also from disciplinary penalties [...], administrative penalties [...], and other forms of penalties,"[681] and thus, moreover, distinct from the concept of sanctions.

The Commission then assessed the confiscation order under the second Öztürk-criterion of the second Engel-criterion and noted, inter alia, that the confiscation proceedings (and preventive measure proceedings) did not involve the finding of guilt; confiscation was conditional upon a declaration of dangerousness as based on the suspects' membership of a mafia-type organisation; and the confiscation was based on sufficient circumstantial evidence established on an objective manner and clearly distinguished from mere suspicions and subjective speculation. Therefore, it was preventive measure designed to prevent the unlawful use of property and it did not imply a finding of guilt any more than his compulsory residence order. In respect of the third Engel-criterion, the Commission concluded that the confiscation is not so great to warrant a classification as a criminal sanction. It noted that confiscation orders, widely, are not confined to criminal law, but also encountered in the sphere of administrative law. Property that generally may be confiscated includes: "imported goods [...], the proceeds from unlawful activities [...] such as buildings constructed without planning permissions [...], items considered dangerous in themselves [...] such as weapons, explosives or infected cattle [...], and property connected with [...] criminal activity."[682] Hence, "it can be seen from the legislation of the Council of Europe Member States that measures of great severity, but necessary and appropriate for protection of public interest, are ordered even outside the criminal sphere."[683] Therefore, the Commission concluded that confiscation did "not involve a finding of guilt subsequent to a criminal charge, and does not constitute a *penalty*."[684]

What justifies the result that such confiscations orders do not classify as a criminal sanction, and not even qualify as a legal sanction? – It appears as a rather general observation in respect of the purpose and nature of such confiscation orders that their application are independent of any criminal proceedings and a finding of guilt and designed to prevent the unlawful use of funds and, as a consequence, in preventing the commission of further crimes once it has

[680] M. v. Italy, at p. 97.
[681] Ibid, at p. 97.
[682] Ibid, at p. 98.
[683] Ibid.
[684] Ibid. Italic added. See also Balsamo v. San Marino.

been established the property had an illicit origin, typically on the basis of circumstantial evidence.[685] It is also not decisive for the confiscation order that it is adopted, enforced or otherwise meted out by the criminal courts, because "it is a common feature of several jurisdictions for criminal courts to take decisions of a non-punitive nature as, for example, the possibility for criminal courts to order civil reparation measures for the victim of the criminal act."[686] In this way, the application of such confiscation orders are "having both a compensatory and preventive aim" and shares more similarities with "civil proceedings in rem" as opposed to a criminal sanction.[687] Hence, they do not resemble a fine, because they do not go beyond the level of restoration and they are not imposed on a retributive basis. Therefore, when confiscation orders are applied (not imposed) on the basis of circumstantial evidence, and thereby not on the basis of personal liability for the commission of a violation, the confiscation order is not qualifying as a legal sanction, because the retributive purpose is lacking or otherwise devoid. The consequences that the confiscation order makes the person subject to are also not intended to be inflicted on the person as a personal suffering, but rather targets the property *(in rem)*. Hence, the confiscation is intended to ensure that the crime committed does not pay-off, which is an objective that signifies the purposes of reparation and positive prevention. For similar reasons, confiscation of property in the possession of third parties does also not qualify as a criminal sanction.[688] The views here presented are also more or less directly involved in the discussions conducted in Section III(1)(C), as they provide rather general justifications for the distinction between 'preventive measures' and the concept of a legal sanction.

The views are also more or less involved in respect of (3). For violations of Russian Competition Law of which the applicant companies risked the imposition of a confiscation of unlawfully gained profit, thereby was available as a retributive sanction, the sanction did not classify as a criminal sanction. The ECtHR considered "this order is intended as pecuniary compensation for damage rather than as a punishment to deter re-offending."[689] Accordingly, the comparison with a fine determined the issue and qualified it as a reparatory sanction.

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[685] Balsamo v. San Marino, paras. 62-63.
[686] Balsamo v. San Marino, paras. 63.
[687] Gogitidze and Others v. Georgia, paras. 91, 101-102, and 121. In para. 102, the ECtHR clarified this aspect: "The compensatory aspect consisted in the obligation to restore the injured party in civil proceedings to the status which had existed prior to the unjust enrichment of the public official in question, by returning wrongfully acquired property either to its previous lawful owner or, in the absence of such, to the State."
[688] In addition, confiscation orders imposed in the framework of criminal proceedings against third parties do not qualify or classify as criminal sanctions, cf. ECtHR, Guide on Art. 7, para. 15, p. 9, referring to Yildirim v. Italy, and Bowler International Unit v. France, paras. 65-68.
[689] OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service v. Russia, at p. 10.

Therefore, from the case-law on confiscation orders under Articles 6-7 and 4-P7, it follows more generally that confiscations orders can be imposed as either a: (1) criminal sanction; (2) preventive measure; and / or (3) reparatory and preventive sanction. Hence, "[each] confiscation order must be seen in its context."[690] In the situations, where the confiscation orders have classified as a criminal sanction (1), the confiscation orders have been imposed on a retributive basis following the establishment of personal liability, typically as a direct consequence of a criminal or disciplinary conviction, and its purpose and nature have only been considered punitive and deterrent to extent that the confiscation order by its severity could reach beyond the restorative level.[691] In these situations, the confiscation orders are similar to a fine and assessed on the basis of the same governing principles. The purposes *(i)* governing confiscation orders are thus: retribution, punishment, and deterrence. Its nature *(ii)* is deprivation of the right to property, the same archetype as a fine, because only to the extent that the order, by its maximum severity *(iii)*, may result in a confiscation of property beyond the level of restoration, which thus requires more than the mere confiscation of the unlawfully obtained profit / proceeds / property, it will result in a deprivation of the offender's property.[692] Otherwise, the confiscation order will only qualify as a reparatory and preventive sanction (3).[693] Finally, when the retributive purpose is devoid and / or eclipsed to such an extent that the confiscation order was not applied as a direct consequence of the commission of a violation and it remains within the restorative level to ensure that crime does not pay and to prevent the unlawful use of illicit property, the confiscation order qualifies as a preventive measure (2). The main problem with confiscation orders, applied as a reparatory sanction (2) or preventive measure (3), is that they thus may be difficult to distinguish from forfeiture orders.[694]

(b) Forfeiture of property

In Ulemek v. Serbia the ECtHR had to determine whether 'forfeiture orders' qualified as a criminal sanction. The applicant and defendant had been convicted as a leader of an organised

[690] Balsamo v. San Marino, para. 64.
[691] The fact the ECtHR has treated confiscation proceedings following from a conviction as a part of the sentencing process, and therefore falling outside the scope of Article 6(2), does not alter that conclusion, cf. Phillips v. the United Kingdom, paras. 28-36; Vannucci v. San Marino, para. 45; and Van Offeren v. the Netherlands.
[692] A demolition of property such as a house seems also to follow the same conclusion and governing principles, cf. Hamer v. Belgium, para. 60. However, contrast with Saliba v. Malta, where the ECtHR stated that "a demolition order [for unlawfully constructed buildings] did not constitute a "penalty" within the meaning of Article 7," cf. para. 39. However, the demolition order were mainly examined with respect to Article 1-P1, and not under the Engel-test.
[693] Compare also OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service v. Russia with Varvara v. Italy, para. 51 and Sud Fondi Srl and Others v. Italy.
[694] See, in particular, Gogitidze and Others v. Georgia.

criminal group for a number of serious crimes and sentenced to 40 years of imprisonment. After the criminal conviction, while serving his prison sentence, the prosecutor of organised crime lodged a request for the forfeiture of the applicant's house worth EUR 190,000 because the applicant's aggregate legitimate earnings at the time when he bought the house amounted to EUR 11,650. Hence, there was an obvious objective discrepancy between the value of the house and the applicant's legitimate earnings. Since the applicant failed to provide feasible evidence for the lawfulness of the assets he used for the acquired property, and that he already had been convicted of a number of serious crimes with elements of organised crime, the court accepted and issued the forfeiture order on the basis of the "2008 Law." According to national law, as interpreted by the national courts, such forfeiture orders were adopted "under a special procedure targeting the criminal proceeds of persons convicted of organised crime, which was entirely different from ordinary criminal forfeiture."[695] Hence, it was "a measure for the recovery of criminally acquired wealth."[696] In comparison to the ordinary forfeiture orders issued under the criminal code, then it did not require the establishment of a direct link between the crime of which the applicant had been convicted and the acquisition of the property.[697] The question before the ECtHR, as the question before the national and constitutional courts, was therefore whether the forfeiture amounted to a criminal sanction?

The ECtHR applied the Welch factors and the most decisive arguments were the following.[698] First, albeit the forfeiture order was connected and linked to, and thereby also depending on the commission of a criminal offence, which nevertheless had a sufficient level of gravity, the national courts did not consider the forfeiture order as "an additional punishment, but a consequence of the fact that a perpetrator or other beneficiaries has obtained assets originating from an unlawful act."[699] The ECtHR also noted that the Serbian legal system treated forfeitures as a distinct legal power from the criminal sanctions as the forfeiture order had a legal basis within the 2008 Law and not listed among the criminal sanctions in the criminal code. Furthermore, then even though the criminal procedural law applied as subsidiary legislation and that a special chamber of the criminal courts adopted the forfeiture order, the forfeiture order was not classified or treated as a criminal sanction under national law.

[695] Ulemek v. Serbia, para. 8.
[696] Ibid, para. 11.
[697] Ulemek v. Serbia, paras. 5-13 and 23-27.
[698] Ulemek v. Serbia, paras. 48-58.
[699] Ulemek v. Serbia, para. 49.

Second, in the assessment of the purpose *(i)* and nature *(ii)* of the forfeiture order, the ECtHR observed that the forfeiture order was laid down in the 2008 Law, which intended to comply with the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime.[700] Its purpose and nature *(i)-(ii)* was "to ensure that *crime does not pay* and were primarily of a *restorative* nature."[701] The ECtHR then went on and compared the forfeiture order with a criminal fine and whether it accorded with the principles following from the Welch case in respect of a regime of punishment as it had applied these principles in Dassa Foundations and Others v. Liechtenstein, where the ECtHR held that the seizure and forfeiture orders were similar to a restitution of unjust enrichment under civil law.[702] Similarly, it compared to Balsamo v. San Marino and the principles following from M. v. Italy, where the ECtHR held in respect of an order for the confiscation of property that it was comparable to a civil reparation measure and qualified as a preventive measure.[703] Accordingly, in the Serbian context, the Serbian forfeiture order in question was also restricted to the actual enrichment of an offence; the degree of culpability of the offender was irrelevant for fixing the amount of assets declared forfeited; no coercive sanction of default imprisonment could enforce the forfeiture order; the forfeiture order was comparable to the institution of civil forfeiture in rem rather than a criminal fine because the institution of forfeiture orders is directed against property rather than a person, wherefore it also could be issued for property belonging to third parties; and the assets forfeited by the Serbian courts could be allocated to the benefit of the victims, if the civil claims have been established by final court decisions.[704] Therefore, the forfeiture order clearly had a reparatory and preventive nature and purpose.

Third, this conclusion was further evidence by the assessment of the severity of the forfeiture order *(iii)*, because despite the ECtHR noted that the "forfeiture order may affect assets of a considerable value, without there being an upper limit for the amount of confiscated assets [...] the forfeiture is only applicable to property of which the legal origins cannot be traced."[705] Therefore, the ECtHR could also conclude more generally that the forfeiture order "renders it comparable to a civil forfeiture in rem,"[706] and not a criminal sanction.[707] The comparison with the fine and regime of punishment had thus served their purpose.

[700] Ulemek v. Serbia, paras. 33-38.
[701] Ulemek v. Serbia, para. 50. Italics added.
[702] See the following Section III(1)(A)(II)(2)(c)).
[703] See the previous Section III(1)(A)(II)(2)(b)).
[704] Ulemek v. Serbia, paras. 51-54.
[705] Ulemek v. Serbia, para. 56.
[706] Ulemek v. Serbia, para. 57.
[707] See also Société Oxygène Plus v. France, paras. 40-51.

Accordingly, it followed that the forfeiture order could be considered a 'preventive measure' and not a legal sanction as it did not pursue the purpose of retribution. Even if was imposed on a retributive basis, the specific forfeiture order could not have qualified as a criminal sanction, because the forfeiture was limited to reparation and not comparable to a fine.[708] However, more generally, the legal position of a forfeiture order is identical to that of confiscation orders due to the governing archetype of deprivation of property. Therefore, forfeiture orders must also be seen in their specific legal context.

(c) Seizure of property

The result in Ulemek v. Serbia and the principles derived therefrom were similar to the result and principles following from Dassa Foundation and Others v. Liechtenstein, except that the ECtHR did not only assess an order for the forfeiture of assets, but also an order for the 'seizure' of assets.[709] In respect of the purpose of the *'seizure order'*, the ECtHR first noted that the seize of assets was an interim order for the purpose of, and awaiting, the decision on the actual forfeiture of assets. In this respect, it was "questionable whether a penalty could already be considered as having been "imposed" within the meaning of Article 7,"[710] or, moreover, whether the seizure lacked a retributive purpose. The ECtHR applied the Welch factors. It noted that the seizure orders are linked to and dependent on the commission of a criminal offence, because the seizure under the Code of Criminal Procedure in Liechtenstein could only be made if there was a suspicion that the assets originated from an act liable to punishment, and it will be declared forfeited once it was proved that the assets were proceeds from crime. The seizure may also affect property in the possession of thirds parties (including legal persons), but not independent from a criminal offence. In respect of its purpose (i) and nature (ii), the ECtHR considered the seizure order as a measure "that were aimed at preventing persons suspected of a criminal offence from frustrating the forfeiture of the assets obtained as a result thereof [and] at guaranteeing that crime did not pay."[711] The ECtHR then went to compare the seizure and forfeiture order with the principles following from the Welch case and concluded similarly, as just discussed above for the forfeiture order, they "were more comparable to a

[708] Furthermore, an order for the forfeiture of nationality does also not qualify as a criminal sanction, cf. Ghoumid and Others v. France, paras. 63-73.
[709] However, see also Ulemek v. Serbia, para. 54, discussing the definition of the "proceeds from crime."
[710] Dassa Foundation and Others v. Liechtenstein, p. 16.
[711] Dassa Foundation and Others v. Liechtenstein, pp. 17-18. In this way, the ECtHR also considered that the seizure orders were aimed "at depriving the person concerned of the profits of his crime," ibid. However, such deprivation only becomes final once the profits were forfeited, and whether this is a true and real deprivation is certainly questionable becomes it does not go beyond the level of restoration and reparation.

restitution of unjustified enrichment under civil law than to a fine under criminal law."[712] Finally, the ECtHR noted in respect of the severity of the seizure that the order could "affect assets of a considerable value, without there being an upper limit for the amount of asset of which the person can no longer dispose [but] the seized assets may again be disposed of if the suspicion that they originated from an offence proved to be unfounded."[713] Therefore, "given that the seizure order [...] is limited to the actual enrichment of the beneficiary of an offence, this does not provide an indication that it forms part of a regime of punishment."[714] Accordingly, the seize order did not qualify as a criminal sanction. Rather, it functioned as an interim order that did not pursue the purpose of retribution. Instead, its purpose was rather preventive and provisional for the later forfeiture of the property seized. Therefore, seizure orders do not qualify as a legal sanction, and Articles 7, 4-P7 and 6, in its criminal- or civil-head, does not become applicable for such and similar interim orders, when they are purely of a provisional and / or safeguarding nature. See further the discussions in Section III(1)(C)(II)(3).

B. Disciplinary sanctions

The cases where the ECtHR has applied the Engel-test under Articles 6-7 and 4-P7 often reveals that the applicant has not been subject to a criminal charge or criminal sanction, but nevertheless been subject to one or more *non-criminal sanctions*. The purpose of this Section, III(1)(B), is to therefore to discuss the principles that justifies the results of these cases. However, it should already be noted that the purpose (i), nature (ii) and severity (iii) of the non-criminal sanctions often characterises what the ECtHR generally refers to as the concept of *'disciplinary sanctions'*, wherefore there often will be confluence between the non-criminal sanctions and disciplinary sanctions. Where the ECtHR has applied the Engel-test and found the applicant subject to disciplinary sanctions, the result has often also been that the civil-head of Article 6 instead becomes applicable. When this is the situation, the concept of disciplinary sanctions can be characterised to contain a subcategory of: *'civil sanctions'*. There are also cases, where the ECtHR has applied the Engel-test and found applicants subject to sanctions that are very similar to civil sanctions in respect of their purpose (i), nature (ii) and severity (iii). However, the ECtHR does not find Articles 6-7 and 4-P7 applicable in these situations,

[712] Dassa Foundation and Others v. Liechtenstein, p. 18. The arguments are more or less identical to ones discussed under Section III(1)(A)(II)(b). Just like the forfeiture order, the seizure order was meant to comply with the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime signed on 8 November 1990.
[713] Dassa Foundation and Others v. Liechtenstein, p. 18.
[714] Dassa Foundation and Others v. Liechtenstein, pp. 18-19.

neither Article 6(1) under its civil-head. We may refer to these types of sanctions as *'political sanctions'* due to the civic nature of the violations committed. Because they draw close resemblance with the civil sanctions and the principles that generally characterises the concept of disciplinary sanctions, we may also categorise them as another sub-category thereunder.

(I) Deprivations of civil rights

Recalling from Section II(1)(B)(I)(2) and the discussion of the nature of disciplinary norms, the ECtHR has established in the leading and key case of Ramos Nunes de Carvalho e Sá v. Portugal that "disciplinary proceeding as such cannot be characterised as "criminal."[715] Accordingly, offences committed and sanctions imposed on a variety of professions like judges, lawyers, civil servants, doctors, members of the armed forces, liquidators, etc. generally belongs to the area of disciplinary law. Disciplinary proceedings will be initiated when the offender has violated law provisions governed by specific norms, for example: "A lawyer who negligently or intentionally breaches his or her professional duties or whose professional or private conduct adversely affects the reputation or standing of the profession shall be deemed to have committed a disciplinary offence;"[716] or: "The general duties of civil servants shall comprise: (a) a duty to pursue the public interest; [...]; (d) a duty to inform; (g) a duty of loyalty; (h) a duty of propriety."[717] These law provisions are governed by disciplinary norms, because they are only applying to a restricted group; here: lawyers and civil servants.

In a number of cases, the ECtHR has more or less thoroughly examined the nature, purpose and severity of some of the sanctions available to the authorities in disciplinary sanction regimes.[718] An overview over the typical examples of the types of sanctions available in a disciplinary sanction regime may look similar to this example:

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[715] Ramos Nunes de Carvalho e Sá v. Portugal, para. 123. Italics added. See, for instance, also Müller-Hartburg v. Austria, para. 39; and Le Compte, Van Leuven and De Meyere v. Belgium, para. 42.
[716] Müller-Hartburg v. Austria, para. 33, from Section 1(1) of the Disciplinary Act.
[717] Ramos Nunes de Carvalho e Sá v. Portugal, para. 71. This provision "Section 3 – Disciplinary offences" from the Civil Servants' Disciplinary Act was applicable to judges under section 131 of the Status of Judges Act.
[718] Judges: Ramos Nunes de Carvalho e Sá v. Portugal; Demel v. Austria; Kremzow v. Austria; Sturua v. Georgia; Kamenos v. Cyprus; Oleksandr Volkov v. Ukraine; Xhoxhaj v. Albania. Lawyers: Helmut Blum v. Austria; Müller-Hartburg v. Austria; Biagioli v. San Marino. Notaries: Peleki v. Greece. Accountants: Luksch v. Austria. Civil servants: Moullet v. France; Bayer v. Germany; Lázaro Laporta v. Spain; Čivinskaitė v. Lithuania; Pişkin v. Turkey. Liquidators: Galina Kostova v. Bulgaria. Doctors: Haarvig v. Norway. Army soldiers and officers: R.S. v. Germany; Suküt v. Turkey. See also Davies v. the United Kingdom; D.C., H.S. and A.D. v. the United Kingdom; Storbråten v. Norway; Mjelde v. Norway; Çelikateş and Others v. Turkey; Bayer v. Germany; Ravnsborg v. Sweden; Putz v. Austria; Veriter v. France; Schreiber and Boetsch v. France; Kubli v. Switzerland; Toyaksi and Others v. Turkey; Zugic v. Croatia; T. v. Austria; Kyprianou v. Cyprus; Gestur Jónsson and Ragnar Halldór Hall v. Iceland; and Cătăniciu v. Romania.

(1) Pecuniary sanctions: (a) disciplinary fines: (a)(i) ordinary fines, for instance, on lawyers; (b)(ii) day-fines: a day-fine corresponded to the daily salary; (a)(iii) procedural fines.[719]

(2)(a) Non-pecuniary sanctions relating to the right to exercise a profession, including the authorisations and licences necessary for exercising the professions: (a) temporary bans and prohibitions on the right to practicing as a lawyer; (b) disbarment, removal from bar, and striking off persons registered as lawyers or liquidators; (d) suspension of authorisation or licence to practice as a medical doctor; (e) revocation of authorisation or licence to practice as a medical doctor; (f) temporary ban from administering, managing or supervising listed companies; (g) temporary bans on exercising any football related activities;[720] (h) temporary disqualification from holding managerial positions and to establish new companies.

(2)(b) Non-pecuniary and pecuniary sanctions relating to the right to the exercise of a position as a civil servant: (a) warnings; (b) reprimands (written, formal, private); (c) transfers; (d) temporary suspension of duties; (e) disciplinary leave without pay (entailing complete removal from duties for the duration of the penalty); (f) removal from office; (g) dismissals and discharge; (h) early and compulsory retirements; (i) employment and promotion bans; (j) salary cuts.[721]

In some of the cases providing a disciplinary sanction regime like this, the ECtHR has expressed views on the nature of such sanctions: "With the exception of the fine, *these sanctions are typical disciplinary in nature*,"[722] or that: "all the sanctions that the applicant could have incurred *are purely disciplinary in nature*."[723] Besides the fact that disciplinary sanctions are imposed for the violations of laws that are governed by disciplinary norms, the question is nevertheless what justifies their qualification and classification as 'disciplinary sanctions'?

Perhaps the best explanation for why the non-pecuniary sanctions in (2)(a)-(b) qualify as disciplinary sanctions can be given by the example of Biagoli v. San Marino (lawyers):

"56. Turning to the nature and degree of severity of the sanction which the applicant risked incurring, the Court notes that the sanction of disbarment, like temporary suspension of the right to practise, or striking off the register, as well as compulsory retirement, are typical disciplinary sanctions [...]. *Although this is a severe sanction as it affects first and foremost a lawyer's civil right to continue exercising his or her profession, its aim is to restore the confidence of the public by showing that in cases of serious professional misconduct, the relevant disciplinary body will prohibit the lawyer or notary concerned from practicing.* Finally, although not crucial to this finding, the Court notes that *being disbarred does not necessarily have permanent effect.* Pursuant to Article 53 of law no. 28 of 1991 [...] a professional who has been disbarred may be reinstated if he or she has been rehabilitated and it has been shown that his or her conduct has been irreprehensible. In sum, the nature and severity of the sanctions the applicant risked incurring and the sanction actually imposed were not such as to render the charges "criminal" in

[719] See Section III(1)(II)(1)(a)(2)).
Ravnsborg v. Sweden; Putz v. Austria; Veriter v. France; Schreiber and Boetsch v. France; Kubli v. Switzerland; Toyaksi and Others v. Turkey; Zugic v. Croatia; T. v. Austria; Kyprianou v. Cyprus; Gestur Jónsson and Ragnar Halldór Hall v. Iceland.
[720] Platini v. Switzerland, paras. 43-48.
[721] Warnings (a) and reprimands (b) appears to express a threat of a potential future deprivation of entitlements to an office position office, while dismissals, early retirements, removals from office amount to an actual loss and deprivation of entitlements and/or removal from ones office. However, to my knowledge, these sanctions have not been assessed by the ECtHR directly under the Engel-test, but these sanctions seems embedded in the notion of deprivation.
[722] Müller-Hartburg v. Austria, para. 47. Italics added.
[723] Ramos Nunes de Carvalho e Sá v. Portugal, para. 126. Italics added. By this statement, the ECtHR also in its terminology included the fine among the disciplinary sanctions, but at the same time, it also found the fine punitive. However, for the sake of clarity, the ECtHR could have exempted the fine from the disciplinary label as it did in the Müller-Hartburg case.

> nature. Consequently, the disciplinary proceedings against the applicant did not involve the determination of a "criminal charge" within the meaning of Article 6 § 1 of the Convention."[724]

From the case-law more generally, it follows that disciplinary sanctions can be described by the following typical and characterising elements: (i) they are imposed on a retributive basis for the violations of laws that are governed by disciplinary norms as determined pursuant to the first Öztürk-criterion; (ii) they are overwhelmingly pursuing the purposes that are attributed to the non-criminal sanctions as discussed above,[725] but in addition, they may also aim at restoring the reputation and public confidence in a particular group or particular profession; (iii) they first and foremost affects the civil rights of the offender, including the right to continue to exercise her or his profession; (iv) the maximum severity level of disciplinary sanctions are often restricted in some regard or another, so that (iv)(a) disciplinary fines typically has a statutory upper limit, or that (iv)(b) disciplinary non-pecuniary sanctions are limited within certain rather narrow minimum-maximum duration-thresholds like temporary prohibitions of 2 to 5 years. The case-law also reveals that the ECtHR are reluctant to characterise such sanctions as punitive and deterrent albeit the ECtHR often also notes whether the sanctions may have far reaching consequences for the natural or legal persons.[726]

The purpose (i), nature (ii), and severity (iii) of such types of disciplinary sanctions, including the way in which they '*affects'* the civil rights of the offender *((ii))*, can be characterised and explained even further. In the case of Storbråten v. Norway, ECtHR had to assess '*a temporary disqualification from holding managerial positions and to establish new limited liability companies'.* The applicant was for the fifth time declared bankrupt in August 1999 by a business run by him. On 17 January 2000, the administrative authorities imposed a two year disqualification order on him for holding managerial positions and to establish new companies on the basis of the Bankruptcy Act as the applicant satisfied the requirements for such disqualification order, including for the reasons that there existed a reasonable suspicion against the applicant that criminal conduct had led to the bankruptcy and that he displayed carelessness in his business practices, which made him unfit to establish a new company and to serve as a board-member or day-to-day manager of such company. Later, on 18 December 2001, the applicant was in criminal proceedings also convicted for the failure to comply with the bookkeeping requirements of the Penal Code and of the relevant provisions of the Accounting Act and certain VAT and Tax law violations (all criminal offences), which resulted in a sentence

[724] Biagioli v. San Marino, para. 56. Italics added. See also Müller-Hartburg v. Austria, para. 48.
[725] Section II(2)(B)(II)(3).
[726] Pieter and others (n 2) 530.

of thirty-five days' imprisonment and the imposition of tax surcharges. Therefore, the applicant claimed that he had been punished twice in contravention of 4-P7. However, for the double jeopardy clause to apply, it was necessary for the disqualification order of two years to classify as a criminal sanction. The ECtHR then stated in accordance with the second Engel- / Öztürk-criterion [x] and third Engel-criterion [y]:

> [x] "the primary purpose of a disqualification order [was] to protect the shareholders and creditors and the society as a whole against exposure to undue risks of losses and mismanagement or resources that were likely to arise if an irresponsible and dishonest person were to be allowed to operate under the umbrella of a limited liability company. It was *essentially a preventive measure* that was meant to be taken as soon as possible in order to avert such excessive risks as mentioned above and for a defined period, usually of two years. It was intended to offer an easy and rapid means of stopping damaging business misconduct, pending, as the case may be, criminal proceedings."[727]

> [y] "a disqualification order entailed a *prohibition* against establishing or managing a new limited liability company for a period of two years, not a general prohibition against engaging in business activities. In the view of the Court, *the character of the sanction* was not such as to bring the matter within the "criminal" sphere. Although a disqualification order, which was to be entered into a special register for such measures, was capable of having a considerable impact on a person's reputation and ability to practice his or her profession [...], the Court does not find that what was at stake for the applicant was sufficiently important to warrant classifying it as "criminal.""[728]

The disqualification order did thus not classify as a criminal sanction.[729] The ECtHR then added further grounds for the explanation of its conclusion by emphasising that disqualification orders imposed in the first set of proceedings (January 2000) pursued the purpose of "prevention and deterrence," but the criminal sanctions imposed in second set of proceedings (December 2001) also pursued the purpose of "retribution."[730] Furthermore, then "subjective guilt was not a prerequisite [...] in the first set of proceedings, it was a condition for establishing criminal liability in the second set; whereas reasonableness of the *sanction* was a condition in the former context, it was not in the latter."[731] These views primarily concerns the purpose of the sanctions (i). According to the ECtHR's explanation, the applicant was thus subject to a sanction in both sets of proceedings, but only to criminal sanction in the second set of proceedings. While the result is in accordance with the case-law and the principles discussed so far, the explanation provided by the ECtHR is more questionable, in particular with respect to

[727] Storbråten v. Norway, p. 19.
[728] Ibid, p. 19. Italics added. It follows that disqualification order thus, at the same time, both qualified as a preventive measure and a sanction. See also the almost identical case of Mjelde v. Norway, p. 17. In none of the cases, the ECtHR applied the guarantees enshrined under the civil-head of Article 6(1). However, in other similar cases, for instance, Davies v. the United Kingdom; D.C., H.S. and A.D. v. the United Kingdom concerning 'company director disqualifications,' Article 6(1) was applied under its civil-head. Nevertheless, in these two cases, the ECtHR did not refer to the company director disqualifications as sanctions or preventive measures.
[729] Ibid, p. 19.
[730] Ibid, p. 20.
[731] Ibid, p. 20.

whether the disqualification order also qualified as a sanction as it was not entirely clear from the context of the case whether the disqualification order was imposed on retributive basis as a direct consequence of a number of law violations committed. These law violations allowed the bankruptcy court to establish that there had been reasonable grounds for suspecting that the applicant had committed criminal offences in connection with the activities that led to insolvency.[732] These elements therefore rather points to the positive preventive purpose and thus to the application of a preventive measure.[733] For the classification purposes pursued by the Engel-test this nonetheless matters less, because it has already been argued that non-criminal sanctions may pursue the purpose of positive prevention so long that the sanctions are imposed on a retributive basis.[734] When the ECtHR thus adheres to deterrence, it would imply that the disqualification order also was punitive, but that would conflict with the reasons justifying the conclusion that the disqualification order did not classify as a criminal sanction. In addition, there was no subjective guilt involved in the imposition of the disqualification order. Thus, the explanation provided by the ECtHR should rather be read as an emphasis of the purpose of positive prevention, and the circumstantial evidence forming basis for the imposition of the disqualification order points to the application of a preventive measure as opposed to that of a legal sanction. Nevertheless, the more general point here is that the purpose of positive prevention as opposed to negative prevention (deterrence) is one of the main purposes that more typically signifies the non-pecuniary disciplinary sanctions, and the case of Storbråten v. Norway is one among many other cases where "it may be difficult in practice to draw a clear distinction between *deterrence*, as an element of a penalty, and *prevention*."[735]

When disciplinary sanctions in their non-pecuniary form, as imposed on a retributive basis, are pursuing the purpose of positive prevention, then it seems more generally to be understood as a way of the disciplinary sanction to prohibit the offender in exercising the activities of her or his profession in order to *restore* the reputation of and public confidence in that profession and *to prevent* the offender from causing further damage or harm to that profession. In that sense, it may also be considered as both a *'preventive measure'* in the interests of the society and the profession, and a *'sanction'* imposed on the offender on a retributive basis.[736] Similar to criminal sanctions, disciplinary sanctions can thus also pursue the purposes of restoration (similar to reparation) and positive prevention as complementary objectives.

[732] Ibid, p. 2-3.
[733] Section II(2)(B)(II)(1) and compare with the cases in Section III(1)(C)(II)
[734] Section II(2)(B)(II)(3)(c).
[735] Seražin v. Croatia, para. 82.
[736] Xhoxhaj v. Albania, para. 245.

Therefore, disciplinary sanctions, if not all types of sanctions, should be characterised as governed by the notion of sanctions as a *hybrid concept* that are in pursuit of complementary purposes and aims. This has already been argued in respect of fines and confiscation orders.[737]

From the case of Storbråten v. Norway, it followed that disqualification order essentially qualified as a prohibition. The prohibition was provided in the form of a 'temporary' as opposed to a 'permanent' prohibition. The prohibition was also a 'specific prohibition' as it entailed that the applicant was prohibited against establishing or managing a new limited liability company for a period of two years, and therefore not a 'general' prohibition against engaging in business activities more generally. The concept of a 'prohibition' therefore often seems to function as the essential nature of sanctions that are labelled as a 'ban', 'bar', 'disqualification', 'withdrawal', 'suspension', etc. However, the essential nature of a prohibition proves to be governed by another archetype. Thus, the question we must entertain is what is the archetype that governs the essential nature *(ii)* of a prohibition?

In Haarvig v. Norway, the applicant was a medical doctor, which had a licence to perform duty services at a hospital. On 16 December 2018, the applicant was convicted for his involvement in attempts of burglary, obstruction of the police in their attempt to arrest his accomplice, violence against the police, and consumption of hashish and ecstasy. He was sentenced to five months' imprisonment. Later, on the 18 February 2019, the Health Inspectorate suspended / revoked the applicant's licence to perform duty service at a hospital on account of conduct unworthy of a doctor and primarily on the ground of his criminal conviction. On the basis of the suspension / revocation of the licence, the question was therefore whether the double jeopardy clause Article 4-P7 was applicable due to its criminal classification? The Norwegian Supreme had argued that it was primarily a civil law sanction of an administrative regulatory character, and noted under the second Engel-criterion (third in the case) that it is a common departure that such sanctions "have been directed at a limited circle of people."[738]

The ECtHR then applied the Engel-test and noted in respect of the second Engel-criterion / first Öztürk-criterion that the suspension / revocation did obviously "not apply to the public at large; the issue was whether the doctor was unsuited for practicing his profession due to "conduct unworthy of a doctor." Neither was it "a direct and inevitable consequence of criminal prosecution and conviction of a criminal offence. It was the subject of a separate

[737] Section II(2)(B)(II)(2)(a)(3)) and Section II(2)(B)(II)(2)(b)(2)).
[738] Haarvig v. Norway, p. 6, and para. 49 of the judgment of the Norwegian Supreme Court.

assessment of whether the person was unsuitable to practice as a doctor."[739] In respect of the second Öztürk-criterion, the ECtHR did not consider the suspension / revocation "*to punish* the person who had breached the norm, but rather to prevent that he or she in future cause damage to his or her patients or breach the necessary confidence between the public and the legal profession."[740] Finally, the ECtHR applied the third Engel-criterion:

> "As to the nature and degree of the measure, the Court notes that the applicant was *deprived of his right* to perform duty service as a medical doctor in a hospital for a period of 10½ months. It did not prevent him from performing other professional activity [Storbråten v. Norway, p. 19; and Mjelde v. p. 16 referring to the general prohibition against engaging in others activities]. In light of this [...], the ECtHR does not find that *the nature of the sanction* was such as to bring the matter within the "criminal" sphere [because] what was at stake was [not] sufficiently important to warrant classifying it as "criminal.""[741]

In addition, the ECtHR also noted, as it did in Storbråten v. Norway and Mjelde v. Norway, that the measures imposed in the criminal proceedings also pursued the purpose of prevention and deterrence, but "also retribution"[742] in the civil proceedings.

The conclusions and views of the ECtHR needs further discussion. First of all, the points discussed in respect of Storbråten v. Norway also applies in this context. In particular, the ECtHR considered the revocation / suspension to be a legal sanction, which can be questioned, because the reality seems rather to point to the qualification as a preventive measure. However, irrespective thereof, the views that first of all justified the ECtHR in its conclusion was that the suspension / revocation functioned similarly as the prohibition in Storbråten v. Norway, and that the essential nature of such a prohibition was that it resulted in a temporary deprivation of the applicant's civil right to perform duty service as a medical doctor in a hospital for a period of 10½ months. Accordingly, *'deprivations of civil rights'* is the archetype that governs the essential nature of prohibitions, because the deprivation are affecting the right to exercise of a profession. In the case-law, this is a result that stands very strong, in particular when consulting the case-law of Article 6(1) under its civil-head, where the ECtHR has not applied the Engel-test but nevertheless expressed its views on the different sanctions.[743]

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[739] Ibid, p. 12. Emphasis maintained.
[740] Haarvig v. Norway, p. 12. Italics added.
[741] Haarvig v. Norway, cf. p. 13. Italics added.
[742] Haarvig v. Norway, cf. p. 13; Storbråten v. Norway, p. 20; and Mjelde v. Norway, p. 17.
[743] There is quite some evidence for considering deprivations of civil rights as the archetype governing the concept of disciplinary sanctions that prohibits the offender from exercising their profession. For example, in Le Compte, Van Leuven and De Meyere v. Belgium, which concerned a temporary withdrawal of the applicants' civil right to practice medicine, but also was referred to it as a temporary suspension or ban, the ECtHR considered these: "to deprive them temporarily of their rights to practices," para. 47. They were disciplinary sanctions, which effectively constituted "a direct and material interference with the right to continue to exercise the medical profession. The fact that the suspension was temporary did not prevent its impairing that right," para. 49. See further paras. 47-51. Similarly, in Albert and Le Compte v. Belgium, which also concerned the right to continue to exercise the medical profession, which "was a private right and thus a civil right within the meaning of Article 6, para. 1," para. 28. The essential nature and effect of the temporary withdrawals / suspensions was "to deprive them temporarily of their right to practice," because the "effect of the disciplinary sanctions in question was to divest the applicants,

Therefore, deprivations of civil rights often also results in the application of Article 6(1) under its civil-head. Therefore, in this function, they can also be referred to as *'civil sanctions'*. Legal consequences that affects and deprives the offender of her or his *'civil rights'*[744] are as a strong starting point not pursuing the purpose of punishment and deterrence, unless the third Engel-criterion determines otherwise due to the maximum severity of the sanctions and / or in conjunction with any of the criminal classification factors for the sanctions and/or charge.

Therefore, the case-law often reveals that even though the imposition of disciplinary sanctions are resulting in very serious consequences that are detrimental to the offenders, then the offenders have not been subject to a criminal sanction or criminal charge.[745]

Second, the case-law also reveals that "[the] mere fact that a bar is of a permanent nature does not suffice to regard it as a penalty [/criminal sanction]."[746] However, on the other hand, a permanent prohibition such as a life ban on engaging in an occupation (medicine / doctor) ordered as a secondary sanction by a trial court may result in a criminal classification

temporarily (Dr. Albert) or permanently (Dr. Le Compte), of the aforesaid right, which they have duly acquired and which allowed them to pursue the goals of their professional right," para. 28.

[744] More generally, the ECtHR has settled that "where a State confers rights which can be enforced by means of a judicial remedy [...] these can, in principle, be regarded as civil rights within the meaning of Article 6 § 1," cf. Lovrić v. Croatia, para. 55. See also Oršuš and Others v. Croatia, para. 105; and Kök v. Turkey, para. 36. In Denisiv v. Ukraine, para. 53, the ECtHR also stated that "a public-law dispute may bring the civil limb into play if the private-law aspects predominate over the public-law ones in view of the direct consequences for a civil pecuniary or non-pecuniary right." Hence, it should be noted that the concept of 'civil rights' is an autonomous concept. It is also a broad concept determined by reference to its substantive content and effects and not by its legal classification under national law, meaning that civil rights thus can be found under public law when the result of proceedings are decisive for private rights and obligations. Accordingly, Article 6(1) becomes applicable, but not without exceptions, to pecuniary rights and interests; right to establish and practice a profession (also before professional bodies), rights resulting from disputes relating to social law and matters and rights relating to employment disputes for civil servants such as salaries, allowances and / similar entitlements. The first two cases where the ECtHR seems to attach an autonomous meaning to the concept of 'civil rights and obligations' under Article 6(1) were König v. Germany and Ringeisen v. Austria. In the latter case, the ECtHR stated that the civil-head of Article 6(1) covers "all proceedings the result of which is decisive for private rights and obligations," cf. para. 94, and that "the character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence," cf. Ringeisen v. Austria, para. 94. The private or public capacity in which the public authority had acted is thus not conclusive. Only the character of the right or obligation at issue are relevant, cf. König v. Germany, para. 90. The civil-head of Article 6(1) is restricted by the concept of 'the determination of his civil rights and obligations' in the way that "civil rights and obligations must be the object – or one of the objects – of the "contestation" (dispute); the result of the proceedings must be directly decisive for such a right," cf. Le Compte, Van Leuven and De Meyere v. Belgium, para. 47. Emphasis and brackets maintained. Thus, only a tenuous connection or remote consequences do not suffice for Article 6(1) to apply under its civil head. See further the ECtHR, Guide on Article 6, civil, paras. 32-62, and the case-law referred to therein.

[745] See, for example: (1) Withdrawals of authorisations to practice medicine: König v. Germany, and Kraska v. Switzerland, paras. 6-7 and 23-27. (2) Withdrawals / disbarment of the right to practice law: H v. Belgium, paras. 36-48. (3) Revocation of licence: Benthem v. the Netherlands, paras. 32-36; Pudas v. Sweden, paras. 30-38; Tre Traktörer Aktiebolag v. Sweden, paras. 36-44; Fredin v. Sweden, paras. 62-63; and Kingsley v. the United Kingdom, paras. 32-34. (4) Temporary suspensions on practicing medicine: Albert and Le Compte, paras. 25-29; Diennet v. France, paras. 11, 18, and 27-28; and Le Compte, Van Leuven and De Meyere v. Belgium. (5) Refusal of authorisation: Bakker v. Austria, para. 26, and Chevrol v. France, paras. 44-55. (6) Compulsory administration of banks: Credit and Industrial Bank v. the Czech Republic, para. 54-73. See also Perez v. France, paras. 47-75; Cegielski v. Poland, para. 24; and Manasson v. Sweden.

[746] Xhoxhaj v. Albania, para. 245, and Rola v. Slovenia, para. 66. Therefore, even permanent bans and bars imposed (e.g. on a judge for rejoining the justice system after an dismissal) will not necessarily result in a criminal classification of the sanction and neither in a criminal charge, if no other criminal classification factor is involved, cf. Xhoxhaj v. Albania, para. 240-246. See also Peleki v. Greece, para. 37.

of the sanction.[747] In addition, a prohibition of 10 years on practising certain professions and applying for a large number of public posts, "may have a very serious impact on a person, depriving him or her of the possibility to continuing professional life [...]. This sanction should thus be regarded as having at least partly punitive and deterrent character."[748] The case-law is not fully settled and consistent in respect of permanent or rather long temporary deprivations and prohibitions on the exercise of civil rights. The results seems to require the existence and involvement of the other criminal classification factors for the sanctions and / or charge.[749] However, the justifications for considering permanent or even rather long deprivations and prohibitions on the exercise of civil rights as criminal sanctions seems to imply a view, which also may point towards a tendency, that the ECtHR in reality does not consider the scope of the sanctions to affect only the civil nature of the rights in question. Instead, by the more general consequences and implications which the sanctions entail for the general and ordinary life of the offender, the sanctions seems to transgress the rather specific and narrow scope of the disciplinary sanctions, and reach into the realm and general scope of ordinary liberty rights,[750] in similar fashion as for the deprivations of the (licence-based) right to drive.[751] This might reveal that certain civil rights can transform into or travel up the ranks in the implied hierarchical order of rights, from deprivations of civil rights and into the position of liberty rights.

Third, in Ramos Nunes de Carvalho e Sá v. Portugal, the ECtHR acknowledged that disciplinary sanctions may allow for the imposition of even very severe and harsh sanctions, causing serious consequences for the offender,[752] and that disciplinary sanctions also are *'stigmatising'*.[753] Therefore, just like criminal sanctions, disciplinary sanctions can also be

[747] ECtHR, Guide on Art. 7, para. 14, p. 9, and Gouarré Patte v. Andorra, para. 30.
[748] Matyjek v. Poland, para. 55.
[749] Other of the criminal classification factors were also present in Matyjek v. Poland, see paras. 43-58, wherefore there is some uncertainty with respect to the conclusions here drawn. Compare also with the cases of Sidabras and Diatas v. Lithuania, and Polyakh and Others v. Ukraine, paras. 56-59.
[750] The difference between the permanent bar and temporary ban of 10 years seems to be that the temporary ban is not limited to a specific profession but contains a broader scope by depriving the possibility to continue professional life more generally, while the permanent bar, e contrario, still allows the person to make use of their qualifications outside the specific area practised before the bar. For similar reasons, the ECtHR has often also noted that the "dismissal from the post of judge did not formally prevent him from practising law in another capacity within the legal profession," cf. e.g. Oleksandr Volkov v. Ukraine, para. 93.
[751] Section III(1)(A)(I)(2).
[752] In the context of civil servants, the ECtHR has, for instance, stated in Moullet v. France that "compulsory retirement is the harshest measure on the scale of disciplinary sanctions, it is a sanction characteristic of a disciplinary offence and cannot be confused with a criminal penalty," cf. Moullet v. France, p. 15. See also, for instance, Müller-Hartburg v. Austria, para. 48; Biagioli v. San Marino, para. 56; Ramos Nunes de Carvalho e Sá v. Portugal, para. 126.
[753] In Ramos Nunes de Carvalho e Sá v. Portugal, the ECtHR provided two very general statements that acknowledged that disciplinary sanctions can entail very serious consequences for the offender and involve a significant degree of stigmatisation. First: "even if they do not come within the scope of Article 6 of the Convention under its criminal head, disciplinary penalties may nevertheless entail serious consequences for the lives and careers of judges. The accusations against the applicant were liable to result in her removal from office or suspension from duty, that is to say, in very serious penalties which carried a significant degree of stigma (see, [Grande Stevens and Others v. Italy, para. 122])." Second: "The accusations against the applicant were liable to result in her removal from office or suspension from duty, that is to say, in very serious penalties

characterised as allowing for the imposition of sanctions that provides a significant degree of stigma on the offender as well as to allow for the imposition of very seriousness consequences that may cause significant detrimental effects on the offender.

(II) Deprivations of liberty rights and civil rights inside prison

The offender has been subject to a criminal sanction when the offender has been sentenced to prison. However, once the offender is serving her or his prison-sentence in a prison-cell, the question becomes how sanctions imposed on prisoners by the administration of the prison or detention they will qualify and classify as it is given that the prisoners are already subject to a deprivation of liberty. It is clear from this legal area and context that the first Öztürk-criterion as a main rule, but nevertheless depending on the specific type of violation, will consider the prisoners as offenders that are being charged with a disciplinary offence, because the sanctions are only be imposed on prisoners serving a prison-sentence within some form of prison-setting excluding the prisoners from the ordinary society. Thus, the sanctions only targets a closed group of individuals qualifying as prisoners. Pursuant to the case-law, with respect to the purpose (i), nature (ii) and severity (iii) of the sanctions, primarily the latter two, it follows that the legal position under the Engel-test first of all is determined on the basis of whether the prisoners are having the duration of their original imprisonment-sentencing prolonged. In these situations, the prolongation of the prison-sentence amounts to an additional and fresh deprivation of liberty, and therefore also classifies as a criminal sanction.[754]

There nevertheless exists an important exception to that main rule. Some cases have concerned the general practice inside prison- and detention-regimes for the granting and forfeiture of remission. According to such practices:

> "a prisoner will be set free on the estimated date for release given to him at the outset of his sentence, unless remission has been forfeited in disciplinary proceedings [which] creates in him a legitimate expectation that he will recover his liberty before the end of his term of imprisonment. Forfeiture of remission thus has the effect of causing the detention to continue beyond the period corresponding to that expectation."[755]

In Campbell and Fell v. the United Kingdom, the ECtHR considered the forfeiture of already awarded remission (570 days) to involve "serious consequences as regards the length of his detention that these penalties have to be regarded, for Convention purposes, as

which carried a significant degree of stigma [...] and which were apt to have irreversible repercussions on her life and career. They did in fact result in a disciplinary penalty of 240 days' suspension from duty, although the period of suspension lasted for only 100 days in practice [...]," para. 203.

[754] Compare with Section III(1)(C)(I).

[755] Campbell and Fell v. the United Kingdom, para. 72.

"criminal,"" and furthermore: "by causing detention to continue for substantially longer than would otherwise have been the case, the sanction came close to, even if it did not technically constitute, deprivation of liberty."[756] The forfeiture of remission of a maximum of 42 days, where the applicants actually were awarded 40 and 7 days of remission, has also triggered the application of Article 6 under its criminal-head.[757] It thus follows that the "Engel" criteria apply in the prison context in connection with the disciplinary punishment of prisoners,"[758] and that forfeitures of awarded remission are governed by the archetype of deprivation of liberty.[759]

In Campbell and Fell v. the United Kingdom, the ECtHR only assessed the forfeiture of remission, but the applicant also risked the imposition of sanctions such as: (i) forfeiture of certain privileges for an unlimited time; (ii) exclusion from associated work; (iii) stoppage of earnings; and (iv) cellular confinement for a maximum of 56 days.[760] Such and similar types of sanctions are generally "treated as a disciplinary matter and [...] designed to maintain order within the confines of the prison.[761] The question is whether these types of sanctions also are governed by the archetype of deprivation of liberty or some other rights?

The case-law does not seem to be fully settled and explicit on this question, and the ECtHR seems to treat solitary confinement (iv) as governed by the archetype of deprivation of liberty, while the other types of sanctions and similar types seems to be governed by the archetype of deprivation of civil rights. In the case of Toth v. Croatia, the ECtHR again had to classify a solitary confinement of a prisoner. The ECtHR therefore had the chance to take a more general stance in respect of solitary confinements.[762] It noted that a solitary confinement between 3 and 31 days had been awarded in different military- and prison-settings. Mr Toth was in the present case subject to a solitary confinement of 21 days. The ECtHR stated that the "punishment did not extend the applicant's prison term and thus did not amount to an additional deprivation of liberty, but only to aggravation of the conditions of his detention."[763] Generally, the ECtHR considers such sanctions to restrict "the applicant's free movement inside the prison and his contact with the outside world for a period (as long as the solitary confinement)."[764] Therefore, solitary confinement is governed by the archetype of deprivation of liberty.

[756] Ibid, para. 72.
[757] Ezeh and Connors v. the United Kingdom, paras. 69-130.
[758] Toth v. Croatia, para. 28.
[759] Campbell and Fell v. the United Kingdom, para. 72; and Ezeh and Connors v. the United Kingdom, para. 129.
[760] Campbell and Fell v. the United Kingdom, paras. 14, 28-29, and 72.
[761] Ezeh and Connors v. the United Kingdom, para. 90.
[762] It is a question that typically is relevant in the prison-context, but in the case-law also in the military-context.
[763] Toth v. Croatia, para. 38; and Mariusz Lewandowski v. Poland, para. 30.
[764] Štitić v. Croatia, para. 61. Brackets added.

The case-law on solitary confinement nevertheless seems to be settled in one regard, but unsettled in another. First, so long as the original prison-sentence is not extended, a solitary confinement rather qualifies a disciplinary sanction that aggravates the conditions under which the original sentence is served and therefore does not classify as a criminal sanction, even though the specific violations committed by the prisoner also contains some criminal colours (and allows for establishing concurrent criminal liability for instance).[765] In these situations, the criminal guarantees contained in Articles 6-7 and 4-P7 will therefore also not apply.[766] However, this case-law has to be contrasted with the case of Mariusz Lewandowski v. Poland, a decision from July 2012 compared with Toth v. Croatia as a judgement of November 2012, where the applicant was imposed the maximum penalty that could be imposed, i.e. 28 days in solitary confinement. The ECtHR argued that the it "cannot but regard such a sentence as severe [...], where the sanction imposed consisted in restricting the applicant's free movement inside the prison and his contact with the outside world for a period of three months."[767] Furthermore, the ECtHR attached "particular importance to the fact that in the present case the sentence of solitary confinement actually imposed on the applicant was the maximum penalty which could be imposed."[768] Hence, the third Engel-criterion will consider a certain length of solitary confinements, indicated at around 28 days, as a deprivation of liberty. In these situations, the criminal guarantees in Articles 6-7 and 4-P7 will apply in full.[769]

"[At] the core of maintaining an adequate prison regime lies the need to impose disciplinary sanctions for breaches of prison discipline."[770] In Ganzi v. Italy, the applicant was placed in a special prison regime and subject to the following nine restrictions, which are rather similar to the sanctions referred to above in (i)-(iii):

> "(a) limits on visits by family members, with a maximum of one visit for one hour per month;
> (b) no meetings with third parties;
> (c) prohibition on using the telephone, except for one call – to be recorded – per month to members of the family if the applicant had not had a visit;
> (d) prohibition on receiving or sending out sums of money in excess of a specified amount, except for defence costs or fines;
> (e) no more than two parcels of laundry per month;
> (f) no organisation of cultural, recreational or sports activities;
> (g) no right to vote in elections for prisoners' representatives or to be elected as a representative;
> (h) no handicrafts;

[765] Section II(3)(A)(I)(2).
[766] Toth v. Croatia, paras. 36- 38. See also Eggs v. Switzerland; X v. Switzerland; P. v. France; J.U. v. France; A. v. Spain; Štitić v. Croatia, paras. 46-62; Payet v. France, paras. 94-99. Whether the civil-head of Article 6(1) applies seems not to have been settled. See also Öcalan v. Turkey (no. 2), paras. 186-196, in respect of social isolation of a prisoner. See also with Boulois v. Luxembourg in respect of a refusal of prison leave.
[767] Mariusz Lewandowski v. Poland, para. 30.
[768] Ibid, para. 30. Article applied under its criminal-head, cf. para. 31.
[769] Ibid, para. 31.
[770] Štitić v. Croatia, para. 61.

(i) no more than two hours per day to be spent outdoors."[771]

The ECtHR did not apply the Engel-test in that case. However, it stated that "at least some of the serious restrictions imposed on the applicant [...] – such as the one restricting his contact with his family and those affecting his pecuniary rights – clearly fell within the sphere of personal rights and were therefore civil in nature."[772] Article 6(1) applied under its civil-head.[773] Therefore, such sanctions may also be considered as governed by the archetype of deprivations of civil rights.[774] However, the discussion so far in respect of the prison-context raises the more fundamental question of when a right *exactly* qualifies as a 'liberty right' as opposed to that of a 'civil right'.[775] The case-law is not settled on this question and distinction, albeit the ECtHR tilts towards considering most of these rights as civil rights, and therefore perhaps only as *restrictions* on liberty rights, rather than a true deprivation of liberty rights. Nevertheless, it is the prison context that justifies their disciplinary classification.

(III) Deprivations of political and electoral rights

The ECtHR has consistently held that 'political rights', such as, "the right to stand for election and retain one's seat [...], the right to a pension as a former member of the parliament [...], or a political party's right to carry on its political activities [...] cannot be regarded as civil rights within the meaning of Article 6."[776] In addition, membership of and exclusion from a political party or political association are not covered by Article 6 in its criminal- and civil-head,[777] just like the ECtHR has confirmed more generally that "matters relating to conduct in political office, in particular the duty not to place oneself in a conflict of interests, are political rather

[771] Ganci v. Italy, para. 12.
[772] Ibid, para. 25. See also Gülmez v. Turkey, para. 30, and Enea v. Italy, para. 103.
[773] Ibid, para. 26. See also the cases referred to in the previous footnote.
[774] When national law provides judicial remedies against disciplinary sanctions imposed on prisoners, the result is that the applicant has a right to challenge the disciplinary sanctions before the national courts, cf. Gülmez v. Turkey, para. 29, and Vilho Eskelinen and Others v. Finland, paras. 62-63. In Enea v. Italy, para. 106, the ECtHR also stated: "Any restriction affecting these individual civil rights must be open to challenge in judicial proceedings, on account of the nature of the restrictions (for instance, a prohibition on receiving more than a certain number of visits from family members each month or the ongoing monitoring of correspondence and telephone calls) and of their possible repercussions (for instance, difficulty in maintaining family ties or relationships with non-family members, exclusion from outdoor exercise). By this means it is possible to achieve the fair balance which must be struck between the constraints facing the State in the prison context on the one hand and the protection of prisoners' rights on the other."
[775] Compare with Section III(1)(A)(I)(2) on prohibitions on the right to drive, and the previous Section III(1)(B)(I) on the specific and general scope of prohibitions.
[776] ECtHR, Guide on Art. 6, civil, para. 82, p. 25.
[777] Ibid, para. 82, p. 25, referring to Lovrić v. Croatia, para. 55, where the ECtHR held more generally in respect of the freedom of association: "Freedom of association has both civil and political aspects. The present case does not concern the applicant's membership of a political party, that is, the political aspect of that freedom, in which case Article 6 § 1 would not be applicable [...]. Rather, it concerns his membership of a hunting association with a private-law character, that is, the civil aspect of that freedom to which Article 6 § 1 indubitably applies."

than civil."[778] Therefore, as a matter of principle, the ECtHR has taken a rather clear-cut stance that the legal area of political and electoral rights and sanctions does not fall under the scope of Article 6 in its entirety, accordingly, neither under its criminal- or civil-head.[779]

The concept of disciplinary sanctions not only include deprivations of civil rights, but it may also include deprivations of political and electoral rights, because these share the common trait with all disciplinary sanctions of targeting a particular and rather closed group of natural or legal persons. In a number of cases, the applicants have been subject to sanctions similar to the following types:

> (1) Disqualifications from standing for an election (as electoral candidate) and removal from elected office (including forfeiture of parliament seat and presidential office);[780] and
> (2) Other political and electoral sanctions, including:[781] (a) dissolution of political parties;[782] and (b) loss of electoral rights, the right to exercise public functions, and the right to pensions and allowances paid by the State;[783] and
> (3) Pecuniary sanctions, e.g.: repayment of amount in excess of election expenditures.[784]

In respect of the essential nature (ii) rather than the purpose (i) and severity (iii) of a 'disqualification from standing for an election and removal from elected office', then they are typically 'temporary' in nature, because the prohibition contained in the disqualification is running through a certain time period and they are therefore also only resulting in a temporary deprivation of the applicants' political rights. In Pierre-Bloch v. France, the ECtHR held:

> "The purpose of that penalty is to compel candidates to respect the maximum limit. The penalty is thus directly one of the measures designed to ensure the proper conduct of parliamentary elections, so that, by virtue of its purpose, it lies outside the "criminal" sphere. Admittedly, as the applicant pointed out, disqualification from standing for election is also one of the forms of deprivation of civic rights provided in French criminal law. Nevertheless, in that instance the penalty is "ancillary" or "additional" to certain penalties imposed by the criminal courts (see paragraph 39 above); its criminal nature derives in that instance from the "principal" penalty to which it attaches."[785]

Three observations follows from this statement and the case-law more generally. First, the essential nature and ultimate effect of the disqualification from standing for election is that it resulted in a deprivation of civic / political rights.[786] Second, a less strong principle which o

[778] ECtHR, Guide on Art. 6, civil, para. 82, p. 25, referring to Cătăniciu v. Romania, para. 35.
[779] Galan v. Italy, paras. 82 -97; Pierre-Bloch v. France, paras. 52 and 61; Paksa v. Lithuania, paras. 66-67; Estrosi v. France, Tapie v. France.
[780] Pierre-Bloch v. France; Paksas v. Lithuania; Galan v. Italy; Estrosi v. France. In Pierre-Bloch v. France, the ECtHR concluded under the second and third Engel-criterion in the assessment of a disqualification from standing for election, limited to a period of one year from the date of the election, and applied only to the election of the national assembly in question, that "neither the nature nor the degree of severity of that penalty brings the issue into the "criminal" realm," cf. para. 56.
[781] ECtHR, Guide on Art. 6, criminal, para. 44, p. 14, and ECtHR, Guide on Art. 7, para. 15, p. 10, referring, inter alia, to Sobaci v. Turkey.
[782] Refah Partisi (the Welfare Party) and Others v. Turkey.
[783] Galan v. Italy, paras. 34 and 92.
[784] Pierre-Bloch v. France.
[785] Pierre-Bloch v. France, para. 56.
[786] See also Galan v. Italy, paras. 92-93.

some extent follows from the statement is that even when such sanctions are imposed by the criminal courts with a legal basis within national criminal law, they do not seem to qualify as criminal sanctions, but rather as 'ancillary sanctions' to primary criminal sanctions, because in those instances, they are imposed as an ancillary sanction to primary criminal sanctions and therefore derive "its criminal nature [...] from the "principal" penalty to which it attaches."[787] Third, because disciplinary sanctions generally are designed to ensure that the members of particular groups *comply* with specific rules governing their conduct, and they are almost identical in their essential nature to the sanctions resulting in a deprivation of civil rights, the 'disciplinary' label is well-suited to comprise those types of political and electoral sanctions, because they will not qualify or classify as criminal sanctions nor result in any criminal charge for the purposes of Articles 6-7 and 4-P7. Fourth, however, in Galan v. Italy, the ECtHR has provided a distinction which carries the potential for classifying certain political sanctions as criminal sanctions. In that case, the ECtHR distinguished between the *'active'* right to cast a vote (general scope) and the *'passive right'* to stand for election (specific scope), reserving only the deprivation of the active right to vote as criminal sanctions.[788] The active right to vote at parliamentary elections thus also draws (very) close resemblance with the deprivations of liberty and ordinary liberty rights. This points to a common tendency in the case-law of the ECtHR in respect of those cases concerning civil and political rights, that when the scope of certain civil and political right are having general implications for the (ordinary) life and liberty of the offenders, the rights at issue tends to transform or reclassify as or similar to liberty rights for the purposes of the Engel-test and Articles 6-7 and 4-P7. Nonetheless, a deprivation of the passive political rights, which have specific political consequences for the offenders, rather than consequences for their ordinary life and liberty, they do not qualify as criminal sanctions nor result in a criminal charge unless other classification factors are involved.

C. Other legal powers and measures than sanctions

In the case-law of the ECtHR, the perhaps most difficult categories of legal powers to be distinguished from the concept of a legal sanction are the legal powers, which either qualifies as an 'enforcement power' or 'preventive measure'. As a main rule, whenever a natural or legal person has been subject thereto, the criminal guarantees contained in Articles 6-7 and 4-P7 do not apply, unless they in reality are qualifying as a legal sanction and that particular sanction

[787] Ibid. para. 56.
[788] Galan v. Italy, paras. 96-97.

is classifying as a criminal sanction. As it turns out, as we shall see, enforcement powers and preventive measures are rather 'applied' than 'imposed', and therefore they often also lacking a retributive element and / or the intention of inflicting a punishment. The substantive rather than the formal qualification and classification must therefore continue in order to establish the two legal categories of enforcement powers and preventive measures and to distinguish these legal categories from the concept of sanctions. This is the purpose of this Section, III(1)(C).

(I) Enforcement powers

In Section III(1)(B)(II) it was held that so long that the disciplinary sanction is not extending the original prison-sentence, the sanction will not, as a main rule, classify as a criminal sanction. Instead, some of the sanctions imposed by the administration managing a prison-regime were argued to classify as disciplinary sanctions, albeit the offender already is serving her or his prison-sentence. This situation and context is very similar to the general position that the ECtHR has taken at least since Kafkaris v. Cyprus, whereby the concept of a (criminal) sanction has to be distinguish from the concepts of the 'execution' or 'enforcement' of sanctions, because Articles 6-7 and 4-P7 do not provide any direct protection in that respect.

The ECtHR has acknowledged that this distinction between the imposition of (fresh) sanctions and the execution and enforcement of already imposed sanctions does not always allow for a clear cut. However, in Kafkaris v. Cyprus, the ECtHR laid down the fundamental principle that governs that distinction: "In consequence, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 [...]."[789] At least since Kafkaris, it has also followed that decisions concerning the execution or enforcement of sentences, the aggravation of already imposed penalties, and changes in prison rules and conditions for (early) release do not fall within ambit of Article 7.[790] This views entails that the concept of a legal sanction should be viewed as different from the concepts of the execution and enforcement of sanctions. What is not expressly and well-articulated in the case-law, but

[789] Kafkaris v. Cyprus, para. 142. Emphasis maintained. The ECtHR also stated: "However, in practice, the distinction between the two may not always be clear cut." See also Hogben v. the United Kingdom, para. 4; Hosein v. the United Kingdom, p. 2; Grava v. Italy, para. 51; Uttley v. the United Kingdom, p. 8; Kafkaris v. Cyprus, para. 151; Uttley v. the United Kingdom, p. 8; Scoppola v Italy, para. 98; M. v. Germany, para. 121; Rio Del Prada v. Spain, para. 83; Giza v. Poland, para. 31; Kadusic v. Switzerland, para. 70.

[790] Kafkaris v. Cypress, para. 151; M. v. Germany, para. 121. Neither does decisions with respect to the place of the execution of the sentence, hereunder transfer of sentenced prisoners from one prison to another, including from a foreign prison to a prison of the home country, and even where serving the prison sentence becomes effectively harsher, cf. Müller v. the Czech Republic, pp. 7-8.

which justifies the validity of this distinction, is that the mere execution and enforcement of sanctions (and in this perspective also 'enforcement powers' more generally) are not pursuing the purpose of retribution. The retributive purpose, which functions as the main requirement for concept of sanctions, requires that the consequences (sanctions) are directly imposed on the offender for her or his personal liability for the offence committed. Instead, the execution and enforcement of sanctions rather ensures that these consequences reaches their aim and gets fully implemented and thereby en*forced*. As argued in Chapter 2, by the views of Aquinas on law and punishment, legal coercion is necessary to install virtue, and without an element of force, the fear of punishment will remain as an empty threat.[791] Therefore, as a starting point, an application of force is not an imposition of legal consequences but an implementation of legal consequences. Similarly, an aggravation of the legal consequences already imposed on the offender rather remains qualified as an implementation of the legal consequences already imposed than to the imposition of fresh legal consequences (sanctions). However, according to the rule of the exception, the execution and enforcement of already imposed sanctions may in reality qualify and therefore also function as an additional and fresh sanction *(and deprivation)* as, for instance, when a change in the method for the calculation of the sentencing it does not only concern the execution or enforcement of the sentence imposed but also has a significant impact on the severity of the sentence to the detriment of the individual;[792] or when a sentence for the imprisonment with a maximum duration then later is prolonged on the basis of an amendment to the criminal laws that abolishes the maximum duration ("automatic extension of sentence").[793] Therefore, the concept of enforcement rather deals with issues of implementation and ways to transform the consequences into reality than to impose consequences.

(II) Preventive measures

[791] Chapter 2, Section II(1)(A)(I), and ST, Vol. II, Pt. I-II, Q95, a1.
[792] Del Rio Prada v. Spain, paras. 77-118. In Gurguchiani v. Spain, the ECtHR considered the *replacement* of a prison sentence, while being served, with expulsion combined with a ten-year ban on entering the country as amounting to a penalty equal to the one imposed when the applicant had been convicted. When there are no changes in the scope of the sentences imposed, for instance, where a maximum thirty-years prison sentence remain as thirty years without any extension, then it can hardly be argued that there has been a violation of Article 7. See also Arrozpide Sarasola and Others v. Spain.
[793] M. v. Germany, paras. 134-137. The case concerned a preventive detention sentence that the ECtHR considered amounting to a sentence for imprisonment. Accordingly, the prolongation of preventive detention sentence constituted an additional penalty as modifying the scope of the original sentence. It was imposed retrospectively under a law enacted after the applicant had committed his offence. In this way the present case distinguished itself from Kafkaris v. Cypress, where, at the material time, a life sentence could not clearly be taken to amount to twenty years' imprisonment. See also Jendrowiak v. Germany; O.H. v. Germany; G v. Germany; K v. Germany; Glien v. Germany, Koprivnikar v. Slovenia; Bergmann v. Germany; W.P. v. Germany, Ilnseher v. Germany.

(1) Measures that did not involve retribution

(a) Exclusion from access and other restrictions on liberty

The cases her referred to may generally be considered to relate to what may be described as measures for the exclusion from access to ordinary liberty rights and other restrictions on liberty'. The case of Seražin v. Croatia concerned a distinction between 'protective measures', which the ECtHR considered to qualify as a sanction, and 'exclusion measures', including a temporary ban on attending sports competitions and a duty to report to the police, which the ECtHR considered to qualify as a 'preventive measure'. I refer to that discussion above.[794]

In a comparison with the case of Seražin v. Croatia and the exclusion measure, the ECtHR has also had the change to reflect on the application of a court order placing the applicant under special police supervision for two years, including, among other restrictions, a compulsory residence order on him during that time. Such court order was issued on the basis of the applicant's previous criminal convictions for drug trafficking, absconding and unlawful possession of weapons, his association with dangerous individual (mafia-type of crimes), his declaration as dangerous, and failure to comply with a police warning. Under national law, the order for special supervision and compulsory residence was considered as an application of a preventive measure (Act 1423/1956).[795] The ECtHR concluded that such measure of "special supervision is not comparable to a criminal sanction."[796] Similarly, a refusal to grant residence permit to an individual following his criminal conviction, which thereby restricted his possibility to live in a country, did also not amount to a criminal sanction.[797]

It is rather obvious from these cases that the measures applied pursued the purpose of prevention and lacked a retributive purpose. For the same reasons, the measures do not qualify as a legal sanction, and thereby cannot classify as a criminal sanction. Their categorisation under national law as 'preventive measures' are thus also a suitable label.

(b) Suitability assessments and revocation of licence

The case of Palmén v. Sweden concerned a revocation of a licence to carry weapon with the possibility to re-gain the licence, if deemed suitable. In that case, the defendant had been

[794] Section II(2)(B)(II)(1). Seražin v. Croatia should be contrast with Velkov v. Bulgaria, paras. 46-52.
[795] De Tommaso v. Italy, paras. 10-27 and 30-42.
[796] De Tommaso v. Italy, para. 143, reiterated in Seražin v. Croatia, para. 90: "was not considered to amount to a "criminal" sanction within the autonomous meaning of the Convention." See also Ciulla v. Italy, paras. 39-40; Raimondo v. Italy, para. 43; Guzzardi v. Italy, para. 100; and Timofeyev and Postupkin v. Russia, paras. 70-87.
[797] Davydov v. Estonia.

convicted by the criminal courts for assaulting his partner and imposed a suspended sentence of one month and 50 hours of community service. Despite the defendant was liable to imprisonment, he was not imposed a prison sentence because he had no earlier conviction. Approximately one year later, in separate proceedings, the Police Authority revoked the defendant's licence to carry weapon on the basis of a suitability assessment that determined whether the defendant continued to have a right to carry weapon. The criminal conviction of assault had given rise to the administrative proceedings leading to the revocation, but the administrative proceedings was not an automatic consequence of the criminal conviction. The Police Authority focused on the defendant's personal circumstances including many of the same facts relating to his conduct that formed part of the criminal conviction, such as, being under influence of alcohol, that the assault had taken place at home, and that the violence was against his partner. The defendant failed the suitability assessment, because the Police Authority considered the defendant to lack high levels of reliability, good judgement and obedience to the law, and therefore not deemed suitable to possess a weapon. The ECtHR concluded that the revocation was not taken to punish the applicant nor to "deter him from committing crimes in the future [...] the underlying object was preventive and to ensure public safety."[798] Although the revocation was "a severe measure, it cannot be characterised as a penal sanction; even if it was linked to his behaviour, what was decisive was his suitability to hold a firearm."[799] Therefore, neither "in nature [nor] severity, [the revocation was] a criminal sanction."[800]

The case of Rola v. Slovenia, which concerned *a permanent revocation of a licence as liquidator,* is very similar to Palmén v. Sweden in respect of the factual circumstances. In that case, the application had been convicted for violent behavior on two counts and imposed a suspended prison sentence, a judgement that became final on 21 June 2011. Since 9 April 2004, the applicant had a licence to work as a liquidator in insolvency proceedings, but on 27 June 2011, the Ministry of Justice revoked *ex officio* the defendant's licence pursuant to section 109 of the Financial Operations Acts prescribing that the licence had to be divested when he had been convicted of a criminal offence committed with intent. The defendant applied for a new licence, but the application was refused as section 108 of the Financial Operations Acts prescribing that a licence cannot be granted once it had been revoked. The revocation of the licence

[798] Ibid, para. 26. The ECtHR also emphasised that the applicant did not depending on using a weapon for professional purposes, and observed that the applicant may apply for a new weapon licence at any time and that, if he is deemed suitable, may be granted a licence again.
[799] Ibid, para. 27.
[800] Ibid, para. 28. See also Tre Traktörer AB v. Sweden, para. 46, concerning a withdrawal of an alcohol licence. However, in that case, the ECtHR did not apply the Engel-test.

to work as a liquidator was therefore permanent. The ECtHR first of all appreciated the case-law of the Slovenian Constitutional Court which had ruled that "although a measure that prevented a person from obtaining a licence to practise a certain profession amounted to a "legal consequence" of a conviction, it was not to be considered to be a sanction that was criminal in nature."[801] The ECtHR also noted that the relevant provisions of the Financial Operations Act provided that "to be considered suitable to perform the functions of a liquidator, a person must have no prior conviction for, inter alia, any publicly prosecutable criminal offence committed with intent," which is a purpose that do not "inflict a punishment in relation to a particular offence of which the person has been convicted, but is rather aimed at ensuring public confidence in the profession in question. It is aimed at members of a professional group possessing a special status." Hence, the revocation of the licence "did not have a punitive and dissuasive aim pertaining to criminal sanctions."[802] Finally, the ECtHR concluded that even though the revocation had a permanent effect, which itself was a rather severe consequence, then it "did not prevent him from practising any other profession within his field of expertise."[803] Therefore, the revocation of the licence did not qualify as a criminal sanction.

These cases are more difficult to justify in respect of their result and from a consistent and coherent view on the case-law of the ECtHR. In Section III(1)(B)(II) it was argued that the revocation of licence is a disciplinary sanction when the revocations are imposed on a retributive basis. These cases here discussed rather considered the revocations to qualify as a preventive measure due to the suitability assessment conducted. When a suitability assessment is a prescribed requirement for the application of a legal power there is thus a strong indication for considering the application of such legal powers to qualify as a preventive measure, even though the application of the measures more or less directly follows as an automatic consequence of the violation committed. In this way, it is the suitability assessment itself which overrules and makes the purpose of retribution devoid. In addition, the suitability assessment also overrules and makes the purpose of punishment devoid, because where a suitability assessment considers the person unsuitable to hold a licence, there is no right conferred on the person, and there is thus also not any right to be deprived. Reversely, without the prescribed suitability assessment, the revocation would (only) qualify as a disciplinary sanction.

[801] Rola v. Slovenia, para. 63.
[802] Ibid, para. 64 (all three). In comparison, the ECtHR stated in Galina Kostova v. Bulgaria that "the breaches imputed to the applicant were rules governing the specifically the duties of liquidators of insolvent companies, not rules of general application [...]; and the most severe sanction that the applicant risked was that which was in fact imposed: removal of her name from the list of persons qualified to act as liquidators of insolvent companies," cf. para. 52.
[803] Ibid, para. 66.

(2) Measures that do not involve punishment

(a) Measures requiring registration and placement in some register

In some cases, the ECtHR has assessed measures imposing requirements to be placed and / or registrate in some register, including: (i) placement and registration on a sex offender register,[804] and (ii) obligation to have a DNA profile registered.[805] These measures were more or less applicable as a direct consequence and / or automatic result and obligation of a criminal conviction and a new law that entered into force after their convictions. The ECtHR remarked that the measures do not require more than a registration or mouth swab of the offender.[806] Albeit they had "a preventive and deterrent purpose [they] cannot be considered to be punitive in nature or as constituting a sanction."[807] Instead, they "should be considered as a preventive measure,"[808] because they did not inflict a punishment upon the offender.[809] The views of the ECtHR makes it rather evident that such legal measures are pursuing the purpose of positive prevention and therefore qualify as preventive measures.

(b) Compulsory hospitalisation and preventive detention

In a number of cases, the ECtHR has had the change to assess measures for the compulsory hospitalisation and preventive detention as opposed to and in comparison with ordinary prison-sentences of imprisonment.[810] The main distinction applied by the ECtHR is whether such sentences that orders the offender for compulsory treatment actually results in a real treatment so that the punitive element is devoid, or that the element of treatment and other preventive elements are devoid because the sentence is served like any other ordinary prison sentence under detention settings that rather results in a true deprivation of liberty.[811] The manner in which

[804] Adamson v. the United Kingdom and Gardel v. France.
[805] Van der Velden v. the Netherlands.
[806] Adamson, v. the United Kingdom, p. 4; Gardel v. France, para. 45; and Van der Velden v. the Netherlands, p. 7.
[807] Gardel v. France, para. 43; Adamson v. United Kingdom, p. 4. Van der Velden v. the Netherlands, p. 7. The ECtHR considered the registration to assists in solving crimes and facilitates easier police investigations to constitute a deterrent, but also the purpose of such measures (in the particular case: DNA registration) "to contribute towards a lower rate of reoffending in sex offenders, since a person's knowledge that he is registered with the police may dissuade him from committing further offences and since, with the help of the register, the police may be enabled to trace suspected reoffenders faster," cf. Van der Velden v. the Netherlands, pp. 6-7.
[808] Gardel v. France, para. 46.
[809] Van der Velden v. the Netherlands, p. 7.
[810] Berland v. France; Bergmann v. Germany; W.P. v. Germany; Ilnseher v. Germany; M. v. Germany; Jendrowiak v. Germany; O.H. v. Germany; G v. Germany; K v. Germany; Glien v. Germany; and Koprivnikar v. Slovenia.
[811] Berland v. France, para. 38; Bergmann v. Germany, paras. 151-183; W.P. v. Germany, paras. 75-80; Ilnseher v. Germany, paras. 202-239. Compare to M. v. Germany, paras. 124-131. The ECtHR has stated: "Minor alterations to the detention regime compared with that of an ordinary prisoner serving his sentence [...], cannot, in the Court's view, mask the fact that there has been no substantial difference between the execution of the prison sentence and that of the preventive detention order against

such sentences are being executed, enforced and implemented therefore becomes crucial. The ECtHR has concluded with respect to compulsory treatment orders that they have "a preventive and remedial function, without being punitive in nature, and [do] not constitute a sanction."[812] On the other hand, when orders for the compulsory treatment or preventive detention are resulting in a true deprivation of liberty, they are nevertheless "among the most severe – if not the most severe"[813] of criminal sanctions.[814] Orders that are sentencing the offenders for a true and real remedial treatment and preventive detention qualifies as preventive measures.[815] In this way, they overrules and makes the purpose of punishment devoid.

(3) Emergency and preliminary measures

(a) Precautionary measures

The case of Escoubet v. Belgium concerned an immediate withdrawal of a driving licence for a maximum of 15 days that could be exercised by the police immediately against drunk or drinking drivers. The applicant was involved in a road accident. The police was called to the scene and ordered the applicant's driving licence to be immediately withdrawn on the ground that he was presumed to have been driving with a blood-alcohol level of over 0.8 grams per litre, which was the prescribed limit in Belgium at that time. The presumption was disputed by the applicant. As the applicant also was unable to perform a breath test at the scene of the accident, a blood test was carried out later that day. It revealed an alcohol level of 2.70 grams per litre of blood at the time of the accident. Because the applicant had not been carrying his driving licence on 16 June 1994, the police came to seize the licence at his house the next day pursuant to order for its immediate withdrawal, and it was handed over to the police. On 29 June 1995, the police court in Brussels sentenced the applicant to a fine of BEF 22,500 and disqualified him from driving in 45 days. The applicant held before the ECtHR that the immediate withdrawal of his driving licence felt within the criminal-head of Article 6.

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the applicant," c.f. e.g. O.H. v. Germany, para. 106 and G v. Germany, para. 73. In Bergman v. Germany, the ECtHR stated that the "punitive element and its connection with his criminal conviction, is eclipsed to such an extent that the measure is no longer to be classified as a penalty within the meaning of Article 7" cf. para. 182.

[812] Berland v. France, para. 44. Preventive measures therefore are not protected by Article 7. Other measures associated with a declaration of criminal insanity must also "be seen as measures of a preventive nature," cf. para. 46. In Berland v. France, in addition to the compulsory hospitalisation, the applicant was also ordered two other measures: a twenty-year ban on entering into contact with the complainants and on possessing a weapon. These two bans were for same reasons as compulsory hospitalisation also considered as preventive measures, cf. Berland v. France, paras. 45-46.

[813] M v. Germany, para. 132. See also Jendowwiak v. Germany, and Glien v. Germany.

[814] O.H. v. Germany, para. 106; G v. Germany, para. 73; and K v. Germany, para. 82.

[815] Bergmann v. Germany; W.P. v. Germany; and Ilnseher v. Germany. In respect placement of mentally disturbed offenders in a psychiatric hospital, see further the cases of Kerr v. the United Kingdom; Antoine v. the United Kingdom; Valerity Lopata v. Russia; and Vasenin v. Russia.

The ECtHR first noted in respect of the first Engel-criterion that "the fact that immediate withdrawal is a measure governed by the consolidated Acts of 16 March 1968, which constitute a separate criminal statute, is not decisive. The fact that a measure is provided for in a criminal statute of a respondent State does not in itself signify that is falls within the scope of Article 6 of the Convention."[816] The ECtHR further emphasised that the criminal procedural safeguards laid down in Article 6 "do not, as a rule, apply to various preliminary measures which may be taken as part of a criminal investigation before bringing a "criminal charge", such as arrest or interviewing of a suspect."[817] In this respect, the ECtHR observed that the immediate withdrawal of the applicant's driving licence occurred before he was formally charged. However, the ECtHR reiterated "that the concept of a "penalty" in Article 7 is, like the concept of "criminal charge" in Article 6 [...], an autonomous one."[818] Therefore, the ECtHR continued the assessment pursuant to the second Engel-criterion.

In the assessment of the second Engel-criterion, the ECtHR laid down what it later, in Seražin v. Croatia, has referred to as Escoubet methodology (/ test).[819] The Escoubet methodology consisted in comparing the particular legal power at dispute, i.e. the immediate withdrawal of a driving licence, with what Belgian criminal law considered a (criminal) sanction. Accordingly, the ECtHR stated in respect of the disputed measure:

> "The immediate withdrawal of a driving licence appears to be a *preventive measure* for the safety of road-users temporarily, designed to take a driver who is potentially dangerous to the other road-users temporarily off the roads. It should be compared with the procedure of issuing a licence, which is undoubtedly an administrative procedure and is aimed at ensuring that a driver is fit and qualified to drive on the public highway. The immediate withdrawal is a *precautionary measure*; the fact that it is an *emergency measure* justifies its being applied immediately and there is nothing to indicate that its purpose is punitive."[820]

According to the second part of the test, the ECtHR then went on a compared the immediate withdrawal of a driving licence with the sanction:

> "Withdrawal of a driving licence is distinguishable from disqualification from driving, a measure ordered by the criminal courts at the end of criminal proceedings. In such a case, the criminal court assesses and classifies the facts constituting the offence which may gave rise to disqualification, before imposing disqualification for a period it deems appropriate, as a principal or secondary penalty. There is, moreover, a notable difference between the maximum period for which disqualification can in normal circumstances be ordered and that for which a driving licence can be withheld after immediate withdrawal: five years (or even permanent disqualification in certain circumstances) in the former case; fifteen days (which may be increased to forty-five in special circumstances in the latter case."[821]

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[816] Escoubet v. Belgium, para. 34.
[817] Ibid.
[818] Escoubet v. Belgium, para. 35.
[819] Seražin v. Croatia, para. 72. See also Blokker v. the Netherlands.
[820] Escoubet v. Belgium, para. 37.
[821] Ibid. See also Malige v. France, para. 38.

The immediate withdrawal of a driving licence was thus not comparable to a standard case of a similar criminal sanction under Belgian criminal law. Therefore, the ECtHR concluded that the "impact of such a measure, in scope and in length, is not sufficiently substantial to allow it to be classified as a "criminal" penalty,"[822] and "Article 6 is not applicable under its criminal head."[823] The preliminary and emergency nature and purpose of such a legal power for the immediate withdrawal of a driving licence seems to justify that such and similar legal powers rather should to be sub-categorised as a 'precautionary measure' under the concept of 'preventive measures', because distinct from the latter, the former measures rather sets aside, freeze and/or suspend the exercise of certain rights for the purpose of avoiding that certain present dangers, with serious and detrimental consequences, to unfold and become a reality. The concept of 'preventive measures' are rather linked to various and more broad types of measures that aims to prevent law breaking or that crimes occur, including in comparison such preventive measures as discussed just above, and driving bans applied on the basis of a suitability assessment;[824] driving bans imposed as a preventive measure after repeated road traffic violations and convictions;[825] and educational measures for alcohol and traffic.[826]

(b) Provisional measures

The power to seizure property seems to follow many of the same principles discussed in Escoubet v. Belgium. In Section III(1)(A)(II)(1) it was also argued that the measure of seizure of property qualified as a provisional measure.[827] Just like the forfeiture orders, the ECtHR considered the seizure of assets (property) to be a preventive measure guaranteeing that crime does not pay "by depriving the beneficiaries of crime from the proceeds thereof."[828] However, the seizure order was under national law also considered as a 'provisional measure' for the later forfeiture of the seized assets once it had been proved that the assets originated from a crime / act liable to punishment. This was acknowledged by the ECtHR as the seizure order also "aimed at preventing persons suspected of a criminal offence from frustrating the forfeiture of the assets obtained as a result thereof."[829] Accordingly, the seizure order was applied

[822] Escoubet v. Belgium, para. 38.
[823] Escoubet v. Belgium, para. 39. See also Hangl v. Austria v. Austria, and Nicolae Virgiliu Tănase v. Romania, para. 135.
[824] Becker v. Austria.
[825] Matijašić v. Croatia.
[826] Blokker v. the Netherlands.
[827] Dassa Foundation and Others v. Liechtenstein.
[828] Dassa Foundation and Others v. Liechtenstein (pp. 17-18).
[829] Dassa Foundation and Others v. Liechtenstein (p. 17). Just like the forfeiture order, the seizure order was meant to comply with the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime signed on 8 November 1990.

provisional to the latter forfeiture order. It was applied on an emergency and preliminary basis in order to ensure and preserve that the seized property latter could be subject to a forfeiture. As the seizures of property generally may lead to forfeiture (or confiscation) or property, seizure orders seems better to fit a distinct sub-category under the concept of preventive measures, even from precautionary measures as they do not necessarily lead to a specific sanction, that is: 'provisional measures'. For similar reasons, an ordinary *'arrest'* by the police, seems also to justify a categorisation as a provisional measure.[830]

D. Conclusions

The discussions above in Sections III(1)(A)-(C) had a primary focus on the purpose (i), nature (ii) and severity (iii) of sanctions, in particular the latter two as the discussions in Section II and conclusions in Section II(4) were more devoted to the purposes of sanctions. Therefore, the main objective here is not only to conclude on the discussions in Section III(1), but also to bring forward the views and principles that together characterises the sanction theory that more or less directly is applied and manifesting in the case-law of the ECtHR. On this basis, the following conclusions and principles can be deduced as governing the concept of a legal sanction, including in respect of the qualification and classification of sanctions, as well in respect of distinguishing the concept of a legal sanction from other types of legal powers.

First, it is the mere fact that the offender, as a natural or legal person, has committed a violation of a law that *sanctions* the imposition of a legal sanction. All legal sanctions are therefore characterised by the legal consequences that are directly imposed on the offender, and of which the offender must endure to suffer. In this way, the concept of a legal sanction corresponds and is in line with the logical doctrine of retribution discussed in Chapter 2.[831] Within the legal rather than the philosophical realm, this entails that personal liability (guilt) for the commission of the violation(s) must be established by some sanctioning authority, which therefore also typically has a number of different types of sanctions available to be imposed on the offender as either a natural or legal person. The different types of legal consequences imposed on the offender manifests in these different types of sanctions available to the sanctioning authority. When the sanctions are directly imposed on the offender, the sanctions will thus pursue the purpose of retribution. In this way, the retributive purpose also

[830] Escoubet v. Belgium, para. 34.
[831] Chapter 2, Section II(1)(A)(III) and Section II(1)(C)(I), in particular the views by Quinton.

functions as the main and fundamental requirement for identifying a legal sanction. Without the retributive purpose, the case-law reveals that the legal powers applied by the authorities rather qualifies as 'preventive measures', because they tends to pursue the purpose of positive prevention. This is most evident from the cases where the application of certain legal powers is due to a suitability assessment. The suitability assessment does *not* establish personal liability for the particular violation committed. Rather, the assessment takes into account a number of factual circumstances, including, typically, any previous convictions for different but relevant types of violations committed in order for the authorities to determine whether the person still is deemed suitable or worthy for holding, or to continue to hold, a license-based (civil) right. A positive assessment thus functions as the fundamental requirement for hold the right and to exercise the activity that is linked-in with that particular right. The fact that a commission of a violation motivates the authorities to conduct a new suitability assessment of the person in question, which is also an offender for the previous violation committed, does not alter the fact that it is the suitability assessment that provides the legal basis for the application of the legal powers in question, and not the personal liability for the violation. Accordingly, when the person (which therefore often also will be an offender) is deemed *un*suitable or *un*worthy to hold or to continue to hold such a right, no right is then conferred on the person. When the person does not hold any right, the person cannot either be subject to any true deprivation of a right. Therefore, the purpose of 'retribution' and the 'deprivation of a right' functions as the two main legal requirements for characterising and identifying a legal sanction.

From the case-law it therefore also follows more or less directly that 'a deprivation of a right' is the essential nature and thereby the governing archetype of all legal sanctions, in particular all of the punitive sanctions as opposed to the reparatory sanctions (to be discussed in the following). Within the Engel-test, the essential nature and governing archetypes were found to be deprivations of the rights to liberty and property, civil right, and political rights. Outside the scope of the Engel-test, but within the scope of the ECHR, deprivations of life, liberty and bodily safety (prohibition against torture) was also argued in Section II(2)(C)(I) to provide the archetypes that may governed Articles 2-5 ECHR. From these discussions, and the results and conclusions made by the ECtHR, it thus follows for the classification purposes of the Engel-test and Articles 6-7 and 4-P7 that there exists a hierarchical order of rights, where only some of the rights-deprivations and governing archetypes are attributed to and therefore classifies as criminal sanctions, while others are attributed to and therefore signifies the

disciplinary sanctions. The classification of sanctions under the Engel-test therefore establishes a right-based theory and sanction philosophy that governs the concept of a legal sanction.

The governing archetype and essential nature of all punitive sanctions is the '*deprivation of a right'*. The purposes that are attributed to the criminal sanctions are: (1) retribution, (2) punishment, and (3) deterrence. First and foremost, the purpose of 'punishment' and the concept of a 'punitive sanction' is therefore governed by the notions and archetypes of a deprivation of a right to liberty and property under the Engel-test. Albeit the Engel-test has not been used to deal with cases that related to deprivations of life and bodily safety, it seems reasonable and fair also to attribute to the concept and class of criminal sanctions the deprivations of the rights to life and bodily safety. Afterall, these two human rights are evidently of an even more fundamental nature to all natural persons than the rights to liberty and property, and there will be much less of a need for using the Engel-test in respect of such sanctions. As the case-law also reveals, the Engel-test is much more relevant for determining the reality of the sanctions and other types of legal powers that affects the right to liberty, property, and civil and political rights. However, even in respect of deprivations of liberty, the Engel-test is rather settled as it functions as one of the main archetypes that governs the class of non-pecuniary criminal sanctions. The is most evident in respect of imprisonment and similar custodial and incarcerating sanctions served in a prison or detention-setting, because the ECtHR considers these sanctions as punitive and deterrent, and they are triggering the criminal guarantees in Articles 6-7 and 4-P7 almost irrespective of the length of the prison-sentence and whether the offender violated a criminal or disciplinary norm. Imprisonment excludes the offender from the general circulation in the society and thereby also from having access to and enjoy the ordinary life and liberty rights in the society. While imprisonment functions as the main example of non-pecuniary criminal sanctions, then the prohibition of the right to drive a car might point to another as some deprivations have resulted in criminal classification of the sanction due to the third Engel-criterion. This point to a rather unsettled question under the Engel-test, that is, the scope of the concept of 'liberty rights'? A right to drive a car is a licence-based right, which typically signifies the existence and concept of 'civil rights', but when such a deprivation is resulting in a criminal classification of the sanction, the result rather indicates that the *exercise* of the civil right in reality might qualify as (the exercise of) a general and ordinary liberty right. The case-law is unsettled and unclear because the ECtHR is not explicit on such questions. Nevertheless, it points to a more fundamental distinction underlying the results of the ECtHR's case-law between the scope of 'liberty rights' and / or 'ordinary liberty

rights' on the one side and the scope of 'civil rights' on the other side. To the extent that the exercise of a civil right has a rather general application in the society, and it is useful to everyone irrespective of their occupation or profession, the essential nature of the governing and underlying right rather qualifies as a liberty right than a civil right. This also illustrates the dynamic aspects of the *living* archetypes within the ECHR as a *living* document: an initial civil right may during the course of time and the developments in and evolvement of the society carry an inherent ability and potential for transforming into a liberty right, similar to the example of a withdrawal of a driving-licence. If this interpretation stays correct, and deprivations of liberty rights rather than civil rights signifies the criminal sanctions, the task will remain during the course of time to assess whether the exercise of civil rights in the society may have evolved and transformed into liberty rights. This observation is relevant for all types of sanctions.

Perhaps the most clear-cut distinction between criminal sanctions and non-criminal sanctions can be made in respect sanctions that affects the right to property, in particular the pecuniary sanctions due to the usefulness of the principle of restitution and the fundamental requirement of 'level of restoration' derived therefrom. How pecuniary sanctions reaches beyond the level of restoration has already been discussed in many places of this Chapter,[832] but it is also worth noting that this requirement is useful to establish a closer theoretical connection between the purposes (i) and nature (ii) of criminal sanctions. Only to the extent that the pecuniary sanction is higher than what would amount to a reparatory pecuniary sanction, the offender can be considered subject to a true and real deprivation of property. This therefore entails that the concept of 'reparatory pecuniary sanctions' functions as the archetypical pecuniary sanction that governs the notion of non-criminal pecuniary sanctions, while the concept of a 'fine' functions as the archetype that governs the notion of criminal pecuniary sanctions. These views and principles that thus makes up the concepts of reparatory pecuniary sanction and a fine were also found applicable in respect of property that did not concern money, and thus also applicable in respect of any type of assets carrying a pecuniary, monetary or financial value, thereby covering property and property rights more generally. Moreover, these notions also governed the assessments of whether confiscation and forfeiture orders classified as a criminal sanction, because the ECtHR observed whether the confiscation or forfeiture may result in, or are restricted to, the actual enrichment of the offender, or they are carrying an inherent potential to go beyond the level of restoration, and thereby also whether they were comparable to a fine. Their classification therefore calls for an individual assessment of the

[832] See Section II((2)(B)(II)(2)(a)(3)) and Section II(4).

maximum severity prescribed by the law governing their application. However, according to the case-law, 'confiscation orders' may rather typically be allowed to reach beyond the level of restoration and therefore also classifies as a criminal sanction due to the twin-objectives of punishment and deterrence, where 'forfeiture orders' are not allowed to reach beyond the level of restoration as they typically are carrying an inherent restriction to the actual enrichment of the offender and therefore qualifies as a reparatory and preventive sanction. Accordingly, a forfeiture order does also *not* result in any true and real deprivation of property, because it would require that the forfeiture actually reaches beyond the level of restoration. Therefore, an order for the forfeiture of (monetary) assets qualifies as a non-criminal pecuniary sanction.

This points to the general principles laying out the sanction theory in respect of pecuniary sanctions. It was argued in Section II that criminal pecuniary sanctions may, and often inherently will, pursue complementary purposes of punishment and deterrence on one side and reparation and prevention on the other. This view is logical consequence of the fundamental criterion of level of restoration and principle of restitution. Thereby, a tax surcharge, for instance, contains a reparatory and preventive amount by compensating or repairing for the pecuniary loss caused to the state as a victim of the violation committed, and a punitive and deterrent amount imposed as a punishment to deter against future tax law violations. Along similar lines, it could thus also be argued that a confiscation order that is allowed to reach beyond the level of restoration in reality often also will contain a forfeiture of the proceeds derived or other types financial assets acquired due to the violations committed and an additional deprivation of money or other financial assets beyond the level of enrichment. In this way, there is hardly no conceptual different between the concept of a 'fine' and a 'confiscation order', because both results in a true deprivation of property. Neither is there hardly any conceptual differences between a 'reparatory pecuniary sanction' and a 'forfeiture order', the latter governed by the archetype and notion of the former, because the reparatory pecuniary sanctions and forfeiture orders does not result in any true deprivation of property when they are restricted to the actual and illegitimate enrichment of the offender. Finally, a strict application of these principles also makes the comparison between the autonomous notion of a 'criminal sanction' and the autonomous and more broad notion of a 'criminal charge' more evident and concrete. For instance, if national criminal law allows the criminal courts to forfeit proceeds derived from crime in order to prevent the proceeds from being used for further commission of crimes, the ECtHR *will* most likely find the criminal guarantees contained in Articles 6-7 and 4-P7 applicable. However, if the ECtHR would reach such a result, the result would not be a

consequence of the autonomous notion of a 'criminal sanction', but a consequence of the autonomous notion of a 'criminal charge'. The legal basis of the forfeiture order within national criminal law satisfies the first alternative Engel-criterion, and the involvement of the criminal courts is one of the classification factors that both provides criminal colours to the sanction and charge, but in this case it would not accord with the principles that governs the autonomous notion of a criminal sanction, because the forfeiture order only pursues the purposes of reparation and positive prevention and does not result in any true and real deprivation of property.

The archetypes and deprivations of the rights to life, bodily safety, liberty, and property have a higher place in the hierarchical order of rights than deprivations of civil rights and political rights, because the former right-deprivations will as a main rule qualify and classify as 'criminal sanctions', while the latter right-deprivations (only) will qualify and classify as 'disciplinary sanctions'. We therefore turn to the exceptions and the legal position and principles that governs the concept of disciplinary sanctions. First, an important exception applies in respect of deprivations of property and what was referred to as 'disciplinary fines' as compared with the concept of 'criminal fines'.[833] The concept of a 'disciplinary fine' entails that a fine is imposed for the violation of law provisions that are governed by disciplinary norms and that they by their maximum level of severity under the third Engel-criterion will not result in a criminal classification. For natural persons, a disciplinary fine at around EUR 43,750 has not been re-classified as a criminal sanction. This amount is not an absolute amount, but nevertheless indicative of those high maximum levels that have not deserved a criminal classification. For legal persons, no similar amount for disciplinary fines has been given in the case-law. The concept of a 'criminal fine' entails that a fine is imposed for the violation of law provisions that are governed by disciplinary norms almost irrespective of the maximum level of the fine. This entails a rather paradoxical view and legal position in respect of deprivations of property that a small (and unsignificant) fine imposed for the violations of general norms are punitive and deterrent and therefore classifies as criminal sanctions, while very high fines imposed for the violations of disciplinary norms are considered punitive, but not deterrent, and therefore classifies as disciplinary sanctions. This legal position is due to the strength of the first Öztürk-criterion under the second Engel-criterion. Albeit this may conflict with the reality actually experienced by the offenders, because such disciplinary fines will be experienced as much more punitive, deterrent and severe than small (100 Euros or less) fines for traffic or tax-violations (violations of general norms), then it remains the legal position under the Engel-test.

[833] Section III(1)(A)(II)(a).

However, this legal position points to a more important and general conclusion in respect of the hierarchical order of rights and the strength and placement of the different archetypes therein, that is, while deprivations of liberty will almost always result in a criminal sanction, irrespective of whether the offender has violated laws governed by criminal or disciplinary norms, then the deprivations of property depends more upon the essential nature of the governing norms that has been violated. Therefore, deprivations of liberty is a stronger archetype, and thus placed higher in the hierarchical order, than deprivations of property.

In hierarchical order of human rights, the archetypes and deprivations of civil rights and political rights are placed lower than deprivations of property rights. A permanent deprivation of civil rights does not result in a classification as a criminal sanction, unless the direct consequences imposed on the offender have rather general implications for the life and liberty of the offender. Thereby, it may also be questioned whether it actually is a civil right at stake or the sanctions in reality affects the liberty rights of the offender. A deprivation of the civil right to exercise the profession as an attorney or liquidator only imposes very specific and narrow consequences on the offender, because the offender may still make use of her or his law degree in another context than that of an attorney or liquidator. The sanctions imposed, in some way or another, thus have to transgress the specific scope of the civil right-deprivation and affect the performance of her or his professional life more generally in order for the sanctions to classify as criminal sanctions. In this way, the distinction between the general and specific scope of the sanctions accords very similarly with the distinction already made between general and specific scope of the norms violated under the first Öztürk-criterion of the second Engel-criterion. The same principle also conforms with what has become the governing and applicable distinction in respect of deprivations of political rights, because the distinction between the *'active right'* to cast a vote at an election and the *'passive right'* to stand for election is a distinction between the general and specific scope of political rights in the way that everyone (or almost everyone) have the right to cast a vote at (parliamentary) election while the right to stand for an election is specific and only applicable to those that either runs for an election or already have been elected. Therefore, the active right to vote resembles more the essential and general nature of liberty rights, while the passive right to stand for an election resembles more the specific nature of civil rights to exercise a certain profession.

When all sanctions, except reparatory sanctions, results in a deprivation of a right, a question arises with respect to why deprivations of civil rights and political rights also not are considered to pursue the twin-objectives of punishment and deterrence? – A positive answer

would perhaps require that the fundamental requirement of 'level of restoration' also can be applied in respect of the non-pecuniary sanctions as a governing principle. If a disciplinary offence was required to be repaired by the offender so that the (ongoing) violation was terminated and the legal position of the offender restored back into compliance with the law, the offender had been subject to reparatory non-pecuniary sanction that also pursued the purpose of positive prevention, because the reparation of the legal position into compliance would also prevent the continuation of the violation. However, this is not a full account of the legal consequences imposed on the offenders for their commission of a disciplinary offence, because in addition they are not allowed to continue to practice their profession as the prohibition deprives the offenders of their civil right to exercise her or his profession on either a temporary or permanent basis. This additional element of civil-right deprivation, manifesting in the duration / years of the prohibition essentially imposed, is that not equivalent to legal consequences that reaches beyond the level of restoration? – The case-law of the ECtHR does not allow to conclude so, but the logical implications of the governing principles may. The realities of the consequences is that they to the offender also serves the function and pursues the purpose of punishment and deterrence like any other right-deprivation. However, this is not legal position of the ECtHR. Rather, in respect of the long-standing legal tradition of the Member States to distinguish between criminal law and disciplinary law provides for more of a political stance, that such sanctions resulting the deprivations of a civil right are first and foremost belonging to the disciplinary sphere. Therefore, disciplinary fines can be punitive, but not deterrent. Therefore, civil rights-deprivations are neither punitive nor deterrent within the meaning of negative prevention, but preventive in the positive and political sense so that civil rights-deprivations prevents the offender from causing further damage or harm to the particular profession and aim to restore the reputation of that profession and public confidence therein. Whether the legal consequences directly imposed on the offender, also to the offender qualifies as legal consequences in pursuit of punishment and deterrence is thereby disregarded.

Finally, the concept of a legal sanction must also be distinguished from the concepts of 'enforcement powers' and 'preventive measures'. The concepts of enforcement powers and preventive measures are first and foremost characterised by the lack of retribution and an absence of an intention to inflict a punishment on the offender and to deter against repetition against the commission of a violation. The concept of *'enforcement powers'* means that the authorities' application of legal powers is an application of force in the way that their consequences not only aim but also are implemented, and thereby transforms into and becomes a

reality. Therefore, sanctions can also form part of the application of an enforcement power as when an offender due to the prison-sentence actually is put into prison. Without such an enforcement and execution of legal sanctions, they would just remain as empty threats without any real punitive and deterrent effect and value. On the other hand, the case-law also requires that a distinction is made in respect of enforcement powers and legal sanctions, or moreover between the enforcement and execution of sanctions and the imposition of sanctions. For example, the case-law reveals that a prolongation of the original prison-sentence does not qualify as an enforcement power, because the offender is still held liable to the original offence committed, which served as the legal basis for the original sentence imposed, but now also, in addition, may suffer an extension of the duration of that prison-sentence, wherefore it rather qualifies as an additional criminal sanction in the form of a fresh and further deprivation of liberty. The concept of *'preventive measures'* must be negatively defined, because their application requires that the purposes of retribution and / or punishment are eclipsed to such an extent that these purposes as made devoid. Accordingly, their application must not be due to the establishment of personality liability for a criminal or disciplinary offence committed, or the legal consequences does not result in any true deprivation of a right, as when the offender is ordered a treatment sentence in comparison to an ordinary sentence of imprisonment. True preventive measures may nonetheless be applied on the basis of a previous conviction for a criminal offence or disciplinary offence, when the facts that also made it possible to establish personal liability of the offender for the commission of the criminal or disciplinary offence, also provides and makes up the evidence, typically in the form of circumstantial evidence, for deeming that same person / offender as *un*suitable to hold a licence or to be the legitimate owner of property in question. Furthermore, then some preventive measures also categorises as *'precautionary measures'*, because such measures may be applied immediately to hinder and / or avoid that dangerous situations or significant safety concerns with serious and detrimental consequences, they unfold and becomes a reality. Other preventive measures instead categorises as *'provisional measures'*, because their purpose is to freeze and / or restrict the control- and / or disposal-rights over property in order to ensure that there will exist property for a possible later confiscation or forfeiture ('seizure orders'), or that a natural person does not escape the jurisdiction of the criminal courts and thus remain available for a due trail and a later possible conviction ('arrests'). Accordingly, the emergency and preliminary purposes of the precautionary and provisional measures are generally and legitimately setting aside, freezing and / or suspending the exercise of certain rights on a temporary basis without any

intention to impose a direct punishment on the persons who are affected or to establish any personal liability for some criminal or disciplinary offence committed.

2. The scope of the Engel-test

A. The scope of the Engel-test under the ECHR

Since the Engel and Welch cases, the ECtHR has on the basis of the Engel-test found the criminal guarantees in Articles 6-7 and 4-P7 applicable within areas of national law that did not classify as criminal law. This result was either due to the existence and imposition of criminal sanctions or that the defendant / offender more broadly was subject to a criminal charge / offence / proceedings. Therefore, the long history of the Engel-test makes it possible to (attempt to) provide an overview of those areas of law, where the Engel-test have found the criminal guarantees applicable. The following table only provides for a non-exhaustive attempt (unfortunately), and the footnotes provides refers only to some of the main cases:

- Laws regulating drugs and narcotics;[834]
- Military law regulating behaviour of soldiers;[835]
- Detention law regulating behaviour of prisoners;[836]
- Traffic law regulating the safe use of roads and vehicles;[837]
- Laws regulating "Minor offences;"[838]
- Laws regulating "Administrative offences;"[839]
- Securities law, particularly market abuse;[840]
- Laws regulating banks and investment firms;[841]
- Competition laws, particularly anti-competitive behaviour;[842]
- Tax and value-added tax (VAT-) law;[843]

[834] E.g. Wilkinson and Allen v. the United Kingdom; Welch v. the United Kingdom; Jamil v. France; Göktan v. France; and Tomasovic v. Croatia.
[835] E.g. Engel and Others v. the Netherlands; Mills v. the United Kingdom; Moore and Gordon v. the United Kingdom; Findlay v. the United Kingdom; Wilkinson and Allen v. the United Kingdom; Smith and Ford v. the United Kingdom.
[836] E.g. Campbell and Feel v. the United Kingdom; Ezeh and Connors v. the United Kingdom; and Mariusz Lewandowski v. Poland.
[837] E.g. Öztürk v. Germany; Lutz v. Germany; Schmautzer v. Austria; Umlauft v. Austria; Palaoro v. Austria; Pfarrmeier v. Austria, paras; Escoubet v. Belgium; Malige v. France; Kammerer v. Austria; Gradinger v. Austria; Baischer v. Austria;; Kantner v. Austria; Franz Fischer v. Austria; Sailor v. Austria; W.F. v. Austria; Nilsson v. Sweden; Bachmaier v. Austria; Falkner v. Austria; Schutte v. Austria; Stempfer v. Austria; Hauser-Sporn v. Austria; Oliveira v. Switzerland; Berdajs v. Slovenia; Mesesnel v. Slovenia; Michalache v. Romania; Marčan v. Croatia; Bajčić v. Croatia; and Igor Pascari v. the Republic of Moldova.
[838] E.g. Lauko v. Slovakia; Kadubec v. Slovakia; Čanády v. Slovakia, Flisar v. Slovenia; Galstyan v. Armenia; Nicoleta Gheorghe v. Romania; Özmat Insaat Elektrik Nakliyat Temizlik San. Ve. Tlc. Ltd. Sti. v. Turkey; Igor Tarasov v. Ukraine; Maresti v. Croatia; Muslija v. Bosnia and Herzegovina; Milenkovic v. Serbia; and Galović v. Croatia.
[839] E.g. Ziliberberg v. Moldova; Luchaninova v. Ukraine; Anghel v. Romania; Muller v. Austria, Sancakli v. Turkey; Asci v. Austria, Kasparov and Others v. Russia; Khmel v. Russia; Asadbeyli and Others v. Azerbaijan; Sergey Zolotukhin v. Russia; Tsonyo Tsonev v. Bulgaria (No. 2); Simkus v. Lithuania; Milenkovic v. Serbia; Balsytė-Lideikienė v. Lithuania; Menesheva v. Russia; Nemtsov v. Russia; Mikhaylova v. Russia; and Korneyeva v. Russia.
[840] E.g. Grande Stevens and Others v. Italy; Georgouleas and Nestoras v. Greece; Messier v. France; and Didier v. France.
[841] E.g. Dubus S.A. v. France.
[842] E.g. Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia; Carrefour v. France; Société Stenuit v. France; A. Menarini Diagnostics S.r.l. v. Italy; and Lilly France S.A. v. France. Compare with OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service v. Russia.
[843] E.g. Bendenoun v. France; A. P., M. P. and T. P. v. Switzerland; E.L., R.L. and J.O.–L. v. Switzerland; J. B. v. Switzerland; Benham v. the United Kingdom; Jussila v. Finland; Nadtochiy v. Ukraine; Zaja v. Croatia; Dungveckis v. Lithuania; Hannu

- Customs law;[844]
- Trade law regulating import and export trade;[845]
- Laws regulating planning permission for construction;[846]
- Budgetary and financial matters;[847]
- Social security legislation;[848]
- Laws regulating defamatory libel;[849]
- Laws on sports competitions and other events;[850]
- Lustration proceedings;[851]
- Procedural law regulating good conduct in court.[852]

Many of these legal areas may and will often be considered as disciplinary law due to their governing norms. Military law, detention and prison law, and procedural law are very typical examples. Legal areas which perhaps may be considered as a rather new and emerging legal areas governed by disciplinary norms can be such as: laws and proceedings regarding appropriate sportsmanlike conduct before sport federation tribunals and similar sports-related proceedings.[853] Disciplinary law seems also to cover vetting proceeding for judges,[854] and non-compliance with awarded public contracts.[855] In the key case of Ramos Nunes de Carvalho e Sá v. Portugal, the ECtHR also made a more general and thorough effort, on the basis of cases decided in its case-law, to point out a number of examples of legal areas governed by disciplinary norms by emphasising certain professions.[856] From a methodological approach, it can to some extent be presumed as a starting point for the application of the Engel-test that the law and sanctions in question are disciplinary law and sanctions, unless the Engel-test determines otherwise and points to the existence of a criminal sanction or criminal charge. The notion of a *'regime of punishment'* is therefore an inherent and inseparable element of the Engel-test, because the ECtHR must either point to a criminal sanction or some other criminal elements that makes the ECtHR justify why the offender has been subject to a criminal charge.

Lehtinen v. Finland; Segame Sa v. France; Ponsetti and Chesnel v. France; Isaksen v. Norway; Routsalainen v. Finland; Carlberg v. Sweden; A and B v. Norway, Lucky Dev v. Sweden; Häkkä v. Finland; Nykänen v. Finland; Glantz v. Finland; Johannesson and Others v. Island; Pirttimäki v. Finland; Kiiveri v. Finland, Rinas v. Finland; and Österlund v. Finland.

[844] E.g. Salabiaku v. France.

[845] E.g. Garyfallou AEBE v. Greece.

[846] E.g. Zigarella v. Italy; Sud Fondi S.r.l. and Others v. Italy, Varvara v. Italy; G.I.E.M. S.r.l. and Others v. Italy; and Goulandris and Vardinogianni v. Greece.

[847] E.g. Guisset v. France.

[848] E.g. Hüseyin Turan v. Turkey.

[849] E.g. Demicoli v. Malta.

[850] E.g. Velkov v. Bulgaria. Contrast with Seražin v. Croatia.

[851] E.g. Matyjek v. Poland. Compare nevertheless to Sidabras and Diatas v. Lithuania, and Polyakh and Others v. Ukraine.

[852] E.g. Weber v. Switzerland; T. v. Austria; Kyprianou v. Cyprus. Compare to: Ravnsborg v. Sweden; Putz v. Austria; Veriter v. France; Schreiber and Boetsch v. France; Kubli v. Switzerland; Toyaksi and Others v. Turkey; Zugic v. Croatia; and Gestur Jónsson and Ragnar Halldór Hall v. Iceland.

[853] Ali Rıza and Others v. Turkey, para. 154. See also Platini v. Switzerland.

[854] Xhoxhaj v. Albania, para. 244.

[855] Prina v. Romania, paras. 45-62.

[856] Ramos Nunes de Carvalho e Sá v. Portugal, para. 123.

The standards and principles that governs the concept of legal sanction and its classification and the standards and principles that governs the criminal classification factors for the charge and sanctions and points towards the existence of regime of punishment is the substratum derived from an enormous case-law that has assessed the fundamental structures of the laws and institutional settings of the states being parties to the ECHR over a long period time since the landmark case of Engel and Others v. the Netherlands. The standards and principles are therefore also *principles of international criminal law*. Together they make up a blueprint for what can be considered and applied as *substantive criminal law*.[857] For instance, in respect of EU criminal law and whether the CJEU will have a need to qualify and classify a certain type of legal power, Klip has argued that "[it] is likely that the Court will follow the *Engel* criteria developed by the ECtHR."[858] This entails that the principles and results that can be derived from the ECtHR's application of the Engel-test will function as standards and principles for the assessment to be conducted by the CJEU. Certain norms is also held as criminal norms by the ECtHR. In respect of (anti-) competition law, the purpose of preserving free competition in markets is a purpose that seems to be settled as to be in the general interests of the society and thus qualifies as a criminal norms. Reparatory sanctions also functions as the autonomous notion and archetype that governs a large variety of different type of legal sanctions under the class of non-criminal sanctions. The ECtHR has determined that where the sanction regime administered by a certain supervisory administrative authority only allows for the imposition of reparatory non-pecuniary sanctions and not the power to impose punitive and deterrent sanctions, the criminal guarantees will not apply. For instance, the ECtHR has held that: "to determine the existence of a violation of the competition rules, demand that the undertaking cease the violation and impose on the undertaking certain measures which it considered suitable for remedying the established violation and its consequences"[859] in order to "restore the normal market situation,"[860] then the "supervision proceedings [do not] involve the determination of a "criminal charge" within the meaning of Article 6."[861] This view is representing a very strong and general principle that often provides for the most decisive distinction under the Engel-test, i.e. between reparatory sanctions and punitive and deterrent sanctions.[862] Therefore, in respect of the areas of law from the overview above, the sanction regimes found

[857] Andre Klip, *European Criminal Law: An Integrative Approach* (4th edition, Intersentia Ltd 2021) 2.
[858] ibid 243. Italics maintained.
[859] Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, para. 42.
[860] Ibid, para. 43.
[861] Ibid. Emphasis maintained.
[862] Pieter and others (n 2) 529. The "the purpose of the penalty, as the other aspect of the second criterion, mainly serves to distinguish criminal sanctions from purely reparatory and compensatory sanctions."

applicable within these legal areas have often more generally pointed to the existence of a punishment regime either because of the existence of criminal sanctions and / or in combination with the criminal classification factors for charge / offence / proceedings.

B. The scope of the Engel-test within the European legal order

(I) The EU constitutional basis for the Engel-test and the concept of sanctions

The case-law of the CJEU reveals that in various legal contexts the CJEU has had a need to either refer, adhere or apply the Engel-test and the results derived by the ECtHR's application thereof. Since the landmark cases of C-489/10 – Bonda and Case C-617/10 – Fransson,[863] the case-law on primarily Article 50 EUCFR seems to suggest that the application of the Engel-test will be gradually expanded into an increasing number of cases within very different areas of EU law and national law. In respect of the latter, this may primarily be the situation where the legal position under national law either will consist of a direct application of EU Regulations or be based on the implementation of EU Directives, and where these EU Regulations and EU Directives provides legal bases for the direct application and / or implementation of a sanction regime to be administered by a national administrative authority as they make a number of different sanctioning powers available to that authority. Therefore, the purpose here is to discuss the results and principles can be deduced from the CJEU's application of the Engel-test and on the concept of sanctions, and to point to the tendencies found within the CJEU's case-law that characterises the relevance of the Engel-test within the EU legal order.

First, although the EU has not acceded to the ECHR and therefore does not constitute a legal instrument which has been formally incorporated into the EU legal order, then Article 6(3) TEU confirms that the fundamentals rights contained in the EUCFR that are recognised by the ECHR, they are constituting general principles of EU law. In addition, Article 52(3) EUCFR also provides for a principle of consistency by which the fundamental rights contained in the EUCFR, which are corresponding to the human rights guaranteed in the ECHR, are to have the same meaning and scope as those laid down by the ECHR.[864] This entails that the CJEU in the interpretation of the EUCFR must take into account the corresponding rights in

[863] Case C-489/10 – Bonda, ECLI:EU:C:2012:319, and Case C-617/10 – Fransson, ECLI:EU:C:2013:105. On the importance of these cases, see Mitsilegas V, di Martino A and Mancano L (eds), *'The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis'* (Hart Publishing 2019).
[864] Case C-617/10 – Fransson, para. 27. Joined Cases C-217/15 and C-350/15 – Orsi and Baldetti, ECLI:EU:C:2017:264, para. 15; Case C-524/15 – Menci, ECLI:EU:C:2018:197, para. 21; Case C-537/16 – Garlsson Real Estate v CONSOB, EU:C:2018:193, para. 24; and Case C-481/19 – DB v CONSOB, ECLI:EU:C:2021:84, para. 36.

the ECHR, including Articles 6-7 and 4-P7 as interpreted by the ECtHR, and to provide it "as the minimum threshold of protection."[865] The CJEU may nonetheless provide for higher and stronger level of protection than the mere minimum threshold established within the ECHR.[866] Pursuant to Article 51(1) EUCFR, then the provisions of the EUCFR applies not only to the actions taken by the EU institutions, bodies, and agencies with due regard for the principle of subsidiarity, but also to the EU Member States when they are implementing EU law. This entails that they shall not only respect the fundamental rights, but also observe the principles and promote the application thereof in accordance with their respective powers.[867] The case-law of the CJEU first of all reveals that whenever the particularities of a case are relating to issues that concerns Article 6(3) TEU and Articles 51(1) and 52(3) EUCFR, in particular with respect to rules on "Justice" as provided in Articles 47-50 under Title VI of the EUCFR, the CJEU may have a need to apply or otherwise refer or adhere to the Engel-test for the purpose of determining by itself or for the referring courts to decide whether the sanctions classify as criminal sanctions. These provisions are therefore carrying the legal bases for applying the Engel-test within the EU legal order, and the constitutional concept of sanctions. This will be further evidenced by the discussions and observations made in Section III(2)(B).

Second, within the legal bases referred to in the first point primarily, it can also be observed that in a growing number of cases before the CJEU, within different legal areas of national law and EU law, that the CJEU has either referred to the Engel-test, adhered thereto, or directly applied the Engel-test in order to guide the national courts with respect to whether the criminal guarantees should be afforded to the defendant. In respect of EU competition law, it is also a general observance that the CJEU has directly upheld and applied the results from the ECtHR's application of the Engel-test be referring to some of the relevant cases from the ECtHR's case-law. Here is an overview of these legal areas:

- Securities law with respect to market abuse;[868]

[865] Case C-481/19 – DB v CONSOB, para. 37.
[866] On the other hand, Article 50 EUCFR does not extend the scope of protection beyond the rationale and principles contained in Article 4-P7 so that the imposition of criminal sanctions against two legally distinct natural or legal persons are precluded, cf. Pirttimäki v. Finland, para. 51, cf. Joined Cases C-217/15 and C-350/15 – Orsi and Baldetti, para. 25.
[867] This entails that the fundamental rights guaranteed by the EUCFR must be respected when applying national law provisions which reflect or derive from provisions of EU law, cf. Case C-617/10 – Fransson, ECLI:EU:C:2013:105, paras. 18-22.
[868] Case C-45/08 – Spector Photo Group, ECLI:EU:C:2009:806; Case C-537/16 – Garlsson Real Estate v CONSOB, ECLI:EU:C:2018:193; Joined Cases C-596/16 and C-597/16 – Puma and Zecca v CONSOB, ECLI:EU:C:2018:192; and Case C-481/19 DB v CONSOB, ECLI:EU:C:2021:84. In this context, see also Opinion of Advocate General M. Campos Sánchez-Bordona delivered on 12 September 2017, ECLI:EU:C:2017:668, to Case C-537/16 – Garlsson Real Estate v CONSOB; and the Opinion delivered on 12 September 2017, ECLI:EU:C:2017:669, to Joined Cases C-596/16 and C-597/16 – Puma and Zecca v CONSOB. See also the Opinion of Advocate General Pikamäe delivered on 27 October 2020, ECLI:EU:C:2020:861, to Case C-481/19 DB v CONSOB.

- Tax and VAT law;[869]
- Laws on agricultural subsidies,[870] and
- EU competition law.[871]

The following Section, III(2)(B)(I), will discuss these cases primarily with a view towards the CJEU's application and use of the Engel-test and concept of sanctions and the implications that the CJEU's conclusions have for the EU legal order. Because the CJEU's conclusions also relates to and have implications for what is and may referred to as 'EU criminal law', then Section III(2)(B)(II) will continue the discussion of the nature and other general features that characterises EU criminal law to the extent its relates to the Engel-test.

Third, the case-law to be discussed seems fairly equal to what the CJEU considers to be a criminal sanction. There exists an enormous body of case-law where the CJEU has been consulted on questions relating to the legality of the sanctions provided; the appropriateness and / or proportionality of the sanctions imposed or sanctioning decisions adopted by some national and EU authority; or some other questions relating to sanctions. That case-law is characterised by the given situation within these cases that the CJEU does not have any real need to go behind the appearances of the legislative texts and to apply the Engel-test, because it is not questioned before the CJEU whether the legal powers applied by the authorities actually qualify as a legal sanction or whether the sanctions imposed in reality amounts to a criminal sanction or charge for the purposes of triggering the criminal procedural guarantees. Usually, such cases tells no more than what the mere wording of EU legislative acts already prescribes for the sanctions. Any discussion of such sanctions would therefore also have to include an analysis of the entire body of EU administrative law. Therefore, we have to disregard that case-

[869] Case C-617/10 – Fransson; Joined Cases C-217/15 and C-350/15 – Orsi and Baldetti; and Case C-524/15 – Menci. See also the Opinion of Advocate General Cruz Vallalón delivered on 12 June 2012, ECLI:EU:C:2012:340, to Case C-617/10 – Fransson, but in particular the Opinion of Advocate General M. Campos Sánchez-Bordona delivered on 12 September 2017, ECLI:EU:C:2017:667, to Case C-524/15 – Menci.

[870] Case C-489/10 – Bonda. See also and Opinion of Advocate General Kokott delivered on 15 December 2011, ECLI:EU:C:2011:845, to Case C-489/10 – Bonda.

[871] For example, see the following cases and the case-law referred to therein: Case C-199/92 P – Hüls v. Commission, ECLI:EU:C:1999:358, para. 150; Case C-185/95 P – Baustahlgewebe Gmbh v. EC Commission, ECLI:EU:C:1998:608, para. 20; Case C-199/99 P – Corus UK Ltd v Commission, ECLI:EU:C:2003:531, para. 126; Joined Cases C-204/00 P , C-205/00 P , C-211/00 P , C-213/00 P , C-217/00 P and C-219/00P – Aalborg Portland v. Commission, ECLI:EU:C:2004:6, para. 338; Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P – Dansk Rørindustri and Others v Commission, ECLI:EU:C:2005:408, paras. 215-216; Case C-3/06 P – Group Danone v EC Commission, ECLI:EU:C:2007:88, para. 88; and Case C-17/10 - Toshiba Corporation and Others, ECLI:EU:C:2012:72, para. 64. See, for instance, also: Opinion of Advocate General Léger delivered on 3 February 1998, ECLI:EU:C:1998:37, point 31 and footnote 25, to Case C-185/95 P – Baustahlgewebe Gmbh v. EC Commission; Opinion of Advocate General Kokott delivered on 8 September 2011, ECLI:EU:C:2011:552, point 48, to Case C-17/10 Toshiba Corporation and Others; Opinion of Advocate General Stix-Hackl delivered on 26 September 2002, ECLI:EU:C:2002:539, point 150, to Case C-199/99 P – Corus UK Ltd v Commission; Opinion of Advocate General Sharpston in delivered on 10 February 2011, ECLI:EU:C:2011:63, points 60-68, to Case C-272/09 P – KME Germany and Others v European Commission; Opinion of Mr Advocate General Mengozzi delivered on 17 February 2011, ECLI:EU:C:2011:89, point 9, to Case C-521/09 P – Elf Aquitaine SA v European Commission. Opinion of Advocate General Kokott delivered on 18 April 2013, ECLI:EU:C:2013:248, point 25, to Case C-501/11 P – Schindler v. EU Commission. See also Frese MJ, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing 2014), p. 64-93.

law as irrelevant for the purposes here.[872] Let me just point to a few reasons that justifies this conclusion and choice. First, in the case-law which we are going to discuss, the CJEU would most likely have referred to other cases of relevance if it already had decided on the issue of what qualifies as a criminal sanction. There are no such references of relevance.[873] That case-law may thus be generally characterised as the CJEU lacking a need to question the reality of the labels of the legal powers applied and the classification of the sanctions provided and / or applied. Second, some of the main literature on EU administrative law and EU criminal law also have not provided a legal definition of a criminal sanction, or pointed to any case where the CJEU has provided so.[874] In fact, "[to] date, the Court itself has not expressly spoken on the issue."[875] Third, the cases to be discussed in Section III(2)(B)(I)(1)-(4) provides for the exceptions to these observations, and thereby also largely makes up for what the CJEU opines and considers to characterise a legal sanction as a criminal sanction.[876] Fourth, in Chapter 5 to 7 we will nevertheless discuss the case-law of the CJEU that are relevant to the legal powers and sanctions provided under EU financial law, which also takes into account that large body of case-law just referred to, where the CJEU has not applied the Engel-test.[877] Hence, there is a very strong indication of the CJEU being willing to use the Engel-test to qualify any legal powers as sanctions and to determine their classification for the purposes of triggering the criminal guarantees under Articles 47-50 EUCFR in light of Articles 6-7 and 4-P7.

Finally, when the CJEU in preliminary rulings apply the Engel-test and provides some general arguments in accordance with the Engel-criteria in order to guide the national courts in the application of the Engel-test, then within these different legal contexts, it may appear as if

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[872] For instance, see the following and the case-law referred to therein: Paul Craig, *EU Administrative Law* (3 edition, Oxford University Press 2018) 642–644, 664-668; Takis Tridimas, *The General Principles of EU Law* (Second edition, Oxford University Press 2006) 169–173, 234–238. Some of the cases referred in this literature, is also discussed in different parts of this section, as well in Section III(2)(B)(II) below.

[873] Perhaps, this is because there neither is "a Union law definition of the sanction nor of the penalty," cf. Andre Klip, *European Criminal Law: An Integrative Approach* (4th edition, Intersentia Ltd 2021) 415.

[874] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law Text and Materials* (Fourth edition, Cambridge University Press 2019); Klip (n 582); Tridimas (n 597); Craig (n 597); Michael J Frese, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing 2014); Steve Peers and others, *The EU Charter of Fundamental Rights: A Commentary* (1st edition, Hart/Beck 2014); Kai Ambos, *European Criminal Law* (Cambridge University Press 2020); Valsamis Mitsilegas, *EU Criminal Law* (Hart Publishing 2009); Irene Wieczorek, *The Legitimacy of EU Criminal Law* (Hart Publishing 2020); Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing 2018); Dr Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Reprint edition, Hart Publishing 2020); Chloé Brière and President Anne Weyembergh, *The Needed Balances in EU Criminal Law: Past, Present and Future* (Reprint edition, Hart Publishing 2020).

[875] Klip (n 582) 239.

[876] It is also a characterising feature of these cases that the CJEU has not referred to any cases therein of which it has decided or otherwise shared views on the definition of a criminal sanction, except from these cases discussed below. Therefore, the views and principles to be discussed points towards a consolidation, albeit I, in all honesty, cannot claim to have exhausted the entire case-law of the CJEU where it has expressed views on the definition of a criminal sanction.

[877] For instance, see the discussion of the concepts of effectiveness, proportionality and dissuasiveness in Chapter, Section III(1), and also more generally the specific cases relevant for EU banking and securities law in Chapter 7.

the CJEU does not formally adhere to the two cumulative Öztürk-criteria under the second Engel-criterion. Such view and application of the Engel-test is incorrect. The two cumulative Öztürk-criteria have been applicable almost since the beginning due to the landmark case of Öztürk v. Germany. Over time, the Öztürk-criteria have also become such an integrated element of the ECtHR's assessment that they very often is applied as an implicit manner within the scope of to the second Engel-criterion.[878] Nevertheless, the case-law of the CJEU generally reveals that the CJEU aim to apply the Engel-test consistently with the ECtHR's application thereof in accordance with the principle in Article 52(3) EUCFR and should be understood as containing the two Öztürk-criteria.[879] This entails that the case-law of the ECtHR and CJEU and their application of the Engel-test provides the criteria, standards and principles that establishes the architecture and blueprint for a constitutional concept of a legal sanction.

(1) Securities law

A few cases have concerned Articles 47-48 and 50 of the EUCFR, corresponding to some of the human rights in Article 6 and 4-P7 of the ECHR, and administrative sanctions imposed at the national level for violations of the prohibitions against market abuse as laid down in MAR,[880] or the former MAD I.[881] In Case C-537/16 – Garlsson Real Estate v CONSOB, the administrative Italian sanctioning authority ('CONSOB') had for a violation against the prohibition on market manipulation imposed an administrative fine at EUR 10.2 million (later reduced to 5 million) on Mr Ricucci, Magiste International SA and Garlsson Real Estate SA, who were jointly and severally liable for the payment of that sum. Before the CJEU, the Italian Government had submitted to the CJEU that the imposition of the fine "always involves the confiscation of the product or the profit gained as a result of the offence and the goods used for the commission thereof."[882] The same conduct also gave rise to criminal proceedings against

[878] For instance, when the CJEU adherer to the two distinguishing and twin-objectives of criminal sanctions of punishment and deterrence, then these purposes attributed to criminal sanctions have been upheld as such since the Öztürk case under the second Öztürk-criteria in the case-law of the ECtHR. In Opinion of Advocate General M. Campos Sánchez-Bordona delivered on 12 September 2017 to Case C-524/15 – Menci, paras. 44-49, there is also a more correct summary of the Engel-criteria including the two Öztürk-criteria. However, in his Opinions delivered on 12 September 2017 to Case C-537/16 – Garlsson Real Estate v CONSOB, paras. 62-68, and to the Joined Cases C-596/16 and C-597/16 – Puma and Zecca v CONSOB, there are no express or direct references to the Öztürk-criteria.
[879] In Case C-199/92 P – Hüls v. Commission, para. 150, and Case C-45/08 – Spector Photo Group, para. 41, the CJEU referred to two cases of ECtHR, i.e. Öztürk v. Germany and Lutz v. Germany. See also the Opinion of Advocate General Pikamäe delivered on 27 October 2020 to Case C-481/19 DB v CONSOB, paras. 54-58.
[880] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. OJ L 173, 12.6.2014, p. 1-61.
[881] Case C-45/08 – Spector Photo Group; Case C-537/16 – Garlsson Real Estate v CONSOB; Joined Cases C-596/16 and C-597/16 – Puma and Zecca v CONSOB; and Case C-481/19 DB v CONSOB.
[882] Case C-537/16 – Garlsson Real Estate v CONSOB, para. 34.

Mr Ricucci, who were sentenced to a term of imprisonment of four years and six months (later reduced to three years). For Article 50 EUCFR, as interpreted in the light of Article 4-P7, to apply, the fine therefore had to classify as a criminal sanction. The CJEU applied the Engel-test and the main distinction under the second Öztürk-criterion under the second Engel-criterion: "it is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature."[883] The CJEU did not consider the penalty as "intended to repair the harm caused by the offence, but that it also pursues a punitive purpose [and] therefore criminal in nature."[884] This result accords in full with the case-law of the ECtHR as the main governing and fundamental distinction between criminal pecuniary sanctions and non-criminal pecuniary sanctions is conducted on the basis of the autonomous concepts of 'reparatory (and preventive) sanctions' and 'punitive (and deterrent) sanctions'.[885]

In the Joined Cases of C-596/16 and C-597/16 – Puma and Zecca v CONSOB, which related to Article 50 EUCFR / Article 4-P7 and MAD I,[886] and Case C-481/19 DB v CONSOB, which related to Articles 47-48 EUCFR / Article 6 ECHR and the right to remain silent and avoid self-incrimination as well as MAD I and MAR,[887] the CJEU largely upheld these views and principles with respect to the concept of sanctions and the application of the Engel-test. All these cases bears very close resemblance with the case of Grande Stevens and Others v. Italy, decided by the ECtHR, with respect to the factual circumstances and sanctions imposed by CONSOB, a case which also formed part of the material assessed in those CJEU-cases.[888] In addition, within these cases in various legal contexts with respect to very different issues, the CJEU also referred and adhered to the case-law of the ECtHR. In respect of the Engel-test and the concept of sanctions, this process had already been initiated in Case C-45/08 – Spector Photo Group within EU securities law, where the CJEU by an analogy-inference adhered to

[883] Ibid, para. 33.
[884] Ibid, para 34.
[885] See also the Opinion of Advocate General M. Campos Sánchez-Bordona delivered on 12 September 2017, para. 64, referring to punishment and deterrence as the two main objectives of criminal sanctions.
[886] The Joined Cases of C-596/16 and C-597/16 – Puma and Zecca v CONSOB. Instead of market manipulation, then Mr Di Puma and Mr Zecca had participated in several cases of insider dealing, wherefore CONSOB imposed administrative fines on them. Mr Di Puma and Mr Zecca had also been subject to criminal proceedings. To the CJEU, the administrative fines also appeared criminal in nature, but it was nevertheless for the referring court to decide, cf. para. 38.
[887] Case C-481/19 DB v CONSOB. In that case, CONSOB had imposed a number of financial penalties on DB ranging between EUR 50 000 to EUR 200 000 for violations against the prohibitions on insider dealing and the unlawful disclosure of inside information. The CJEU referred to Case C-537/16 – Garlsson Real Estate v CONSOB and its application of the Engel-test, which formed the basis for the referring court to decide whether the financial penalties were criminal in nature. The CJEU nevertheless pointed out that the sanctions appeared to be criminal in nature, cf. paras. 42-43.
[888] Case C-537/16 – Garlsson Real Estate v CONSOB, para. 17; Joined Cases C-596/16 and C-597/16 – Puma and Zecca v CONSOB, para. 18; and Case C-481/19 DB v CONSOB, para. 43.

the similar process already initiated under EU competition law.[889] Therefore, within the legal bases of Article 6(3) TEU and Articles 51(1) and 52(3) EUCFR, in particular with respect to rule of justice as provided in Articles 47-50 of Title VI of the EUCFR, the case-law of the CJEU reveals that the CJEU is either applying, referring or otherwise adhering to the principles that results from the case-law of the ECtHR, including those pertaining to sanctions.

(2) Tax and VAT law

Three cases has related to Article 50 EUCFR, as interpreted in the light of Article 4-P7, and referred to the CJEU for a preliminary ruling. In Case C-617/10 – Fransson, Mr Fransson was summoned to appear before the Haparanda District Court on June 2009 in respect of charges of serious tax offences. He was accused of having provided false information in his tax returns for 2004 and 2005, which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax ('VAT') amounting to SEK 319 143 for 2004 and to SEK 307 633 for 2005. In addition, Mr Fransson was also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue amounting respectively to SEK 35 690 and SEK 35 862. According to the indictment, the offences was regarded as serious because of their very large amounts and that the offences formed part of criminal activity that was committed systematically on a large scale. Before the criminal prosecution, the administrative tax authorities (Skatteverket) had by one and the same sanctioning decision imposed a tax surcharge on Mr Fransson, for the 2004 / 2005 tax years, of SEK 35 542 and 54 240 in respect of the income from his economic activities, of SEK 4 872 and 3 255 in respect of VAT, and of SEK 7 138 and 7 172 in respect of employers' contributions. The decision to impose these fines was based on the same acts of providing false information as those later relied upon by the public prosecutor in the criminal proceedings. The rules at issue related to the implementation of Article 22 of Sixth Council Directive 77/388/EEC.[890]

[889] In Case C-45/08 – Spector Photo Group, para. 42, the CJEU stated in relation to Article 14(1) of MAD I that nonetheless, "in the light of the nature of the infringements at issue and the degree of severity of the sanctions which may be imposed, such sanctions may, for the purposes of application of the ECHR, be qualified as criminal sanctions (see [Case C-199/92 P – Hüls v Commission, para. 150; Engel and Others v the Netherlands, para. 82; Öztürk v Germany, para. 53; and Lutz v Germany, para. 54. By the reference to Case C-199/92 P – Hüls v Commission, the CJEU referred to EU competition law, and the other cases are the founding key cases from the ECHR's case-law establishing the Engel-test.

[890] Article 22 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1; 'the Sixth Directive'). See further para. 6.

In the preliminary ruling before the CJEU, the referring court questioned whether the charges brought against Mr Fransson had to be dismissed on the ground that Mr Fransson in the administrative proceedings already had been punished for the same acts pursuant to Article 50 EUCFR, as interpreted in the light of Article 4-P7. In this regard, the CJEU first noted that Article 50 EUCFR, just like legal position under Article 4-P7, does not preclude a Member State from imposing a combination of tax penalties and criminal penalties for the same acts of non-compliance with tax- and VAT-law. As the CJEU has long held since the Greek Maize case,[891] these penalties may qualify as administrative penalties, criminal penalties or a combination of the two. However, the CJEU stated that "[it] is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that the provision precludes criminal proceedings in respect of the same acts from being brought against the same person."[892] On that basis, the CJEU referred to its ruling in the Case C-498/10 – Bonda,[893] where the CJEU directly applied the Engel-test, and referred to the referring court the issue of determining for itself whether the tax penalties were criminal in nature on the basis of the Engel-test.[894] This case is very similar to a later case of Case C-524/15 – Menci.[895] The main difference in respect of the issues discussed here is that the CJEU also referred to the referring court to decide for itself whether the tax surcharge (EUR 84 748.74) was criminal in nature, but the CJEU nevertheless also went on to guide the referring court in the application of the Engel-test. To the CJEU, the tax surcharge classified as a criminal sanction.[896]

These results fully conforms with the case-law of the ECtHR, where it since the key case of Jussila v. Finland generally has held that even very small tax surcharges or tax fines classify as a criminal sanction. In light thereof, there can be no doubt whether a tax surcharge at EUR 84 748.74 classify as a criminal sanction. Finally, in the Joined Cases of C-217/15 and C-350/15 – Orsi and Baldetti, the CJEU referred to its own case-law prior to the entry into force of the EUCFR with respect to the principle of ne bis in idem, and to case-law of the ECtHR on Article 4-P7, in particular Pirttimäki v. Finland, and ruled in conformity with that case-law and as a matter of principle under Article 50 EUCFR and 4-P7 that "the imposition

[891] Case 68/88 – Commission v Greece, ECLI:EU:C:1989:339, para. 24, and also referring to the subsequent case-law where the CJEU uphold the same principles: Case C-213/99 – de Andrade, ECLI:EU:C:2000:678, para. 19; and Case C-91/02 – Hannl-Hofstetter, ECLI:EU:C:2003:556, para. 17. See further below in Section III(2)(B)(II).
[892] Case C-617/10 – Fransson, para. 34.
[893] Discussed below in Section III(2)(B)(I)(4).
[894] Ibid, paras. 35-36.
[895] Moreover, the similarity exists in respect of the factual circumstances of the case and in the existence of administrative proceedings in which the administrative authorities imposed a tax surcharge at EUR 84 748.74 and the subsequent criminal proceedings, where Mr Menci was prosecuted for the same acts.
[896] Case C-524/15 – Menci, paras. 26-33.

of penalties, whether tax or criminal, does not constitute an infringement of [4-P7] where the penalties at issue concern natural or legal persons who are legally distinct."[897] This view presumes that tax surcharges is settled as to classify as criminal sanctions.

Therefore, these cases before the CJEU reveals a general tendency towards a consolidation and conformity-interpretation whereby the principles and results as derived from the case-law of the ECtHR travels into the EU legal order by the rulings of the CJEU under Article 50 EUCFR, pointing to a clear mirror-image between Article 50 EUCFR and Article 4-P7 with respect to the application of these provisions and their governing concept of sanctions.

(3) Agricultural law

The case of C-489/10 – Bonda is another case concerning a preliminary ruling where the CJEU had to assess the ne bis in idem principle contained in Article 50 EUCFR in light of 4-P7. Mr Bonda was a Polish citizen that in 2005 submitted a request for an agricultural subsidy to the competent national agricultural agency. The application contained an incorrect declaration of the extent the land was cultivated (212.78 hectares) in comparison to the land actually used for agriculture (113.49 hectares). In 2006, on the basis of Article 24 of Regulation (EC) 1782/2003 and Article 138(1) of Regulation (EC) 1973/2004, the Polish authorities ordered Mr Bonda to: (i) repay the excess aid; (ii) declared him ineligible to receive any aid for (the single area payment) for 2005; and (iii) imposed a penalty on him consisting of the loss of entitlement to the single area payment, up to the amount of the difference between the real area and the area declared, for the three years following the year in which the incorrect declaration had been made. In 2009, the Polish District Court also convicted Mr Bonda on the basis of the Polish Criminal Code for submitting a false declaration concerning the facts of essential importance for obtaining a single area payment (subsidy fraud). Mr Bonda was sentenced to eight month's imprisonment suspended for two years and a fine of 80 daily rates of PLN 20 each. The main question before the CJEU was therefore whether the criminal sanctions imposed on Mr Bonda by the Polish District Court in 2009 contravened Article 50 EUCFR as interpreted in the light of 4-P7. Such a result would require that the sanctions imposed by the Polish Authorities in 2006 on the basis of Article 138(1) of Regulation No 1973/2004, they classified as criminal sanctions.[898] The CJEU applied the Engel-test, but at the outset it observed in respect of its

[897] Joined Cases of C-217/15 and C-350/15 – Orsi and Baldetti, para. 25, but see further paras. 23-27.
[898] Case C-489/10 – Bonda, paras. 1-26.

own case-law that it had previously held that "penalties laid down in the rules of common agricultural policy, such as the temporary exclusion of an economic operator from the benefit of an aid scheme, are not of a criminal nature."[899] The CJEU summarised:

> "29. The Court considered that such exclusions are intended to combat the numerous irregularities which are committed in the context of agricultural aid and, because they weigh heavily on the European Union budget, are of such a nature as to compromise the action undertaken by the institutions in that field to stabilise markets, support the standard of living of farmers and ensure that supplies reach consumers at reasonable prices (see [Case C-210/00 – Käserei Champignon Hofmeister, para. 38]).
>
> 30. In support of that view, the Court further observed that the rules breached are aimed solely at economic operators who have freely chosen to take advantage of an agricultural aid scheme (see [Case C-137/85 – Maizena and Others, para. 13; Case C-240/90 – Germany v Commission, para. 26; and Case C-210/00 – Käserei Champignon Hofmeister, para. 41]). It added that, in the context of a European Union aid scheme in which the granting of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness, the penalty imposed in the event of non-compliance with those requirements constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound financial management of public funds of the European Union ([Case C-210/00 – Käserei Champignon Hofmeister, para. 41])."[900]

In the Bonda context and in respect of the aim of the measures provided in Article 138(1) of Regulation No 1973/2004, the CJEU considered there to be "nothing to justify a different answer being given" in this respect.[901] The CJEU then went on the compared with Articles 1, 5 and 6 of Regulation No 2988/95,[902] which was laying "down a common set of legal rules for all fields covered by Community policies,"[903] and from which the following principles followed: (i) on the basis of Article 1, the concept of 'irregularities' was giving "rise to the application of 'administrative measures and penalties';"[904] (ii) on the basis of Article 5(1)(c) and (d) that "the total or partial removal of an advantage granted by the Community rules" and "the exclusion from or the withdrawal of an advantage subsequent to that of the irregularity constitute administrative penalties;"[905] and (iii) that the ninth recital of the preamble thereto and Article 6(5) considered administrative penalties to form an integral part of the objectives of the common agricultural policy and have a purpose of their own, wherefore they may be applied independently of any criminal penalties, "if and in so far as they are not equivalent to such penalties."[906] However, neither was the CJEU's own previous case-law and the comparisons with the provisions of Regulation No 2988/95 enough to convincingly establish

[899] Ibid, para. 28.
[900] Ibid, para. 29-30.
[901] Ibid, para. 31.
[902] Council Regulation (EC, Euratom) No 2988/95 of December 1995 on the protection of the European Communities financial interests. OJ L 312, 23.12.1995, p. 1-4.
[903] Case C-489/10 – Bonda, para. 33.
[904] Ibid.
[905] Ibid, para. 34.
[906] Ibid, para. 35.

the administrative classification of the sanctions imposed on Mr Bonda. In the referred case-law, the CJEU had also not applied the Engel-test. As it was questioned whether there had been a contravention of the ne bis in idem principle in Article 50 EUCFR and Article 4-P7, the ECtHR thus had a need to determine whether these sanctions in reality classified as criminal sanctions on the basis of that authoritative test. The CJEU thus went on with the analysis.

On the basis of the first Engel-criterion, the CJEU observed that the measures provided in Article 138(1) of Regulation No 1973/2004 were "not regarded as criminal in nature by the European Union law, which must in the present case be equated to 'national law' within the meaning of the case-law of the [ECtHR]."[907] In accordance with the first Öztürk-criterion of the second Engel-criterion, the CJEU found that the rules within Regulation (EC) No 1973/2004, which Mr Bonda had been violating, they only applied "to economic operators who have recourse to the aid scheme set up by that regulation."[908] Albeit the CJEU did not express any statement thereof, then in light of the principles that follows ECtHR's case-law it would thus follow that the laws violated by Mr Bonda were governed by disciplinary norms. In accordance with the second Öztürk-criterion of the second Engel-criterion, the CJEU then went on to ascertain whether the sanction imposed on the farmer was punitive. Aligned with point 65 of the Opinion delivered by the Advocate General,[909] the CJEU argued that the sanctions were not punitive, because the reduction of the amount of aid that may be paid to the farmer for the years following was subject to the submission of an application in respect of those years, thus meaning that the sanction becomes ineffective if the farmer makes no such application the following year or no longer satisfies the conditions for receiving the grant of the aid. In addition, the sanctions also became partly ineffective, "where the amount of aid the farmer can claim in respect of the following years is lower than the amount of aid to be withheld pursuant to the measure reducing the aid wrongly paid."[910] Thus, the alternative character of the second Engel-criterion did not suffice to rule that the sanctions classified as criminal. Finally, in the severity assessment of the third Engel-criterion, the CJEU argued that the effect of the sanctions had as their "*sole effect* [...] to *deprive* the farmer in question of the prospect to obtaining aid."[911] Consequently, the sanctions were not classifying as criminal sanctions.[912]

[907] Ibid, para. 38.
[908] C-489/10 – Bonda, para. 40.
[909] Opinion of Advocate General Kokott delivered on 15 December 2011, ECLI:EU:C:2011:845.
[910] Case C-489/10 – Bonda, para. 41.
[911] Ibid, para. 43. Italics added.
[912] Ibid, paras. 37-46.

Albeit the CJEU did not provide any express statements in this regard, then in light of the case-law of the ECtHR, the sanctions were only applicable *'to economic operators who have recourse to the aid scheme set up by that regulation'*, and had as their '*sole effect to deprive the farmer in question of the prospect to obtaining aid*'. This conform in full to a deprivation of a civil right, wherefore the CJEU has been guided, and the sanctions governed, by the autonomous notion of a disciplinary sanction. In this regard, the CJEU's ruling may be considered to contribute and clarify that the concept of disciplinary sanctions also may result in a deprivation of the prospects to entitlements. Furthermore, the case-law of the ECtHR thereby also proves useful and applicable for the general classification of all classes of legal sanctions, and irrespective of whether the sanctions are based on pure national law or results from the direct application of EU regulations or the implementation of EU law. Finally, as is evident from the CJEU's reference to its own case-law where it had to decide on the criminal nature of sanctions, that without the Engel-test, then the CJEU lacks an authoritative test and methodology that in any convincing way can justify *why* a legal sanction must classify as a criminal sanction with respect to the application of a certain fixed set of *(Engel-)* criteria.

(4) EU competition Law

In comparison, we now turn to an area of EU law, where the EU Commission is the enforcement authority that protects and enforces EU competition law and imposes sanctions on the offenders for violations of the rules thereunder, primarily pursuant to Article 23 of Regulation No 1/2003.[913] In the other areas discussed, the enforcement of national law and EU law and the imposition of sanctions for the violations thereof were conducted by the national courts or other administrative authority. Another difference also becomes evident in comparison to these areas. Generally, the CJEU does *not directly* apply the Engel-test with respect to whether the criminal guarantees are applicable in the enforcement proceedings. Instead, the case-law of the CJEU is more settled as it turns to be a rather practiced fact that the CJEU *de facto* considers and applies EU competition law as if it is EU criminal law. Therefore, Klip has also argued that: "Although a direct statement that competition law is criminal law is avoided by the Court, it nonetheless does apply the principles relevant to criminal proceedings from the ECHR to competition law, and does, in practice, treat it *as* criminal law."[914] Although EU competition

[913] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003.
[914] Klip (n 582) 2–3.

law does not to belong to the traditional and hard core area of criminal law, [915] the criminal guarantees from the EUCFR / ECHR forms such an integrated part of sanctioning principles and fundamental rights protection in the enforcement proceedings that it long seems to be necessary to discuss and uncover the criminal colours of the enforcement proceedings.[916]

The invisible elephant in that case-law of the CJEU, which justifies such a result, is the Engel-test and the ECtHR's conception of the autonomous notion of criminal sanctions. For instance, in an Opinion delivered by Advocate General Mengozzi, he argued:

> "According to the case-law of the [ECtHR], the fact that a penalty is not defined as a criminal law penalty in the legal order of a Contracting State does not prevent it from being acknowledged as being of a criminal law nature for the purposes of applying the ECHR [....]. Without pursuing my analysis further, I would point out that, in the light of that case-law, it seems unlikely that the penalties imposed on the basis of [Article 23] Regulation No 1/2003 can be anything other than of a criminal-law nature for the purposes of the Convention."[917]

Quite a number of more or less concurring Opinions by the Advocate Generals can be found, and there are numerous cases before the CJEU which also justifies these observations and similar opinions by the indirect fashion in which the CJEU treats EU competition law as EU criminal law, as pointed out by Klip.[918] For example, whether the presumption of innocence-clause in Article 6(2) ECHR applied to the enforcement proceedings, the CJEU ruled:

> "150. It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings *that may result in the imposition of fines or periodic penalty payments* (see, to that effect, in particular the judgments of the European Court of Human Rights of 21 February 1984, Öztürk, Series A No 73, and of 25 August 1987 Lutz, Series A No 123-A)."[919]

Thus, already in the Case C-199/92 P – Hüls v. Commission, the CJEU referred to the key case of Öztürk v. Germany (conclusions which were reaffirmed in Lutz v. Germany) in which the ECtHR established what would become the two cumulative Öztürk-criteria under the second Engel-criterion. Accordingly, there is very strong evidence for considering the fines and periodic penalty payments under EU competition law to qualify and classify as criminal sanctions. In light of the case-law of the ECtHR, competition law, in particular the rules on anti-competition law, are considered as governed by criminal norms pursuant to first Öztürk-criterion. When the offenders (undertakings) also risks the imposition of a fine, the offender also risks the imposition of a punitive and deterrent pecuniary sanction, which qualifies as a

[915] Opinion of Advocate General Kokott delivered on 18 April 2013, ECLI:EU:C:2013:248, point 25, to Case C-501/11 P – Schindler v. EU Commission. This has acknowledged in the case-law of the ECtHR since Jussila v. Finland (para. 43).
[916] Frese (n 599) 45–121.
[917] Opinion of Advocate General Mengozzi delivered on 17 February 2011, ECLI:EU:C:2011:89, point 9, footnote 5, to Case C-521/09 P - Elf Aquitaine SA v European Commission.
[918] See Section III(2)(B)(I) above, and the footnote in respect of EU competition law.
[919] Case C-199/92 P – Hüls v. Commission, para. 150. Italics added.

criminal pecuniary sanction, wherefore the second Öztürk-criterion also is satisfied. In such situations, where the two cumulative Öztürk-criteria and thus also the second Engel-criterion are satisfied, it follows by the alternative character of the Engel-criteria that it would not even be necessary to consult the third Engel-criterion, because the alternative character of the second Engel-criterion has already decided that the such undertakings will risk the imposition of a criminal fine. Therefore, the presumption of innocence-clause is also triggered. For the CJEU to overrule such a result, would also be to overrule the principles and results established and settled in the ECtHR's case-law. In accordance with Article 6 TEU and 52(3) EUCFR, the direct enforcement by the EU Commission in EU competition law therefore rather points to a legal position where the CJEU directly applies the principles and results as derived from the case-law of the ECtHR than to overrule or otherwise create doubts about their validity. The principles from the case-law of the ECtHR thus manifests as EU constitutional principles.

The archetypes that governs the essential nature of sanctions, as living creatures within the living document of the ECHR, has a dynamic nature and may therefore also be found to exist in a number of different areas of national and EU law. The overview on the areas of national law in which the ECtHR, on the basis of the Engel-test, has found the criminal guarantees applicable was provided in Section III(2)(A). This overview revealed that the Engel-test gradually has been travelling and applied into these different areas of law in order to determine whether the criminal guarantees should be afforded to the defendants. From the previous discussions of this Section, III(2)(B)(I)(1)-(3), the case-law of the CJEU also already reveals a similar tendency to apply the Engel-test for exactly the same purposes within the European legal order.[920] Therefore, one the basis of Article 6(3) TEU and Articles 47-52 EUCFR, and by the example of the legal position within EU competition law, including the principles and results established by the CJEU in its case-law for the enforcement of EU competition law, it may thus reasonably be expected that the Engel-test will continue its journey into other areas of EU law, where European authorities have sanctioning powers of whatever positive legally designated class to test whether the sanctions in reality classify as criminal sanctions and for the purpose of triggering the criminal guarantees contained in the EUCFR / ECHR. In fact, the CJEU has already ruled that the principles regarding the rights of defence under EU competition law enforcement proceedings in respect of Articles 101-102 TFEU "apply, by analogy, to

[920] Cruz Vallalón has also observed the travelling of the Engel-test as he has noted that the Engel-criteria has been applied by the ECtHR for the interpretation of the term 'criminal proceedings' "to extend the guarantees in Articles 6 and 7 of the ECHR to penalties imposed by the public authorities that are formally classified as administrative," cf. Opinion of Advocate General Cruz Vallalón delivered on 12 June 2012 to Case C-617/10 – Fransson, para. 76.

observance of the rights of the defence in a procedure carried out by the ECB in respect of a requirement under relevant directly applicable acts of Union law, in terms of Article 18 SSMR."[921] This view by the CJEU stipulates that the lege lata within EU banking law already is established as so. Much therefore indicates that the CJEU more generally in the future will adhere to the principles governing the sanctioning and enforcement proceedings under EU competition law with respect of the defense rights.[922] As the Engel-test and its conception of a criminal sanction justifies that legal position with EU competition law, any future analogy-inferences and references to cases decided by the CJEU under EU competition law in respect of defense rights and other criminal guarantees will therefore also derive their justification therefrom. At one point, the Engel-test and the ECtHR's concept of a criminal sanction might thereby even be the "invisible elephant" within those legal areas providing the true and real justification for the application of the criminal guarantees in those legal areas. Perhaps, the travel started by the Case C-199/92 P – Hüls v. Commission.[923]

If such views will prove to be valid, Klip has argued what might be an even more general result in respect of the legal position within these areas of EU administrative law:

> "One of the consequences of the use of the ECHR criteria [Engel-criteria] is that, in this book, competition law is regarded as criminal law, contrary to the terms of Article 23, paragraph 5 Regulation 1/2003 on Competition Law, which states that "Decisions taken pursuant to paragraph 1 and 2 shall not be of a criminal nature". At this stage, it may be sufficient to mention that the European Court of Justice (Court) itself regards all the principles guaranteed under the ECHR as being relevant to competition law."[924]

Accordingly, to the extent that the Engel-test continues its journey, the result may be very similar, that the areas also should be treated as (EU) criminal law. However, whether the result is that other areas of EU law than EU competition law, where an European authority is in charge of the enforcement and imposition of sanctions, deserves a similar treatment, still remains an open question. It nonetheless raises the more fundamental question of what is the *exact* difference between criminal law and administrative law, in particular when these areas of administrative law provides legal bases for the imposition of punitive and deterrent sanctions. One cannot stop wondering whether this really can be the true and real intention of the EU legislators, that such legal areas in reality should be treated directly, or de facto, as (EU) criminal law, and what should be done to mitigate such consequences. Therefore, it may be necessary to consult the source itself. In fact, the Engel-test has for a very long time been

[921] Case T-576/18 – Crédit Agricole SA v ECB, para. 109.
[922] See also the discussions in Chapter 6, Section III(1)(A) and Chapter 7, Section III(1)(B).
[923] I have not been able to track any references to the Engel-test, or cases of the ECtHR where it applied the Engel-test, by the CJEU before the Case C-199/92 P – Hüls v. Commission. If anyone finds such a case, please reach out.
[924] Klip (n 582) 2.

capable of resolving such questions according to its long held position, as deriving from the long held constitutional traditions of the ECHR member states, of providing a fundamental distinction between general-criminal norms and sanctions as opposed to specific-disciplinary norms and sanctions. Afterall, not all areas of (EU) administrative law may turn out to be governed by criminal norms and sanctions. Nevertheless, the fact is growing that the Engel-test and the ECtHR's conception of what defines a legal sanction and makes sanctions classify as criminal sanctions establishes the blueprint for what should be treated as (EU) substantive criminal law within the EU constitutional bases of Articles 6 TEU and 47-52 EUCFR.

(II) EU criminal law

These discussions therefore raises the more fundamental question: "What, then, is *criminal* law?"[925] A full discussion of this question would stress beyond the scope of the research questions asked in this Thesis. The formal EU legislative structures and the associated CJEU case-law are also well discussed in literature on EU criminal law,[926] which primarily is devoted to this question from the perspective of positive law. While competences within subject matters of criminal law used to be the exclusive prerogative of the individual EU Member States, matters of criminal law has gradually and continues to be subject to a Europeanisation, including EU constitutionalisation, whereby competences are being conferred upon the EU. As it currently and rather generally stands within the EU legal order, the general norms of criminal law are primarily being formulated at the EU level while the implementation and enforcement of the criminal law is reserved for the EU Member States.[927] Nevertheless, when Klip argues that EU competition law is (to be) treated as EU criminal law, EU competition law with respect to the EU commission's enforcement of EU competition law also functions as a substantive exception to the enforcement of criminal law at the national level. EU competition law thereby establishes a paradigm for what is, and perhaps should be, treated as EU substantive criminal law. If the Engel-test is the alpha omega that justifies the substantive criminalisation of EU competition, then a first question is whether the CJEU has a more general need to apply the Engel-test within EU law more generally, and which implications that follows therefrom?

[925] ibid. Italics maintained. See also the discussion in Chapter 5, Section 2, p. 228-244.
[926] Klip (n 582); Ambos (n 599); Mitsilegas, *EU Criminal Law after Lisbon* (n 599); Mitsilegas, *EU Criminal Law* (n 599); Jacob Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* (Reprint edition, Hart Publishing 2019); Peers and others (n 599).
[927] Klip (n 582) 1.

The Engel-test and the standards and principles it provides are functioning as an international blueprint for substantive criminal law. This may also be evidenced in the ECtHR's case-law, where excerpts from national case-law are forming part of the legislative material before the ECtHR, and where the national (typically constitutional) courts, applies the Engel-test. More generally, the Engel-test adheres and applies, protects and establishes principles of international substantive criminal law, which has proven operational and effective in all the forums in which the Engel-test has been applied. When EU criminal norms are being implemented and enforced at the national level, the Engel-test will continue to function as a blueprint and procedural guardian of international substantive criminal law in the national forums and the forum of the ECtHR. This raises another question of what the Engel-test will treat as substantive criminal law at the national level with respect to the EU norms that follows from the implementation of EU Directive and application of EU Regulations?

I will need to restrict myself here to only a few observations and arguments. While the first question mainly is discussed in the first observation and argument provided, the second question is mainly discussed in the rest of observations and arguments. However, the observations and arguments in each regard may also serve in the other.

A first observation and argument concerns the authority of the Engel-test and the need to justify what is a criminal sanction under EU law more generally. With respect to what the CJEU considers as a criminal sanction, Klip has already argued that: "To date, the Court itself has not expressly spoken on the issue, although there has been cases in which the criminal nature of proceedings was relevant."[928] In the same context, he further argues that: "An important element of this definition is that a *punitive element* must be attached to the sanction,"[929] and refers to Case C-158/08 – Agenzia Dogane Ufficio delle Dogane di Trieste v Pometon SpA, where the CJEU held: "the obligation to give back an advantage improperly received by means of an irregular practice does not breach the principle of legality. The obligation to repay is not a penalty."[930] Such a result accords in full with the case-law of the ECtHR, because 'repayments' are governed by the archetype and autonomous notion of 'reparatory pecuniary sanctions', and all 'reparatory sanctions' classifies, per se, as non-criminal sanctions. However, this is not the (general) point I would like to make. Rather the opposite. The principles governing the concept of a legal sanction could thus very easily explain *why* a repayment is not a legal

[928] ibid 239.
[929] ibid. Italics added.
[930] Case C-158/08 – Agenzia Dogane Ufficio delle Dogane di Trieste v. Pometon SpA, ECLI:EU:C:2009:349, para. 28.

penalty. In this case, just like in the enormous amount of cases before the CJEU where it has *not* applied the Engel-test,[931] the CJEU does not have any convincing explanation, if *any* explanation at all, for justifying why a repayment is not a penalty, or even more generally, for why a legal power qualifies as a legal sanction and when that legal sanction classifies as a criminal sanction. We are given results rather than explanations, and the legal position within a number of areas of EU (administrative) law depends upon lawyer's ability to do guesswork for such an explanation and justification. Within that case-law, the CJEU does also not have, nor apply, any consistent and coherent set of decisive criteria that makes it accessible and foreseeable whether a legal sanction classifies as a criminal sanction, and which can be used and applied independently in all areas of EU (administrative) law. Without such a set of authoritative criteria and principles, the results appears rather arbitrary from a legal (including theoretical and philosophical) perspective, and it does not allow for any constructive and productive discussion, only speculation. For instance, let us stay with our excerpt and example from that case-law above. If the term and concept of 'punitive' defines the term and concept of 'penalty', then what is meant by the concept of *'punitive'*? Such a definition would ask for, and thereby require, a set of criteria and principles to justify why a legal sanction is punitive, and the definition would also be required to establish why *exactly* these criteria and principles are the ones having authority to determine the issue, and not some other criteria and principles.[932] Because the definition also will have to be applied by a sanctioning authority, these set of criteria and principles will also have to be *practically applicable*. Here is a challenging question: Without applying the Engel-test, can *anyone* explain why a repayment is not punitive, and which set of criteria and principles that are having authority to determine that issue and why?[933] The challenge might continue, because if a repayment is a legal sanction, how would the CJEU determine whether a repayment is, or is not, a 'deterrent' / 'dissuasive' legal sanction? The challenge will need to continue, because if a repayment is a legal sanction and not a preventive measure, how is a repayment to be determined as 'effective'? And in what sense is a repayment 'proportionate'? Generally, under EU law, all classes and types of legal sanctions are required to be effective, proportionate, and dissuasive. Hence, these questions are not trivial. Therefore, this is the general point I am making: within the case-law of Articles 6-7 and 4-P7, and thus also within the rich and long case-law going across the national constitutional courts, there already exists a rather consistence set criteria and principles that have the capability to determine such

[931] I refer to the discussion in relation to footnote 597 above in Section III(2)(B)(I).
[932] Wieczorek (n 599) 21–43.
[933] Oswald Jansen (ed), *Administrative Sanctions in the European Union* (1st edition, Intersentia 2013). The question is also asked to the literature referred to in footnote 599 in Section III(2)(B)(I) above.

issues. Therefore, rather than to invent its own test, the CJEU should continue to walk along the steps already taken and allow the Engel-test to continue its journey and determine what is to be considered as substantive EU criminal law in the future, even though: "The Court thus equates the definition under Union law with the one under national law."[934] In fact, that would be "logical, as the Union does not yet have its own criminal law."[935] Nonetheless, whether the EU *can* define its own criminal law in contravention of the principles and results that can be derived from the ECtHR's case-law is another question, but not to be answered here.

Second, from the perspective of positive EU law, there is at least two main elements driving the legal forces that are having a strong influence on *national* criminal law. First, pursuant to Article 4(3) TEU and the principle of sincere co-operation, it is well-established that the EU Member States are subject to a duty of loyalty with the respect to objectives of the EU and the enforcement of its legislation. In relation to the EU legal order and national criminal law, the Greek Maize case has established certain principles and requirements,[936] which has been upheld in the subsequent cases decided by the CJEU.[937] Abstracting from the factual circumstances of the Greek maize case, the principles and requirements to be derived from that case entails that the EU Member States, due to the principle of sincere co-operation, mainly are required: (i) to penalize any persons who infringes EU law in the same way as those who infringes national law; (ii) to take all measures necessary to guarantee the application and effectiveness of EU law where EU law does not specifically provide any penalty for an infringement; (iii) for these purposes ((i)-(ii), the choice of penalties remains within the discretion of the EU Member States, but the choice of penalties must ensure that infringements of EU law are penalise under conditions, both procedural and substantive, which are analogues to those applicable to infringements of national law of a similar nature and importance and which, in any event, makes the penalty effective, proportionate, and dissuasive; and (iv) the national authorities are required to proceed with the same diligence as that which they bring to bear in implementing corresponding national laws. In this regard, Klip has argued that the third

[934] Klip (n 582) 241.
[935] ibid.
[936] Case 68/88 – Commission v Greece, ECLI:EU:C:1989:339, paras. 22-25.
[937] Case C-326/88 – Hansen, ECLI:EU:C:1990:291, para. 17; Case C-7/90 – Vandevenne, ECLI:EU:C:1991:363, paras. 11-12; Case C-210/91 – Commission v Greece, ECLI:EU:C:1992:525, para. 19; Case C-382/92 – Commission v UK, ECLI:EU:C:1994:233, para. 55; Case C-383/92 – Commission v UK, ECLI:EU:C:1994:234, para. 40; Case C-352/92 – Milchwerke Köln/Wuppertal v Hauptzollamt Köln-Rheinau, ECLI:EU:C:1994:294, para. 23; Case C-36/94 – Siesse, ECLI:EU:C:1995:351, para. 20; Case C-177/95 – Ebony Maritime and Loten Navigation, ECLI:EU:C:1997:89, para. 35; Case C-213/99 – de Andrade, ECLI:EU:C:2000:678, para. 19; Case C-354/99 – EC Commission v Ireland, ECLI:EU:C:2001:550, para. 46; Case C-230/01 – Penycoed, ECLI:EU:C:2004:20, para. 36; Case C-167/01 – Inspire Art, ECLI:EU:C:2003:512, para. 62; Joined Cases C-387/02, C-391/02, C-403/02 – Berlusconi and Others, ECLI:EU:C:2005:270, paras. 36, 53, and 65; Case C-367/09 – Belgisch Interventie- en Restitutiebureau v SGS Belgium NV, ECLI:EU:C:2010:648, para. 41; and Case C-263/11 – Ainārs Rēdlihs v Valsts ieņēmumu dienests, ECLI:EU:C:2012:497, para. 44.

requirement (iii) establishes (a) an "assimilation principle,"[938] and (b) a principle that requires that penalties must be effective, proportionate, and dissuasive. The other requirements in (i)-(ii) and (iv) more generally seems to establish (c) a principle of "same diligence."[939] It follows that (a) relates mostly to legislation (law on the books), while (b) relates both to legislation and enforcement (law in action), while (c) relates only to enforcement in practice. In light of the Engel-test and the concept of a legal sanction, I would like to make two arguments concerning (a) and (b) primarily, which concerns the character of national and EU criminal law.

Regarding (a), then Klip argues that the "*assimilation principle"* requires Member States to use the same or similar means of legislation that they (would) use with regard to similar violations of national law ("analogous procedural and substantive conditions")."[940] He then exemplifies the assimilation principle with the following example:

> "In a situation where the national penal law of a Member States has criminalised subsidy fraud as a serious crime that may result in imprisonment of six years and a maximum fine of €1,000,000, the assimilation principle would require a Member State to criminalise European Union fraud under more or less the same conditions. It would prevent a Member State from making European Union fraud an administrative offence, since that would make the gap between the national fraud provision and the provision on European Union fraud too large. However, a Member State under whose national system subsidy fraud is an administrative offence – i.e. it may lead to an administrative fine of €200 – is free to do the same with European Union fraud and still comply with the demands of the assimilation principle."[941]

Accordingly, it follows that the assimilation principle requires formal legislative conformity at the national law in respect of consistency and coherency with how the national legal system already is treating the offence of subsidy fraud. It may be added that to the extent that a number of different EU Member states in accordance with the assimilation principle is required to criminalise EU subsidy fraud, then across the legal systems of those EU Member States there will also be some level of conformity, at least in respect of the criminalisation of the offence of subsidy fraud, despite the types of sanctions available might vary substantially. The assimilation principle may thus be a mechanism that provides for formal conformity in a similar way as a harmonisation, albeit not identical thereto, and thus also a driver for further integration and bringing the national criminal justice systems into to conformity, albeit other EU Member States still are allowed to treat subsidy fraud as an administrative offence.

The point I will like to make concerns the question of how subsidy fraud would be treated in the forum of the ECtHR, if any applicant / offender should consider to do so. First,

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[938] Klip (n 582).
[939] ibid 80.
[940] ibid 79–80. At p. 80, he also argues that this is also "related to the same diligence requirement, although "assimilation" relates to legislation and "same diligence" to what states do with the legislation which they have in place."
[941] ibid 80.

to illuminate the issue at stake, the ECtHR may adhere to international comparative law, including international criminal law, with respect to how the parties to the ECHR are legislating on the issue of subsidy fraud. To the extent that a large number of EU Member States have criminalised subsidy fraud, the criminalisation of the offence would also be functioning as a criminal classification factor under the Engel-test. These relative factors are nonetheless not decisive, but indicative of the existence of a criminal offence. Under the Engel-test, this is one aspect from substantive perspective, which may push for and provide additional pressure for the criminalisation of subsidy fraud albeit the EU Member States on the basis of the results from the Engel-test is not under any obligation to criminalise subsidy fraud.

Another point also follows from the application of the Engel-test. Even when the EU Member States, due to the assimilation principle, are allowed to treat EU subsidy fraud as administrative offence, the first Öztürk-criterion under the second Engel-criterion would (most likely) consider such an offence as governed by criminal norms, because fraud-provisions are usually generally applicable to everyone and thus not addressed to any specific profession or closed group of natural or legal persons. In these situations, when the first Öztürk-criterion is satisfied, the second Öztürk-criterion only requires that the offender would risk the imposition of a punitive and deterrent sanction in order to trigger to criminal guarantees in Articles 6-7 and 4-P7, without the necessity to apply the third Engel-criterion. Since Jussila v. Finland, following the principles from the Öztürk case, the ECtHR has held that even small fines are punitive and deterrent when they are imposed on the basis of a violation of criminal norm. Smaller fines than €200 have also already satisfied that requirement and therefore also triggered the criminal guarantees.[942] It is nevertheless necessary to stress out again that such a result from ECtHR would *not* require the formal legislative criminalisation of subsidy fraud under national law of the EU Member States. A positive Engel-test does not require any assimilation nor criminalisation. However, irrespective thereof, then from a procedural and enforcement perspective, the issue would be treated as a matter of criminal law. Moreover, where the assimilation principle may be seen as mechanism for formal legislative criminalisation, then the Engel-test contributes by treating such issues as criminal law, and therefore also a driver for additional substantive criminalisation at the national level. Albeit the importance of the assimilation principle has diminished due to the effect of Article 83 TFEU,[943] the Engel-test

[942] Section III(1)(A)(II)(1)(a)(1)).
[943] Klip (n 582) 80–81.

remains as a substantive driver for formal legislative criminalisation at the national level and thereby also for some sort of approximation of the national criminal justice systems.

Regarding (b), the requirement for penalties to be effective, proportionate and dissuasive (referred to as the 'three requirements to sanctions' in the following), which relates both to legislation and practical enforcement, and the assimilation principle are now "codified in various Third Pillar instruments and some regulations, and have found their way in criminal law Directives adopted since 2009."[944] Chapter 6, Section II, will also show in respect EU financial law that this protocol for the three requirements to sanctions also are having legal bases within EU legislative acts formally classifying as EU administrative law. Chapter 6, Section III(1), will also discuss the definitions of three concepts of effectiveness, proportionality, and dissuasiveness as practical enforcement principles for the application and imposition of sanctions with a view towards their application in the EU financial sector, but in light of the following observation: Under EU law more generally, there does not exists any consistent and coherent definitions of these three concepts. On this basis, it is necessary to point out some elements from Klip's discussion of these three requirement to sanctions,[945] as it concerns the nature and character of EU criminal law more generally, but also the nature and character of EU administrative law, and the distinction between those two fundamental legal areas.

First, as just mentioned, the same protocol for the three requirements to sanctions are being used for criminal sanctions and administrative sanctions. Hence, irrespective of their classification, all sanctions are required to effective, proportionate, and dissuasive. In light of the Greek maize case and the subsequent case-law, and the various legislative acts that have been adopted and covers very different aspect and areas of EU criminal law and EU administrative law, the protocol for the three requirements to sanctions are general in another sense as well. Even where there is *no* legal basis within one of the legislative acts of EU criminal law and EU administrative law for the sanctions that they provide, to be effective, proportionate, and dissuasive, it no longer makes any sense if these sanctions also not are required to be effective, proportionate, and dissuasive, despite their lack of any explicit, positive and formal prescription thereof within any of these EU legislative acts. There exists at least two arguments in support of that view. By the example of EU financial law, which is to be determined in Chapter 5 and further discussed in Chapter 6 and 7, a provision-based template of *fully identical* types of criminal sanctions can be found within legislative acts of EU criminal law (MAD-

[944] ibid 89.
[945] ibid 81–90.

CRIM and AMLD-CRIM),[946] and a provision-based template of *almost* fully identical types of administrative sanctions can be found within legislative acts of EU administrative law. All of these sanctions are required to be effective, proportionate, and dissuasive. To the extent that one type of sanction that is required to be effective, proportionate, and dissuasive is fully or almost identical with a sanction found in another legislative act of EU criminal law or EU administrative law, it makes absolutely no sense if that same type of sanction, although it is lacking formal basis thereof, is not to be subject to the same three requirements as well. A second argument goes in the same direction and is based upon a general observation on how the CJEU often infers, refers, adheres and draws principles from one legal area to another. For example, as evidenced above in respect of EU competition law, the CJEU adheres to results and draws principles from EU competition law and applies them by an analogy-inference into EU banking law, and the CJEU even draws principles and applies results from the ECtHR's case-law. Such and similar examples are profiling the CJEU's reasoning and way of inferring under EU law much more generally. Such a way of reasoning seems to dictate that whenever the CJEU are deciding on issues relating to one specific type of sanction, the principle contained in that sanctioning decision will as a main rule also be of equal importance and applied to the legal position of that same type of sanction, irrespective of which and how many legislative acts that particular sanction are having its legal bases. Logically and legally, such an inference is valid under the protocol of the three requirements to sanctions. Therefore, these two arguments in relation to the protocol for the three requirements to sanctions points to an emerging field of law, or legal discipline, which can be referred to as: *"EU sanctions law,"* which under the umbrella and protocol of the three requirements to sanctions can collect and systematise all the sanctioning principles that follows from the sub-areas under EU criminal and administrative law. To the extent that these sanctioning principles are derived from a concept of a criminal sanction, such a discipline of EU sanctions law will essentially qualify as: *"EU substantive criminal law."* A constitutional (Treaty-) foundation (Article 6 TEU), which is embedded in the corresponding human and fundamental rights of ECHR and EUCFR and the standards and principles that follows from the ECtHR's and CJEU case law, and which provides for and applies an authoritative test with a consistent and coherent set of standards and principles to determine whether any offender in reality has been subject to a criminal sanction, seems just right and what is needed for the purposes of triggering the criminal procedural guarantees and safeguards within a different legal areas of EU administrative law.

[946] See Chapter 5, Section III(2)(A).

The first point leads to a second. Above, in Section III(2)(B)(I)(4), it was argued that the CJEU treats EU competition law as if it is EU criminal law. Rightfully so, Klip therefore also does the same in his book on "EU criminal law – An Integrative Approach."[947] In the same Section, it was argued that the CJEU, in the Case C-199/92 P – Hüls v. Commission, decided that the presumption of innocence-clause in Article 6(2) ECHR applied to the enforcement proceedings "relating to infringements of the competition rules applicable to undertakings *that may result in the imposition of fines or periodic penalty payments."*[948] Pursuant to Article 23(2) of Regulation (EC) No 1/2003, the maximum fine which the EU commission may impose "shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by the infringement of the association."[949] As evidenced in the case-law, this may result in fines of a very high amount.[950] As mentioned above, and to be discussed in Chapter 7, the European Central Bank ('ECB') may impose a similar maximum fine of up to "10 % of the total annual turnover, as defined in relevant Union law, of a legal person in the preceding business year."[951] The ECB also has a similar power to impose periodic penalty payments.[952] As these types of sanctions are very similar, in particular the fines in respect of their content and total maximum severity, then the principles discussed under the first point would suggest two arguments: (i) the ECB enforcement proceedings in relation to the imposition of fines and periodic penalty payments should therefore also be protected by the criminal guarantees from Articles 6-7 and 4-P7 from the ECtHR. However, (ii), the ironically part and argument is that this will *not necessarily* be the result from an application of the Engel-test on EU banking law, because as will be discussed in the Chapter 6 and 7, there is an important fundamental difference between EU competition law and EU banking law, that is, that the provisions under EU banking law would consider EU banking law to be governed by disciplinary norms and not criminal norms. If this will be the result of the analysis, the ECB fines will qualify as disciplinary fines, and the ECB enforcement proceedings as disciplinary proceedings, and not criminal proceedings. Here is the more crucial argument: without the application of the Engel-test and the principles that establishes the concept of a legal sanction, the argument cannot be made before the CJEU, and the first point just made would rather point to the (over-) criminalisation

[947] Klip (n 582) 2.
[948] Case C-199/92 P – Hüls v. Commission, para. 150. Italics added.
[949] Regulation (EC) No 1/2003, Article 23(2), third sub-paragraph.
[950] See more generally: Michael J Frese, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing 2014). See also: https://ec.europa.eu/competition/antitrust/cases/.
[951] SSMR, Article 18(1).
[952] SSMR, Article 18(7) in conjunction with Articles 4a(1)(b) ECBSR I and Article 120(b) SSMFR. The view to be presented is also relevant for the other sanctioning authorities in the EU financial sector due to Article 39 SRMR; 36b CRAR; and 25k and 66 EMIR. See further Chapter 7, Section III(2)(A)(II)(4)(a)-(c).

of EU banking law and potentially other areas of EU administrative law as well. However, this may nevertheless and very-well be the result due to a full-blown scrutiny by the CJEU or ECtHR, but it carries the potential of separating, fundamentally, EU criminal law from EU administrative law. In this way, the Engel-test and the concept of a legal sanction may be serving as a blueprint for the foundation of EU criminal law,[953] but also a challenge for the multilevel governance of EU financial sanctions imposed and enforced at the national level or EU level.

Third, the initial but fundamental question of what is EU criminal law implies a search for an identifiable legislative DNA-profile and blueprint establishing the foundation for the discipline and legal area. Without such profile and blueprint, it is not unlikely that the widespread use of the protocol for the three requirements to sanctions and the provision-based templates for types of sanctions available to the different national and European sanctioning authority, like the types of sanctions available to the EU Commission and the ECB, would lead to an *over*criminalisation from the point of view of the Engel-test. This observation requires some arguments in relation to the three requirements for effectiveness, proportionality, and dissuasiveness. A first argument is simple one, but nonetheless meditative one. The protocol for the three requirements to sanctions are not only strictly concerning the concept of '*sanctions'*. As evidenced in Chapter 6, Section III, the protocols also prescribes the three requirements for the concept of *'penalties'* (singular: penalty), irrespective of whether the penalties, or sanctions, are formally classified as administrative or criminal by the EU legislators. From the perspective of Articles 6, 7 and 4-P7 ECHR, there is no difference between the concept of *'punishment'* and *'penalty'*. Hence, the term 'penalty' already implies a legal classification as a criminal sanction. By the application of the term 'penalty' under EU administrative law, there thus already exists an indication that EU legislators considers these legal powers to qualify as sanctions, and that the sanctions are considered *punitive*. In addition, the penalties are required to be 'dissuasive', which in Section III(1) of Chapter 6 is argued just to be another word for 'deterrence' as the EU legislators, the CJEU and ECtHR also use it in accordance with the deterrence theory discussed in Chapter 2. Under the Engel-test, the same two concepts of punitive and deterrent (punishment and deterrence) is also considered as the two *twin*-objectives that signifies the purposes that are attributed, and thus reserved, for criminal sanctions. Klip has also confirmed, referring to the two Öztürk-criteria under the second Engel-criterion, including the deterrent and punitive purposes of the penalty, that: "This definition has been

[953] Klip also argues in that direction, but nevertheless for different reasons. See Andre Klip, *European Criminal Law: An Integrative Approach* (4th edition, Intersentia Ltd 2021) 243.

widely accepted, separating as it does criminal law from other fields of law, and has been confirmed consistently by the ECtHR."[954] A strict terminological application of these principles would therefore often also lead to triggering the criminal guarantees whenever EU administrative law allowed for the imposition of *'administrative penalties'*. However, the concept of 'sanctions' represents a much better choice of word, if the EU legislators truly intends to distinguish between administrative sanctions and criminal sanctions, because that concept has inherently a much broader scope. As argued in Section II and III(1) continuously, the autonomous concept of a legal sanction contains two autonomous sub-categories of sanctions: (i) punitive (and deterrent) sanctions, and (ii) reparatory (and preventive) sanctions. From the conceptual observations just made, the concept of a 'penalty' would thus carry with it an inherent self-contradiction, if that concept also should be used to capture both sub-categories ((i)-(ii)) of sanctions, because it would be quite a misnomer and self-contradiction to refer to a concept such as: *"reparatory penalties."* That concept implies and points to its opposite, by the very use of the term penalty, that it, per se, is punitive and deterrent in purpose and nature.

Another meditation follows from the third point. What is *exactly* meant by the three concepts of 'effectiveness', 'proportionality', and 'dissuasiveness'? As one of very few, Klip has made some general and widespread observations from the case-law of the CJEU and Opinions of different Advocate Generals from the perspective of EU criminal law in various legal contexts.[955] This discussion is admirable, but under the current state of EU criminal and administrative law it is destined to be fruitless if one seeks conceptual clarity. I will therefore need to bring in some of my own observations in order to make my point and to further introduce the more detailed discussion carried out in Chapter 6, Section III(1), in order to justify my attempt in that Section to provide for legal definitions for the three concept and requirements to sanctions of 'effectiveness', 'proportionality', and 'dissuasiveness'.

In respect of 'effectiveness', Klip shares his sentiment as well as his view on the concept: "It is not easy to define the meaning of "effective" in relation to measures to enforce EU law. Since it should be distinguished from "dissuasive", it seems that "effective" relates to the fact, if violations occur, the system is capable of responding to it."[956] I fully shares this sentiment, but not the view, and for the following reasons. First, from what seems to be a presumed perspective of rules on the books (legislation) rather than rules as applied (practical

[954] ibid 2.
[955] ibid 81–88.
[956] ibid 81.

enforcement), both are contexts of which the concept of effectiveness is applicable, then Klip refers to either some cases of the CJEU or Opinions of Advocate Generals to describe the meaning of 'effectiveness': (i) effective means "among other things, that the Member States must endeavour to attain and implement the objectives of the relevant provisions of Community law;"[957] (ii) "Rules laying down penalties are effective where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose the penalty provided for;"[958] (iii) "the coexistence of different legal remedies with different objectives specific to administrative law, civil law or criminal law, cannot, in itself, undermine the effectiveness;"[959] and: (iv) "The obligation to enforce is an obligation as to the result to be achieved. Or, in other words, Union law does not prescribe penalties of a specific nature (custodial sentences or fines). In *Scialdone*, it regarded custodial sentences for fraud cases for damages of at least €250,000 as effective."[960] In accordance with Klip's sentiment, it is not only difficult to define but also to find any meaning at all within these views as there hardly can be derived any applicable principle or general standard to determine whether a sanction or penalty is effective. The quotes are other examples of when we are given results rather than justifications or explanations. However, my argument does not goes so much to the validity of the derived conclusion that the system has to be capable of responding to any occurring violations. Rather, my point is that there is no principle or standard at stake here that determines what effectiveness means. The discussion in Chapter 6, Section III(1) will further emphasise this point. In addition, Frese has shown from a case-law analysis on EU competition law, which is and also should be treated as EU criminal law, that the concept of 'effectiveness', at least as sanctioning principle in its function as a requirement for the imposition of sanctions, carries a more specific definition. It "requires Member States to terminate and penalise infringements of Articles 101 and 102 TFEU effectively," which is particularly evident in respect of persisting infringements:

> "What constitutes an effective sanction for the purposes of Article 4(3) TEU depends on the type of anti-competitive behaviour and the circumstances of the case. It is suggested that persisting infringements, whether as a consequence of the undertaking's behaviour or its very structure, require a remedy that *effectively terminates the infringement*. How this is achieved seems less important. A cease-and-desist order together with a sufficiently severe penalty payment and attached to a well-reasoned decision establishing the infringement may be as effective as an order stating positively what commercial changes are to be made (divestures, compulsory licensing etc)."[961]

[957] Quoting the Opinion of Advocate General van Gerven delivered on 5 December 1989, ECLI:EU:C:1989:609, to Case C-326/88 – Anklagemyndigheden v. Hansen and Søn I/S, point 8.
[958] Quoting the Opinion of Advocate General Kokott delivered on 14 October 2004, ECLI:EU:C:2004:624, to Joined Cases C-387/02, C-391/02, C-403/02 – Criminal proceedings against Berlusconi and Others, point 88.
[959] Quoting the CJEU in Case C-603/19 – Criminal proceedings against TG and UF, ECLI:EU:C:2020:774, para. 56.
[960] Klip (n 582) 81. Italics maintained. Klip refers to Case C-574/15 – Criminal proceedings against Mauro Scialdone, ECLI:EU:C:2018:295, paras. 33 and 52.
[961] Frese (n 599) 102.

For reasons not to be stated here, this view bears quite some merit from a deeper and more theoretical perspective in order to function as a general sanctioning standard and principle, because the types of sanctions available on the books must be capable under practical enforcement proceedings to terminate very specific types of violations of a very different nature and seriousness in order for the sanctions to be considered satisfying the requirement of effectiveness.[962] This might contain a call for punitive sanctions but also, if not first and foremost, of reparatory sanctions, because the types of sanctions available in a particular sanction regime must be capable of handling different types of very specific violations committed by very different types of natural and legal persons, as they occur. It is therefore implied that not all types of sanctions may be deemed capable of satisfying the effectiveness requirement. It would require legal expertise and experience within that field of law to determine this issue as the nature and character of reparatory sanction always depends upon the subject matter regulated by the law, and may therefore also vary accordingly (and substantially). To the extent that it is a call for reparatory sanctions rather than punitive sanctions, the effectiveness requirement is more relevant for administrative, as opposed to criminal, sanction regimes.[963] If the effectiveness requirement thus is considered to contain an objective for the termination of the violation, the effectiveness requirement will thereby also be aiming towards compliance or restoration into compliance, which under the Engel-test is a purpose that is attributed to reparatory sanctions and disciplinary sanctions. From this perspective it makes less sense to speak of an effective punishment or effective penalty, because the objective of punishment is to inflict a punishment (a "suffering" in the form of a deprivation of a right), wherefore the effectiveness of a punishment / penalty instead rather means how the punishment and penalty ensures that the deprivation, as inflicted, is effective. Therefore, it is a better fit for reparatory sanctions to be capable of terminating a violation effectively and punitive sanctions to be required to be *enforced* effectively. In the same way, it sits better for the concept of punishment to be characterised as severe and deterrent, than effective.[964] In light thereof, the concept of effectiveness implies a different meaning in respect of whether it is a requirement for punitive sanctions in comparison to reparatory sanctions, which implies a different meaning in respect of criminal sanctions in comparison to administrative sanctions, which implies a more fundamental

[962] Chapter 6, Section III(1).
[963] The concept of sanction regimes is defined in Chapter 5, Section III, but it is nevertheless depending on and developing from the notions of a 'regime of punishment' from this Chapter, Section II(3), and the institutional aspect on the notion of punishment discussed in Chapter 2, Section II(2).
[964] See the definitions in Chapter 6, Section III(1)(B).

difference between the objectives of EU criminal law and EU administrative law and makes it questionable of the purpose of using *penalties* under EU administrative law.

In respect of 'proportionality', we are facing a concept of which there is attached an enormous amount of case-law from the various different legal bases under EU law, where it is required to conduct a proportionality assessment. I discuss this issue at length in Chapter 6, Section III(1), in order to deduce a proportionality standard that can be applied by the CJEU for the purpose of assessing whether the sanctions imposed are proportionate. However, the merit of this discussion rests upon the observation that one single applicable standard that serves all the different legal masters from the different legal bases under EU law, each having their own purposes from the various legal contexts in which the proportionality assessment is required to be conducted, does not result in a legal definition of the proportionality concept that fits all the specific purposes of these legal bases. For instance, it is *really* the exact same proportionality assessment that must be conducted under Article 5(4) TEU, Articles 45-66 TFEU in respect of restrictions on the freedoms, and Article 49(3) EUCFR? The discussion of the case-law and literature in Chapter 6, Section III(1), points to some extent in that direction, but within EU competition law, Frese has shown that the proportionality standard is different depending on the nature and character of the sanctions imposed.[965] In EU competition law, the CJEU has found a need to formulate a different definition of the concept of proportionality. Quoting the Opinion of Advocate General Kokott, Klip also seems to point at a proportionality concept specific for criminal sanctions, but which nevertheless shares elements with proportionality concept formulated elsewhere in the various contexts of EU law more generally:

> "A penalty is proportionate where it is appropriate (that is to say, in particular, effective and dissuasive) for attaining the legitimate objectives pursued by it, and also necessary. Where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous. Moreover, the effects of the penalty on the person concerned must be proportionate to the aims pursued."[966]

There exists a number of different issues following from this definition and applied as a general standard and principle of which only the two most fundamental ones should be mentioned here. The most relevant standard contained therein seems to be the obligation to have recourse to the least onerous one, where there is a choice between several equally appropriate penalties, when penalties, at the same time, also are required to be dissuasive. Hence, this obligation appears to be inconsistent with the dissuasiveness requirement. Second, all the

[965] Frese (n 599) 107–113.
[966] Opinion of Advocate General Kokott delivered on 14 October 2004, ECLI:EU:C:2004:624, to Joined Cases C-387/02, C-391/02, C-403/02 – Criminal proceedings against Berlusconi and Others, point. 8.

different elements contained in this definition makes it questionable whether anyone actually can point to any proportionality standard therein? When are several penalties equally appropriate? Can anyone understand this definition and actually apply it in practice? Such a definition is not conducive to legal certainty and neither respectful of the need for a strong proportionality requirement. The search for a new legal definition must continue,[967] in particular as there first and foremost also within matters of EU criminal law and criminal sanctions is an obligation to respect the human and fundament rights of the ECHR / EUCFR. This requires a strong, consistent and well-established proportionality standard for the legal sanctions on the books (legislation) and to restrict the severity of the sanctions as applied (practical enforcement).

In respect of 'dissuasiveness', the requirement and concept runs into similar issues as with the concepts and requirement of effectiveness and proportionality. Klip emphasises its close relationship with the proportionality requirement and the latter's mitigating effect on the severity and dissuasive character of sanctions, and points to a few different and inconsistent interpretations following from the case-law of the CJEU and the Opinions of Advocate General.[968] From the discussions in Chapter 6, Section III(1), by taking into account the case-law of the CJEU on EU law more generally, including the cases and the literature on EU administrative law, it will also be argued that the mitigating effect of the proportionality standard and assessment seems to be well-established, if not fully settled in the case-law (at least), irrespective of how the proportionality standard of the proportionality concept is formulated and defined in the CJEU's case-law. What should be understood as 'dissuasiveness' seems to be settled as well. The same discussions in Chapter 6 reveals that the CJEU within EU competition law and EU financial law considers the dissuasiveness requirement to be understood in accordance with the deterrence theory, including, in particular, general deterrence and specific deterrence. This accords with the case-law of the ECtHR and the Engel-test. In this way, EU financial law, besides EU competition law, is also an area of EU law, which may contribute with general principles that governs and defines EU criminal law. Afterall, punishment and deterrence are the two main twin-objectives attributed and reserved for criminal law. Therefore, when both criminal sanctions and administrative sanctions are required to be dissuasive, the task is also to provide and formulate a consistent legal definition in light of the deterrence theory and general and specific deterrence. It will be pursued in Chapter 6, Section III(1).

[967] See Chapter 6, Section III.
[968] Klip (n 582) 87–88.

Finally, it is necessary to point to an important observation that concerns the question of what is EU criminal law and relates to what essentially is EU substantive criminal law as opposed to positive formal legislative- and provision-based EU criminal law. It illustrates that without EU criminal law having a solid substantive foundation and character, the result may be a formal identity-crisis. AMLD-CRIM and MAD-CRIM has been adopted on the basis of Article 83 TFEU, and they are criminalising the offences of money laundering and market abuse.[969] Article 8 AMLD-CRIM and Article 9 MAD-CRIM provides sanctions for legal persons, and they are based on an identical provision-based template with identical types of sanctions. One of these sanctions is: (i)(a) *a judicial winding-up order*. Such sanction may thus be imposed on a retributive basis for the violation of a criminal offence, and the Engel-test will treat it is a criminal sanction due to the first Engel-criterion and conclude that the criminal guarantees will apply as the sanction is intended to be implemented under national criminal law in light of Article 83 TFEU and Articles 8-9 of AMLD-CRIM and MAD-CRIM. Positive EU criminal law has thereby determined the classification of the sanction as criminal.

Chapter 7 will reveal that within the administrative scope of EU financial law, a large number of EU administrative legislative acts are providing for very similar if not fully identical provision-based templates with identical types of administrative sanctions to be imposed on natural and legal persons. One of these sanctions to be imposed on a legal person is: (i)(b) *withdrawal of authorisation*. Such sanction may thus also be imposed on a retributive basis for the violation of an administrative offence, and it is thus implied to be less serious than the criminal offences provided for in AMLD-CRIM and MAD-CRIM. Positive EU administrative law has thereby determined the classification of the sanction as administrative.

Chapter 7 will discuss the case-law under EU financial law with respect to the legal sanction of withdrawal of a licence (licence-withdrawal) held by a legal person formerly operating as a credit institution. One case in particular raises more generally issues of relevance for positive EU criminal law as a credit institution that was subject to a ECB licence-withdrawal (administrative sanction) was also incorporated in an EU Member State which required the *direct* and *automatic* liquidation of the legal person formerly holding the licence of a credit institution, and thus made that legal person subject to a judicial winding-up. It is not unlikely that other EU Member States would or already provides similarly within their national laws, so that a licence-withdrawal of the right to exercise activities as a credit institution or other

[969] On AMLD-CRIM and MAD-CRIM, see Chapter 5, Section III(2)(A),

type of financial activities also would lead to the direct liquidation and judicial winding-up of the legal person holding a licence. The problem should be evident by now as a purely formal and positive law approach would only consider the legal person (subject to a licence-withdrawal) to be subject to an administrative sanction, not a criminal sanction, without triggering the criminal guarantees. This is despite the fact that the legal person suffers the exact same consequences as the legal person that, on a retributive basis, would be subject to a judicial winding-up order due to its commission of one of the criminal offences (money laundering and market abuse). In reality, the legal person subject to the licence-withdrawal has been punished even more severely, because that legal person had only committed an administrative offence, not one of the more reckless and serious criminal offences. Such a result sits very ill under the rule of law, but even more so in the light of justice. How will positive law resolve this issue?

As the society, including the European community, continues to develop and evolve, the long history of the Engel-test bears its own witness and evidence for its relevance and necessity to resolve inconsistent and incoherent positive law issues from a strong substantive foundation. In other words, the history of the Engel-test bears its own heavy evidence for a need to always look behind the legislative appearances. This includes some confession to a natural law and a human rights-based approach to resolve issues such as the one here introduced in respect of legal persons. Therefore, let us see how the application of the Engel-test and the concept of a legal sanction could resolve such issue here at hand in either the forum of the ECtHR or CJEU for the purpose of seeking protection from the criminal guarantees.

The concept of criminal sanctions is attached to deprivations of the right to life, liberty, bodily safety, and property, while the concept of disciplinary sanctions is attached to deprivations of civil rights and political rights. Under the Engel-test, the ECtHR does generally not distinguish between the legal position of natural persons and legal persons.[970] The right to be afforded the criminal guarantees is thus not depending on whether the punished person qualifies as a natural or legal person. On the other hand, the human and fundamental rights are first and foremost *human* rights that are granted to *natural* persons. Hence, it is not obvious that a legal person could or should have any of those rights. However, with the application of the Engel-test comes an underlying distinction between whether the person are directly granted any of the human right as opposed to whether the person should be afforded the criminal

[970] E.g. Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia, paras. 6 and 39-47; Paykar Yev Haghtanak Ltd v. Armenia, paras. 4 and 31-37; Chap Ltd v. Armenia, paras. 5 and 36; Carrefour v. France, paras. 1 and 41-42; Dubus S.A. v. France, paras. 5 and 33-38. See also OOO Neste St. Petersburg, ZAO Kirishiavtoservice, OOO Nevskaya Toplivnaya, ZAO Transservice, OOO Faeton and OOO PTK-Service v. Russia; Valico S.r.l. v. Italy; and Dassa Foundation and Others v. Liechtenstein.

guarantees once the person risks a deprivation of any of those rights. The Engel-test does thus not protect any of the human rights in any strictly manner. This is the specific purpose and scope of the other provisions under the ECHR and the EUCFR (lex specialis). Rather, the purpose of the Engel-test is to determine whether the criminal guarantees attached to criminal proceedings should be afforded to the offender once that offender is subject to an imposition of criminal sanctions. In this way, a legal person could in principle be subject to a deprivation of a right to life for the purpose of its criminal defense rights without actually having that right to life. The case of Dubus S.A. v. France carries *some* evidence for this view as the criminal-head of Article 6 was triggered where a legal person risked to be imposed of a reprimand; a fine up to its level of its minimum capital; and a *de-listing or removal from the register of approved companies*.

Let us entertain this fundamental distinction for a while without necessarily accepting it. Accordingly, the right to life under Article 2 ECHR and Article 2 EUCFR does not grant a legal person the right to life nor does it protect it against any deprivation of its life: the death penalty. However, when the legal person is subject to a sanction which requires its liquidation and winding-up, the right to life of a legal person may function as the governing archetype that requires the protection from the criminal guarantees in order to defend itself before it is put into liquidation and being subject to a winding-up. Afterall, *its right to life is not protected*, wherefore it would suit justice well if the legal person therefore also would have the right to protect itself against deadly and irreversibly consequences. Nevertheless, to some this argument may perhaps sound a bit too far-stretched. However, here is another argument that goes in the same direction. It may seem as an equal mis-fit to consider a legal person to be subject to a deprivation of the right to liberty, when the practical realities are so obvious that it cannot be put into prison and therefore also cannot seek protection from Article 5 ECHR / Article 6 EUCFR. On the other hand, then Articles 49-55 TFEU protects the "Right of Establishment" and provide to all legal persons the *freedom of establishment* pursuant to Article 49 TFEU, which includes primary establishments and secondary establishments, including subsidiaries and branches. This phenomenon of granting liberty rights to legal persons is thus already acknowledged within the EU legal order by the provision of Article 49 TFEU. Going back to the licence-withdrawal, which in reality was a liquidation and judicial winding-up order, what right is there then at stake for the legal person subject to the licence-withdrawal? The liquidation and winding-up order entails that once the proceedings are final, there will no longer be any legal person existing. This first and foremost suggests a deprivation of a right to life for

justifying the application of the criminal guarantees. If that cannot be accepted, it can also be argued that the very same consequences deprives the legal person of its right to liberty, because the imposed deprivation removes the entire foundation for the legal person to exercise the freedom of establishment, including any primary and secondary establishments. Afterall, there will be no establishment left once the winding-up and liquidation proceedings have become final. It is still not a question of whether the licence-withdrawal should be precluded on the basis of Article 49 TFEU, but a question of whether the criminal guarantees should be afforded to the legal person in question once it risks to lose its freedom of establishment. If this argument can be accepted, then it is suggesting a stronger integration between EU criminal law and EU constitutional and human and fundamental rights law, which thus provides for a stronger constitutional and human and fundamental right-foundation for EU substantive criminal law.

What if these arguments cannot be accepted? Well, the Engel-test and the concept of a legal sanction does not seem to disappoint. When a legal person has been subject to a deprivation of property in the form of a fine or confiscation, it follows from the ECtHR's case-law that these sanctions, as a main rule, already triggers the criminal guarantees. The legal person in question will under the winding-up and liquidation procedures lose all rights to its formerly held property and any civil rights held (e.g. all of its licences). Despite there by the example of disciplinary fines exist an exception in respect of property deprivation imposed for a disciplinary offence, then the third Engel-criterion will consider this as an extremely severe sanction, because in comparison to a fine or confiscation of property, where the legal person still exists and may continue to exercise its activities and therefore be able to pay the fine or recover from the confiscation, the deprivation of its entire property and civil rights is a much more severe and serious sanction. The ECtHR or CJEU would also have to compare with legal consequences that follows from the commission of the administrative offence (most likely to qualify as a disciplinary offence under the Engel-test) with the equally severe consequences that follows from the commission of the criminal offences of market abuse and money laundering, because the less serious and reckless administrative offences are thereby punished much harder than a comparable criminal offence, which is a problem generally referred to as: *"marginal deterrence."*[971] When the Engel-test and the ECtHR's conception of a criminal sanction thus may, if it not already does, establish a blueprint for the foundation of EU substantive criminal

[971] See Chapter 2, Section II(1)(B)(I).

law, it will at the same time also provide a heavy challenge for the multilevel governance of EU financial sanctions, and as to be expected, in both forums of the ECtHR and CJEU.

C. Conclusions

In Section III(2) a non-exhaustive overview of the Engel-test's journey into a number of different legal areas has been given. First from the perspective of the ECHR and within the scope of Articles 6-7 and 4-P7. Then, second, from the perspective of the European legal order within the scopes of Article 6 TEU and Articles 47-52 EUCHR. The purpose of the Engel-test's journey has been to determine whether the criminal guarantees contained in these Articles, some of which are corresponding, should be afforded to an offender / defendant once that person was subject to or risked the imposition of criminal sanctions or more broadly has been subject to a criminal charge. As the overviews imply, but also as the discussion points out, the journey of the Engel-test is a journey without a destination. The travelling of the Engel-test will remain relevant as the Engel-test is a guardian of justice that offers a very strong methodological and substantive tool to solve issues that emerges within the limitations of positive law.

The strength of the Engel-test is not only due to its timeless relevance but also its capability to go behind the appearances of positive law. Its strength is shown in a number of other regards. First, the long history of the case-law of the ECtHR reveals the need for an authoritative test that with foreseeability can determine whether the offender has been subject to a criminal sanction or criminal charge for the purpose of triggering the criminal guarantees in practice. The cases before the CJEU reveals a similar need and the discussions also points to a growing need for the CJEU to apply the Engel-test within EU administrative law, in particular EU financial law. However, the authority of the Engel-test is also revealed in two other regards. First, in cases before the CJEU, where the CJEU has not applied the Engel-test, the CJEU is simply unable to provide any convincing explanation and result for why the legal power in question qualifies as a sanction, and why that sanction classifies, or do not classify, as a criminal sanction. It is evident from these cases that the CJEU lacks an authoritative test with a set of authoritative criteria, standards and principles to determine the issue. Without any such authoritative criteria, standards and principles there is no foreseeability and true precedent-value in its decisions and perhaps for that reason, the CJEU decided to apply the Engel-test in the Bonda-case albeit the CJEU in its own case-law, where it did not apply the Engel-test, had assessed similar sanctions before. If the CJEU's ruling had been clear, convincing and the

precedent-value truly evident, the question is why the CJEU anyway decided to apply the Engel-test? This observation may point to some rather unfortunate consequences. Klip has argued in another but relevant context: "This could mean that some cases in the future be decided differently."[972] Second, from consulting the international literature on criminal law and administrative law, it is a bit surprising to note that there does not seem to be any definition of what defines a sanction as a criminal sanction. Perhaps, I have not been thorough enough? – Fines and imprisonment is often pointed to as examples of criminal sanctions, but I still have not seen a set of criteria or any standards and principles that can determine and explain *why* a fine or imprisonment is 'punitive' as evident as it might be and appears to be to everyone. In fact, this is not a criticism of the literature. Instead, this observation is a way of pointing out that perhaps the ECtHR and CJEU, in their functioning as guardians of the ECHR and EUCFR, are the gatekeepers that may be in the best position to construct such a sanction theory, because the essential nature of this topic seems to insist on a real human and fundamental rights-approach to sanctions. As Aquinas saw: "Punishment as related to the subject punished is evil insofar as the punishment in some way deprives the subject of something."[973] Well, what else should that *something* be other than generally acknowledged *rights* within a jurisdiction?

Second, the strength of the Engel-test is also revealed in another regard in the discussions. By the application of the Engel-test by the ECtHR and CJEU, a set of authoritative criteria, standards and principles as well as results are now consolidating. Accordingly: *(i)* the purpose of preserving free competition in markets, the governing objective of competition law, qualifies as a general and criminal norm; *(ii)* the offences of market abuse, including market manipulation, insider dealing and unlawful disclosure of inside information are also governed by general and criminal norms and therefore criminal offences; *(iii)* criminal law and criminal sanctions are primarily governed by the two twin-objectives of punishment and deterrence; *(iv)* the autonomous concepts of *reparatory* (and preventive) sanctions and *punitive* (and deterrent) sanctions determines to a large extent the distinction between non-criminal and criminal sanctions; and *(v)* tax surcharges (tax fines) is settled as to classify as a criminal fines because they are satisfying both of the wo Öztürk-criteria under the second Engel-criterion.

Third, the strength of the Engel-test also manifests in conclusions which are more specific to the CJEU's application of the Engel-test: *(vi)* within all these different legal areas of EU law discussed, the CJEU did not apply any test invented on its own, but the Engel-test,

[972] Klip (n 582) 243.
[973] Saint Thomas Aquinas, On Evil (De Malo), Question 1, Article 4, Reply to Objection 9, p. 79.

even to question and consolidate some of its own case-law as evidence by the Bonda-case; *(vii)* in light of the Bonda-case, the CJEU might be required to the revise some of its case-law on the basis of the Engel-test for the purposes of Articles 47-50 EUCHR, perhaps, in particular, the case-law that relates to Regulation No 2988/95; *(viii)* in light of the Bonda-case, the Engel-test proved useful and effective within EU administrative law to distinguish between criminal law and sanctions on the one side and disciplinary law and sanctions on the other. That case provides evidence for the CJEU is embracing the notion of disciplinary sanctions as governed by the archetype of a deprivation of a civil right; *(ix)* the cases before the CJEU reveals a general tendency towards a consolidation and conformity-interpretation whereby the principles and results as derived from the case-law of the ECtHR travels into the EU legal order by the CJEU rulings under Articles 47-50 EUCFR and in EU competition law. This points to a clear mirror-image between what is considered national substantive criminal law of the EU Member States and what is considered European substantive criminal law, which is evidence by the legal position of the human and fundamental rights within EU competition law; *(x)* within EU competition law, the criminal guarantees from the EUCFR / ECHR is now a rather integrated part of the EU Commissions enforcement proceedings which justifies to treat EU competition law, formally classified as EU administrative law, as EU criminal law; *(xi)* within EU competition law, the imposition of fines and periodic penalty payments classify as criminal sanctions, which was a result derived from the case-law of the ECtHR where it applied the Engel-test, wherefore the CJEU's case-law support the view that similar sanctions elsewhere found in EU law more generally also may be classified as criminal sanctions; *(xii)* on the basis of the results established within EU competition law with respect to the application of the criminal guarantees, the CJEU has ruled in Case T-576/18 – Crédit Agricole SA v ECB, by analogy-inference that, at least the defence rights, also apply in the sanctioning procedure carried out by the ECB under Article 18 SSMR. The cases before the CJEU with respect to market abuse, including Case C-45/08 – Spector Photo Group also reveals that the CJEU seems prepared to initiate the same process in respect of EU securities law. EU competition law therefore serves the CJEU, and can be expected in the future to serve the CJEU, as a blueprint for how the criminal guarantees should be applied within other areas of EU administrative law.

It has thus been argued that what is binding *below*, is binding *above*. Why should it also not be so, even if it means that the ECtHR "thus equates the definition under Union law with the one under national law?"[974] As *above*, so *below*, and *vice versa*, is a good, strong and solid

[974] Klip (n 582) 241.

symmetrical principle that provides legal certainty of what should be considered a criminal sanction and trigger the criminal guarantees. By the Engel-test's strong determination to continue is journey, its' held and applied authority of the ECtHR and CJEU, and its' consolidating results, there is thus not only a sanction theory already functioning and being applied as a blueprint for substantive national criminal law of the EU Member States, but also held and applied as principles of international criminal law. The discussions have shown that within the case-law of the CJEU, the CJEU is now also protecting that blueprint and applying it as the foundation for what already can, and perhaps should, be considered EU substantive criminal law. That blueprint is operational and effective. It can be applied to any area of law in order to determine whether the legal framework in question allows for the imposition of criminal sanctions and whether any other element either relating to the sanctions or charge / offence / proceedings under the sanction regime points to the existence of a *"regime of punishment."*

All these arguments and conclusions here provided are justified on the basis of the ECtHR's case-law in which it has applied the Engel-test and the CJEU's reference, adherence, case-law-inference and direct application of the Engel-test within the scope of Article 6 TEU and Articles 47-52 EUCFR, and the requirement to interpret these provisions in light of the corresponding rights in Articles 6-7 and 4-P7. These provisions as well as arguments and conclusions justifies that the ECtHR's conception of legal sanction can be held and applied as a: *"constitutional concept of sanctions."* Because the Engel-test also determines and defines what is to be considered *"criminal"* from the ECHR-perspective and thereby also substantive criminal law under the national law of the EU Member states, the constitutional bases for the Engel-test will also allow the CJEU in the future to determine and define what should be considered as: *"EU substantive criminal law."* In addition thereto, the discussions have pointed to other elements, which may provide for further consolidation between the legislative structures of positive and formal EU criminal law and the applicable standards and principles that governs EU substantive criminal law. In particular, it has been argued that the EU legislators by the widespread protocol for the three requirements to sanctions of "effectiveness, proportionality, and dissuasiveness," and the provision-based legislative templates of either identical or very similar types of sanctions within EU criminal law and EU administrative law, together with the CJEU's application of the Engel-test, gradually are building the formal structures as well as substantive standards and principles that defines EU criminal law more *generally*. From the perspective of the Engel-test, this could suggest a risk of EU *over*-criminalisation, and that it

might be necessary to consult the authority itself, the *alpha omega*, again, as always. In the Bonda-case, the CJEU already reached out and found, miraculously, a solution.

IV. CONCLUSION

In accordance with the purposes of this Chapter, the conclusion is restricted to: clarify (i) the Engel-test and (ii) the constitutional concept of a legal sanction beyond the summaries and conclusions already made in this Chapter.

With respect to (i), the content of the Engel-test has been unfolded and discussed in Section II. The Engel-test consists of applying the three Engel-criteria, including the two cumulative Öztürk-criteria under the second Engel-criterion (Section II(2)(B)), and it integrates the criminal classification factors for a regime of punishment (Section II(2)). Albeit the Welch factors applied under Article 7 do not formally apply the Engel-criteria in a similar fashion as under Article 6 and 4-P7, there are on the substantive level no real difference between the two tests except that the character of the Engel-criteria are alternative and therefore on a standalone basis can determine the outcome. As the Engel-criteria mostly are applied in a cumulative fashion, the Engel-criteria can be viewed as to integrate and absorb the Welch factors as evidenced in the case-law. A further integration should nevertheless be made more evident in the case-law as it is not conducive to a consistent and coherent read and interpretation of the ECHR and ECtHR's case-law to have two formally different test to decide on identical issues, and as the Engel-test is the standard-test as well the one best argued by the ECtHR, the Welch factor-test seems rather redundant and to be eliminated. The Engel-criteria together with the criminal classification factors integrates the application of the Welch factor into the Engel-test.

From a legal methodological standpoint, the Engel-test essentially employs a methodology that consists in a combination and application of two methods chronologically: (1) it requires that the assessors apply the *'legal doctrinal method'* in order to read and interpret the law provisions in question from a stricto sensu view point, and then on the basis of step one, the assessors are (2) allowed to look behind the appearances of the black letters of the legislative text to determine whether the defendant essentially are subject to a criminal sanction or criminal charge / offence / proceedings by virtue of the application of the Engel-criteria. The second step ((2)) may therefore be referred to as *'legal essentialism'*, because by virtue of the second and third Engel-criteria, the reading and interpretation of the legislation in question is looking for whether it is specific and disciplinary norms or general and criminal norms that

essentially are governing the legislative provisions that has been violated by the offender, and whether the purpose (i), nature (ii), and severity (iii) of the sanctions available satisfies the autonomous notions of what is considering a legal power to qualify as a legal sanction and whether that sanction classifies as a criminal or disciplinary sanction.

With the Engel-test comes two powerful and autonomous notions, that is: (a) the concept of a legal sanction, including the concept of a criminal sanction; and (2) the concept of a criminal charge. The former (a) will be defined in the following, while the concept of (b) a criminal charge needs further characterisation here. The concept of a 'criminal charge' has been referred to as a full confluence between the formal wording and concepts found within Articles 6, 7, and 4-P7 by their making use of the terms criminal *charge*, criminal *offence*, and criminal *proceedings*, because the ECtHR has determined that all these concepts are *corresponding*. Therefore, the ECtHR can also validly apply the Engel-test, understood as either the Engel-criteria or Welch factors, to determine whether the defendant / offender has been subject to any of these in respect of issues relating to Articles 6, 7, and 4-P7. This entails that the concept of a criminal charge is wider than the concept of a criminal sanctions, which reveals itself in the cases where the ECtHR adheres to a number of criminal classifications factors and principles deriving from international criminal law in order to justify its conclusions. In this way, the concept of a criminal charge also covers the concept of a criminal sanction. There is a large amount of cases, where the ECtHR had found the criminal guarantees applicable on the sole basis of the concept of criminal sanctions. Even in cases, where the ECtHR concludes that the defendant has been subject to a criminal charge, criminal offence, or criminal proceedings, it is most often the autonomous notion of a criminal sanction and the principles that makes up the purpose (i), nature (ii), and severity (iii) that drives and fundamentally determines the ECtHR's conclusion. Without the existence of punitive and deterrent sanctions there seems to be no cases, except from the cases decided on the pure merit of the first Engel-criterion, which in reality would justify the conclusions of the ECtHR. This is an observation which transgresses the purpose of the conclusion here, but it is a least indicative of, that the question of: "*what is punishment,"* might serve as the real foundation and legitimacy for criminal law more general.[975] Such arguments have been made in respect of US criminal law.[976] Moreover, if we find ourselves having difficulty to determine and identify, universally, what is a criminal offence, then it may after all be more easy to determine and identify what is an *imposed evil*.

[975] Wieczorek (n 599).
[976] See the quote from George P. Fletcher, Basic Concepts of Criminal Law (1998), p. 25, introducing Chapter 2.

With the criminal classification factors for the sanctions and the concepts of a criminal charge, criminal offence, and criminal proceedings, the ECtHR has since the Welch-case adhered to the notion of what is a "*regime of punishment*." That notion takes into account all the different international criminal law standards and principles that can be used as classification factors for determining more broadly what is criminal. There might exist more principles of international criminal law that are relevant, but the ones discussed are the ones which the ECtHR somehow has found reason to address, typically because the parties to the case has relied upon them in their justifications. These elements to which the factors refer takes into account certain elements in the legislation, the authorities involved, the national system of legal and criminal justice, and more generally the institutional foundations of the legal system of the member states that are parties to the case. As the Engel-test often deal with the distinction between administrative and criminal law, these elements can often be found within administrative sanction regimes, and their existence within any sanction regime points towards and requires an adherence to whether that sanction regime resembles what the ECtHR referred to as a regime of punishment in the Welch case, but also upheld in subsequent case-law as well. A *regime of punishment* equals the notion of a *criminal sanction regime*, and accords in full with what, primarily the US literature, in Chapter 2 discussed as an institutional concept on punishment. As we shall see in Chapter 5 and 6, this notion has travelled into the EU legal order and visited the EU Commission and EU legislators, because the notion of a *"deterrent sanction regime"* can now be found in recitals within legislative acts of EU financial law.

Any *challenge* before the ECtHR, the CJEU or the national forum must thus take into account the Engel-test, including the constitutional concept of sanctions and the criminal classification factors. As evidenced in the ECtHR's and CJEU's case-law, the Engel-test can at least be used: (1) to challenge the classification of the legal powers provided under EU law as applicable or implemented under national law in the forum of the ECtHR as the case-law already reveals that EU secondary law may form part of its review; (2) to challenge EU secondary law in the forum of the CJEU, which in this regard establish itself as the primary forum; and (3) to challenge national law before the ECtHR and/or the national courts.

With respect to (2), the Engel-test provides the architecture for a constitutional concept of a legal sanction based on the standards and principles the relates the purpose (i), nature (ii) and severity (iii) of sanctions. On the basis of a review of the case-law of the ECtHR and CJEU and the discussion and conclusions made in this Chapter, we should be able to construct the legal definition for the constitutional concept of a legal *'sanction'*:

> "A sanction is a legal consequence imposed by a legal authority on natural or legal persons directly for their violation of a law. The legal consequences may result in either: (i) a deprivation of a right, including a right to life, bodily safety, liberty, property, civil rights or political rights, or (ii)(a) a termination of the violation and restoration of the legal position of the offender into compliance with the laws violated; or (ii)(b) a pecuniary restoration of the pre-misconduct legal position of the victims that suffered a loss due the violation of the law."

It is hardly surprising when the Engel-test relies on legal essentialism that punitive sanctions are archetypical in their essential nature by their ultimate consequence of resulting in a deprivation of a *right*. This definition of the concept of a legal sanction therefore is and promotes a human and fundamental right-based sanction theory.

The definition of legal sanction relies upon and employs the logical doctrine of retribution. It entails that the legal consequences must be directly imposed on an offender by a sanctioning authority for the offender's commission of a violation. In this way, it is the violation committed that *sanctions* the imposition of sanctions. The purpose of retribution therefore also functions as the main requirement for the imposition of sanctions on the offender, because it is the offender's personal liability for the commission of the violation(s) that justifies the imposition of sanctions, irrespective of the classification of the sanctions. Personal liability can be established an a number of ways, including on an objective or subjective basis for the commission of the violation(s) and may also include criteria such as guilt and culpability, including intent and gross or simple negligence. Without personal liability for the violation committed, the detrimental consequence to be suffered by the offender will not result in the legal power qualifying as a sanction. Therefore, the concept and purpose of retribution is *crucial* in order to distinguish the concept of a legal sanction from the concept of a *'preventive measure'*, because certain types of legal powers can be applied both as a criminal sanction and a preventive measure. Together with the concept and purpose of retribution, the purposes of punishment and deterrence must be eclipsing to such an extent that the purpose for applying the particular legal power is determined according to doctrine positive prevention. In confiscation proceedings, this entails that the authorities (courts) often relies upon circumstantial evidence and previous criminal convictions for establishing that the wealth and property in the belongings of the previously convicted offender were not obtained legitimately. In administrative and civil proceedings, this entails that a (previously) convicted offender is subject to a suitability assessment which will determine whether the offender, as a holder of a civil right (licence), still satisfies the requirements for being deemed suitable or worthy for holding the civil right. In prison or detention proceedings, preventive detention may also ordered against a prisoner due to an assessment of her or his dangerousness rather than for the commission of a violation. Preventive measures are therefore pursuing other purposes than retribution, punishment and

deterrence, such as to ensure that crimes do not pay-off (confiscation); that the requirements and certain standards are satisfied and upheld in order to carrying the right to exercise the activities of a certain profession or function (suitability); and protection of other inmates (preventive detention). Therefore public safety measures, emergency and precautionary measures, and preliminary and provisional measures, serves as the essential nature and purpose of the archetypes that governs the category of legal powers qualifying as preventive measures.

Reparatory sanctions are also imposed on a retributive basis. They also have an autonomous character, because it is one of the archetypes that governs the class of non-criminal sanctions. Therefore, reparatory sanctions do not in reality result in any deprivation of a right. Rather, reparatory sanctions are sanctions that aims and ensures that the offender can *continue to hold a civil right* and carry on with the activities linked to the civil right by: (ii)(a) restoring the legal position of the offender into compliance with the law, which also includes the termination of the violation(s) committed and prevention against the continuation of ongoing violation(s) by reparatory, remedial and corrective sanctions. Reparatory sanctions also aims at and ensures that the offender: (ii)(b) repairs or compensates any pecuniary loss caused to some victim due to the commission of the violation(s). In these two instances, the sanctions imposed and employed are subject to the fundamental requirement derived from the principle of restitution that the sanctions imposed do not go beyond the *level of restoration*, because that will result in deprivation of a right. The severity of sanctions will typically result in a deprivation of property when the amount imposed on the offender is higher than the loss caused to some victim(s) due to the violation(s) committed. The severity of sanctions may also result in a deprivation of a civil right when the reparatory sanctions imposed goes beyond what is necessary to terminate the violation and restore the legal position of the offender into compliance with law, because such a termination and restoration is not directly linked to the nature of the violation. In this way, there is an inherent and inseparable requirement of proportionality in the imposition of reparatory sanctions for *"poetic exactness,"* which equals the old concept of *proportionality in kind*, as well for the punitive sanctions, reaching beyond the level of restoration, for *"poetic justice,"* which equals the old concept of *proportionality in degree*.[977] The oldest of the concepts, *"lex talionis,"* which captures both proportionality in *kind* and *degree*, therefore continues to be an applicable international sanctioning standard and principle. It follows that punitive sanctions are as a result of the deprivation of a right also more serious and

[977] On poetic exactness and justice, see Chapter 2 more generally, but in particularly Section II(1)(A)(II). See also Chapter 6, Section III(1)(A)(III), with respect to EU law, EU criminal law, and EU administrative law more generally.

severe sanctions, and therefore more stigmatising, while reparatory sanctions are more intrusive. Punitive sanctions therefore also rather targets the natural or legal person as such, while reparatory sanctions are rather targeting the legal position and the recovery of the property (*"in rem."*) Punitive sanctions and reparatory sanctions are together, as available within a sanction regime, removing the incentives of not to comply with the law. As revealed in the cases of securities law and market abuse, the imposition of one or more sanctions, in an interplay or combination of a primary sanction with secondary ancillary sanctions, the sanctioning authorities are capable of both repairing the violation and to punish and deter the offender.

If the definition did only contain the element of 'a deprivation of a right' and not the elements of (ii)(a) 'a termination and restoration into compliance with the laws violated' or (ii)(b) 'pecuniary reparation', the definition would rather define the concept of a *'penalty'*. Any conception of a legal sanction that allows for so-called: "reparatory penalties" would be quite a misnomer, because it contains an internal self-contradiction. Therefore, Articles 6-7 and 4-P7 also applies the corresponding concepts of 'punishment' and 'penalty' according to the their two inherent twin-objectives of punishment and deterrence. If this should be applied strictly within EU law, then it would entail that wherever EU administrative law provides for *"administrative penalties,"* the administrative penalties should be considered as a punitive and deterrent sanction and therefore trigger the criminal guarantees within the corresponding human and fundamental rights from the ECHR of Articles 6-7, and 4-P7, and Articles 47-50 EUCFR. The term "administrative penalties" should thus be read as criminal penalties, but the term *"administrative sanctions"* should not and cannot, and it does not carry any such connotations.

The ECtHR has never concluded or convincingly argued that the sanctions were administrative in *nature*. The reason might be the obvious that the concepts of and distinction between 'criminal' and 'administrative' has nothing to do with the *nature* of sanctions, but the *class* in which the sanctions belong to. The distinction between classes of sanctions is nevertheless a fundamental one, and it is given fact of our times that the sanction regimes that have been assessed under the Engel-test by the ECtHR do not utilize a clear-cut distinction between reparatory sanctions and punitive sanctions to make up the two classes of administrative and criminal sanctions. Therefore, we now have a so-called class of: *"administrative fines,"* even though they, as all fines, are punitive and deterrent in their purpose and nature and therefore in reality also criminal sanctions, and irrespective of whether they are resulting in a loss to some victim. With a reservation for an actual application of the Engel-test, these administrative fines may nevertheless often be considered to qualify and classify according to the fines, which has

been referred to as: *"disciplinary fines,"* because they will typically be imposed for the violation of a disciplinary offence. The existence of disciplinary fines within a sanction regime do not result in triggering the criminal guarantees, unless the third Engel-criterion determines so. The CJEU may thus be expected to apply the Engel-test in order to address this general issue, just as it is also the civil-rights which typically are at stake under the administrative label. An indicative, not an absolute, amount for disciplinary fines at EUR 43,750 imposed on natural persons has not resulted in a criminal classification. No similar amount of disciplinary fines seems to have been established by the ECtHR in respect of legal persons. As a substratum or logical deduction from the Engel-criteria and the standards and principles that are governing the concept of a legal sanction, a true *'administrative sanction'* would thus be a reparatory sanction imposed for the violation of a general and criminal norm. Such an archetype governs the notion and sanctions of *'forfeiture'* and confiscations restricted to the actual enrichment.

In reality, all deprivations of a right is punitive and deterrent, but the legal reality within Articles 6-7 and 4-P7 entails that deprivations of civil right and political rights does not result in any criminal sanction or criminal charge. Disciplinary fines is also an exception to deprivations of property, and one could image that *"disciplinary confiscations"* at one point will be a concept that we will have to familiarize ourselves with within the case-law of the ECtHR or CJEU. It has been argued that there is an emerging tendency with respect to the scope of the deprivations of civil rights and political rights. To the extent, the deprivation of a civil right has consequences beyond the right to exercise a certain specific profession and thereby encroach into the general realm of the ordinary life of the person subject to the deprivation, the case-law points either to the existence of a criminal sanction or criminal charge. Similarly in respect of political rights, where there seems to be a distinction between the general and active right to vote at an election and the specific and passive right to run for election. The more fundamental point to be emphasised here is the problem of distinction between liberty rights and the exercise of civil rights. A similar phenomenon and problem may arise with respect of retributive sanctions imposed on legal persons that requires their liquidation and winding-up of assets, thereby also their right to property and civil rights. The question is nevertheless a much more general one. When a legal person on a retributive basis is subject to a liquidation and winding-up, or risks the imposition thereof (the third Engel-criterion), and thereby no longer will be existing once the proceedings have finalised and the sanction enforced, which archetype is governing? Is it a deprivation of life, liberty, property, or civil rights, or, perhaps,

a combination? – The EU legal order claims to protect the *freedom* of establishment in Article 49 TFEU. I argued that it requires a full commitment to the rule of law and criminal justice.

Finally, it follows from the previous discussions and conclusions made in this Chapter that the Engel-test with the standards and principles it provides for the purpose (i), nature (ii), and severity (iii) of sanctions and the criminal classifications factors it provides for the sanctions and charge / offence / proceedings for determining whether the sanctions classifies as criminal sanctions and the sanction regime resembles a regime of punishment, i.e. a criminal sanction regime, are held, applied and protected as international principles of criminal law within Articles 6-7 and 4-P7. In this way, they are functioning as a blueprint for international substantive criminal law. As shown and discussed in Section III(2), by the CJEU's adherences, references, analogy-inferences or direct application of the Engel-test, the same international principles have thereby also found their way into the EU legal order, when the CJEU needs to perform its functions and address issues with respect to the application of the criminal guarantees within the scope of Articles 6 TEU and 47-52 EUCFR. What functions as an international blueprint within national legal order, thus also functions as a blueprint for the EU legal order. This might prove to be a challenge for EU financial sanctions and sanction regimes found within EU financial law. At the same time, the EU financial sanctions and sanction regimes might be the areas testing and defining the scope of EU substantive criminal law.

> "Sanctions can be a deterrent to wrongdoing and recidivism when they are consistently and reliably applied and have a meaningful correlation to the gravity of the misconduct, the economic and social impact of the misconduct, the unjust enrichment of the wrongdoer and the cost to investors. When potential wrongdoers believe the cost of engaging in misconduct is greater than the reward, they may be dissuaded from engaging in it. Regulators who have and use an array of regulatory responses and sanctions are more likely to deter potential wrongdoers' involvement in misconduct."
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> Credible Deterrence in the Enforcement of Securities Regulation, International Organization of Securities Commissions, p. 8.

§ 4. INTERNATIONAL STANDARDS AND PRINCIPLES ON SANCTIONING

I. INTRODUCTION

The purposes of Chapter 4 are threefold. According to its title, it is first and foremost the aim of this Chapter to discuss the international principles on sanctioning. The analyses and discussion is conducted in Section III on the basis of the documents that contains the international standards and principles on banking supervision, securities regulation and money laundering adopted by three of the most relevant international standard setting bodies ('ISSB') in the financial sector: the Basel Committee on Banking Supervision ('BCBS'); the International Organization of Securities Commissions ('IOSCO'); and the Financial Action Task Force ('FATF').[978] The international standards and principles created by the ISSB are also used as assessment tools in the Financial Sector Assessment Program ('FSAP') under the joint responsibility of the International Monetary Fund ('IMF') and the World Bank, which results in country or regional reports published by the IMF. Section II introduces the FSAP.

In accordance with the main research questions, the analysis and discussion will focus on the concept of sanctions in order to discuss the characteristics of the nature and content of sanctions and the regulation thereof. As sanctions is just one form of legal power conferred on an authority of some sort, the sanctions are found among, and thus to be distinguished from, other forms of legal powers. It will therefore be necessary to broaden the analyses and

[978] Among the most relevant ISSBs for the financial sector is also the Financial Stability Board ('FSB'). The ISSBs are creatures of international political agreements, and they establish the main standards and principles for financial stability and integrity at the global level. The status of the ISSBs within the global financial stability architecture, along with the headline goals of their work programmes, are the result of deliberations taken at the G20 and G7 meetings in the wake of the 2007-09 global financial crisis ('GFC'). See further: Christos V Gortsos, Fundamentals of Public International Financial Law : International Banking Law within the System of Public International Financial Law (Nomos 2012); Shawn Donnelly, 'Financial Stability Board (FSB), Bank for International Settlements (BIS) and Financial Market Regulation Bodies: ECB and Commission Participation alongside the Member States, in Wessel, R. & Odermatt, J., Research Handbook on the European Union and International Organizations, Edward Elgar, 2019.', Research Handbook on the European Union and International Organizations (Edward Elgar 2019).

discussions into the other forms of legal powers in order to distinguish the powers from each other. The conclusions derived from the discussions will then allow me to pursue the second purpose, which is, where appropriate, to apply the standards and principles on sanctioning as an assessment tool in a similar fashion as under the FSAP in Chapters 5 to 7 and thereby to conduct a compliance assessment of whether the EU legal framework on financial sanctions meets the international standards and principles. Reversely, the final purpose is to reflect on whether EU sanctions law with respect to financial sanctions may contribute and fill out any gabs lacking in the international standards and principles on sanctioning. The third and final purpose is a task waiting for Chapter 5, which will describe it in more detail.

II. FINANCIAL SECTOR ASSESSMENT PROGRAM

According to Article IV of the IMF's Articles of Agreement,[979] one of the general obligations of the IMF's members is to recognize the principal objective to continue the development of the orderly underlying conditions that are necessary for financial and economic stability.[980] When a country joins the IMF, it agrees to subject its economic and financial policies to the scrutiny of the international community as well as making a commitment to pursue policies that are conducive to orderly economic growth. The country also agrees to the IMF's country surveillance.[981] The country surveillance is a process in which the IMF's regularly monitors the economies, and where the associated provisions of policy advice are "intended to identify weaknesses that are causing or could lead to financial or economic instability."[982] The Financial Sector Assessment Program ('FSAP') is a key instrument of the IMF's surveillance where it provides input to the Article IV consultation. Under the FSAP, a comprehensive and in-depth analysis and assessment of member countries' financial sector is conducted under the joint responsibility of the IMF and the World Bank with the IMF having the sole responsibility for advanced economies and the World Bank for developing economies and emerging markets.[983]

[979] https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf.
[980] Therefore, each of the members have a duty to collaborate with the IMF and other members. See further Section 1 of Article IV of the IMF's Articles of Agreement.
[981] Section 3 of Article IV of the IMF's Articles of Agreement.
[982] https://www.imf.org/external/about/econsurv.htm. The IMF describes the country surveillance in the following way: "an ongoing process that culminates in regular (usually annual) comprehensive consultations with individual member countries, with discussions in between as needed. The consultations are known as "Article IV consultations" because they are required by Article IV of the IMF's Articles of Agreement. During an Article IV consultation, an IMF team of economists visits a country to assess economic and financial developments and discuss the country's economic and financial policies with government and central bank officials." Brackets maintained.
[983] https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program.

The FSAP therefore consists of two major components. The first component is the 'Financial System Stability Assessment' ('FSSA') conducted under the responsibility of the IMF, which assesses the stability and soundness of the financial sector. The second component is the 'Financial Development Assessment' conducted under the responsibility of the World Bank, and which assesses the financial sector's potential contribution to growth and development of the country. In this way, the overall objective of the FSAP is to achieve an integrated analysis of financial stability and development issues, done on the basis of two broad definitions of 'financial stability' and 'financial development'.[984] The FSSAs may also be tailored, on request to country or regional needs, to specific country or regional circumstances.[985] While both the first and second components are mandatory for the developing and emerging market countries, only the former component is mandatory for the advanced economies. Since the FSAP was first launched in 1999, 142 countries have joined and completed the program. The demand for FSAPs also rose after the GFC, where the G-20 countries made a commitment to undergo FSAP assessments.[986] This includes the EU and US with respect to the first component.[987]

The FSAPs take place every five years and the FSSAs are generally published.[988] The FSAPs (FSSAs) "analyze the resilience of the financial sector, the quality of the regulatory and supervisory framework, and the capacity to manage and resolve financial crises. Based on its findings, the FSSAs produce recommendations of a micro- and macro-prudential nature,

[984] For those definitions, see the IMF, HB, Ch. 1, p. 4.
[985] IMF, HB, Ch. 1, Annex 1.A, p. 11-13. To some extent, the calibration the BCP assessments to country-specific factors may be viewed as contrary to the BCBS intention of viewing the Core Principles as a universal standard to be adopted and implemented, cf. IMF, HB, Ch. 5, p. 177.
[986] https://www.imf.org/external/np/fsap/faq/index.htm#q6.
[987] In addition to the G-20 countries, the IMF deemed other jurisdictions in 2010 as having financial sectors to be systemically important. In this regard, the IMF made it mandatory for 25 jurisdictions with systemically important financial sectors to undergo assessments under the FSAP every fifth year. The list of jurisdictions for these mandatory assessments is based on the size and interconnectedness of their financial sectors. For more detail, see further: https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program. The systemically important countries are: Australia, Hong Kong SAR, Poland, Austria, India, Russian Federation, Belgium, Ireland, Singapore, Brazil, Italy, Spain, Canada, Japan, Sweden, China, Korea, Switzerland, Denmark, Luxembourg, Turkey, Finland, Mexico, United Kingdom, France, Netherlands, United States, Germany, Norway. As for the G-20 countries, only the FSSAs are a mandatory part of Article IV surveillance. See further: https://www.imf.org/external/np/fsap/mandatoryfsap.htm.
[988] https://www.imf.org/external/np/fsap/fssa.aspx. At the end of each FSAP mission, the IMF teams leaves a confidential but detailed and comprehensive aide memoire with national authorities, which the countries may discuss and comment with the IMF team. The FSAP then concludes with the preparation of the FSSA. The FSSA focuses on the issues of relevance to the IMF surveillance "and is discussed at the IMF executive board together with the country's Article IV report." Ibid. On the FSSA procedures, see further "Appendix A" in the Appendices: https://www.imf.org/external/pubs/ft/fsa/eng/pdf/append.pdf.

tailored to country-specific circumstances."[989, 990] As the FSSA sources contain international standards and principles on sanctions in the financial sector, the FSSAs also contains an analysis of the countries' sanction regimes and financial sanctions under the assessment of the quality of the regulatory and supervisory framework. To the extent that the FSSAs have discovered issues worthy of highlighting, remarks will be made in the final reports.

1. The sources of financial system stability assessments

The main FSSA sources that assesses the quality of the regulatory and supervisory framework, under which the standards and principles for sanctions are found, are based upon the IMF's FSAP Handbook,[991] and the IMF's list of endorsed standards, codes and principles.[992] Of the endorsed documents, only the following will be discussed: the 2012 Basel Core Principles for Effective Banking Supervision ('Core Principles', or 'BCP');[993] the 2017 Objectives and Principles of Securities Regulation ('IOSCO Principles')[994] accompanied by the Methodology For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation ('IOSCO Methodology');[995] and the 2022 International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, the FATF Recommendations ('FATF Recommendations'),[996] which is accompanied by the "Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems"

[989] https://www.imf.org/external/np/fsap/fssa.aspx. The IMF has described the stability assessment in the following way: "To assess stability, FSAP teams examine the resilience of the banking and non-bank financial sectors; conduct stress tests and analyze systemic risks, including linkages among banks and nonbanks and domestic and cross-border spillovers; examine microprudential and macroprudential frameworks; review the quality of bank and nonbank supervision and financial market infrastructure oversight; and evaluate the ability of central banks, regulators and supervisors, policymakers, backstops and financial safety nets to respond effectively in case of systemic stress." See the following: https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/14/Financial-Sector-Assessment-Program.

[990] Nevertheless, "a sound and well-functioning system is viewed as comprising three pillars that make up the major policy and operational components that are necessary to support orderly financial development and sustained financial stability," cf. IMF, HB, Ch. 1, p. 4-5. These three pillars are: (I) macroprudential surveillance and financial stability analyses; (II) financial system supervision and regulation; and (III) financial system infrastructure. The elements contained within each pillar both support financial stability and development, but the elements within the third pillar, in particular, constitute the preconditions for effective supervision and regulation. IMF, HB, Ch. 1, p. 4-5. The international standards and principles on sanctions falls with the framework of the second pillar.

[991] https://www.imf.org/external/pubs/ft/fsa/eng/index.htm. Of the IMF's FSAP Handbook, the following chapters are of particular relevance: Chapter 1, "Financial Sector Assessments: Overall Framework and Executive Summary" ('IMF, HB, Ch. 1' – https://www.imf.org/external/pubs/ft/fsa/eng/pdf/ch01.pdf); Chapter 5, "Evaluating Financial Sector Supervision: Banking, Insurance, and Securities Markets" ('IMF, HB, Ch. 5' – https://www.imf.org/external/pubs/ft/fsa/eng/pdf/ch05.pdf); Chapter 8, "Assessing Financial System Integrity – Anti-Money Laundering and Combating the Financing of Terrorism" ('IMF, HB, Ch. 8' – https://www.imf.org/external/pubs/ft/fsa/eng/pdf/ch08.pdf); and Chapter 9, "Assessing the Legal Infrastructure for Financial Systems"[991] ('IMF, HB, Ch. 8' – https://www.imf.org/external/pubs/ft/fsa/eng/pdf/ch09.pdf).

[992] https://www.imf.org/external/standards/scnew.htm.

[993] https://www.bis.org/publ/bcbs230.pdf

[994] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf.

[995] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf.

[996] http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.

('FATF Methodology')[997] as revised in 2020. These documents not only establishes the basis for conducting the FSSAs, they are all also some of the key international standards and principles highlighted by the FSB for a sound financial system.[998] In addition thereto, the documents are supplemented by and refers to a number of papers, reports and resolutions adopted by the BCBS, IOSCO and FATF, which provides context and content to the more-broadly stated standards and principles. In addition, IOSCO has in June 2015 published a paper on "Credible Deterrence In The Enforcement of Securities Regulation"[999] ('IOSCO CDESR'), which reflects "the collective experience and expertise of the member jurisdictions of IOSCO's Committee on Enforcement and the Exchange of Information."[1000] However, the CDESR "has not been prepared, nor is it intended for use as either an assessment or benchmarking reference for securities regulators,"[1001] and the IOSCO Methodology does not refer thereto. Although the CDESR is outside the IOSCO framework, the conclusion on the discussion of the IOSCO Principles will provide an outlook into the IOSCO CDESR where appropriate.

Only a few FSSA country and regional reports have been conducted of relevance for the EU financial sanction regimes and financial sanctions. Two of the country reports are general FSSA assessments, referred to as: 'Country Report No. 13/75' of 15 March 2013; and 'Country Report No. 18/226' of July 19 2018.[1002] Three detailed and technical reports have also been completed and published: (i) Country Report No. 18/227 of 19 July 2018 on "Supervision and Oversight of Central Counterparties and Central Securities Depositories;"[1003] (ii) Country Report No. 18/230 from 19 July 2018 on "Insurance, investment firms and macroprudential oversight,"[1004] and (iii) Country Report No. 18/233 from 19 July 2018 on "Detailed Assessment of Observance of Basel Core Principles for Effective Banking Supervision."[1005] Mainly, the information contained in the latter report ((iii)) is of relevance for discussing and

[997] http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf.
[998] https://www.fsb.org/work-of-the-fsb/about-the-compendium-of-standards/key_standards/.
[999] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD490.pdf.
[1000] IOSCO CDESR, Foreword.
[1001] Ibid. IOSCO nonetheless states that the CDESR "complements the relevant IOSCO Principles by encouraging wider strategic thinking about how to achieve and maintain credible deterrence. It does not alter the Principles or the Methodology which support the assessment of compliance with the Principles," cf. para. 13, p. 7. Furthermore, the CDESR Foreword reflects on its own value as the document contains "useful enforcement practices and powers adopted by various regulatory authorities around the world to promote and encourage credible deterrence of misconduct."
[1002] See the following links: (first) https://www.imf.org/en/Publications/CR/Issues/2016/12/31/European-Union-Financial-Sector-Stability-Assessment-40403; (second) https://www.imf.org/en/Publications/CR/Issues/2018/07/19/Euro-Area-Policies-Financial-System-Stability-Assessment-46100.
[1003] See the following link: https://www.imf.org/en/Publications/CR/Issues/2018/07/19/Euro-Area-Policies-Financial-Sector-Assessment-Program-Technical-Note-Supervision-and-46101.
[1004] See the following link: https://www.imf.org/en/Publications/CR/Issues/2018/07/19/Euro-Area-Policies-Financial-Sector-Assessment-Program-Technical-Note-Insurance-Investment-46104.
[1005] See the following link: https://www.imf.org/en/Publications/CR/Issues/2018/07/19/Euro-Area-Policies-Financial-Sector-Assessment-Program-Technical-Note-Detailed-Assessment-of-46107.

evaluating the sanctions in the EU banking sector. The problems raised therein and the policy recommendations suggested will be discussed in more detail in Chapter 5 and 7 primarily.

2. The FSSA methodologies

The methodology applied for conducting the FSSAs is a form of dialogued based peer review that follows the assessment methodologies provided by, or accompanied to, the international standards and principles.[1006] The methodologies provides both for a compliance assessment of the particular country's or region's legislation implementing the international standards and principles *("laws on the books")*, as well as for an effectiveness assessment *("laws in action")*.[1007] In this way, the methodologies involves an "examination of the adequacy of the legislative and regulatory framework and a determination of whether the supervisors are effectively supervising and monitoring all of the important risks taken by the banks."[1008] The latter component thus ensures that the mere existence of the laws and regulations *("window regulation")* is not sufficient for the implementation of the international standards and principles.

The methodologies deploys different assessment terminologies. While the assessment conducted in accordance with the FATF framework comprise the Recommendations themselves and their Interpretive Notes ('IN') together with the applicable definitions in the Glossary, then the IOSCO Methodology provides for an Interpretative Text ('IT') to the Principles, sets out the 'Key Issues' ('KI') to be addressed by each principle, establishes the 'Key Questions' ('KQ') that are relevant to the assessment of how the jurisdiction is addressing the Key Issues, and it provides 'Explanatory Notes' ('EN') where necessary. The 2012 BCP provides both for preconditions for effective banking supervision,[1009] as well as for Principles on effective banking supervision. To assess compliance with a Principle, certain Essential and Additional Criteria are assigned to each Principle.[1010] The nature of the 'Essential Criteria' ('EC')

[1006] In practical terms, a well-prepared self-assessment is essential. This includes "the summaries of the relevant legal and regulatory texts, as well as a thorough description of the institutional framework and supervisory practices," cf. IMF, HB, Ch. 5, p. 177. In addition, the assessors should meet with the authorities, banks, and other agencies and private sector counterparts so that relevant issues can be discussed. The quality of the assessments, however, aims at mitigating the risk of individual biases through a 'four eyes' approach with reliance on two experts with a mix of skills and backgrounds.
[1007] BCP, paras. 30-37, p. 7-9, and paras. 56-57; IOSCO Methodology, p. 15-17; the FATF Methodology, para. 2, p. 5, and paras. 30-68, p. 12-22. The BCP assessment is nonetheless mostly a compliance assessment.
[1008] IMF, HB, Ch. 5, p. 116.
[1009] The BCP acknowledges that "[from] a broader perspective, effective banking supervision is dependent on a number of external elements, or preconditions, which may not be within the direct jurisdiction of supervisors," cf. BCP, para. 36. See further, BCP, paras. 46-53. None of these preconditions deals directly with financial sanctions and the enforcement of banking law, and they are not graded, cf. BCP, paras. 63-64. Despite the preconditions might be considered to concern the depth of financial sanction regimes in its relation to the criminal justice system, the preconditions are too vague to conclude so. Therefore, they are not a part of the discussions in the following.
[1010] No similar distinctions between the assessment criteria are provided for under the IOSCO and FATF methodologies.

is to provide for "minimum baseline requirements for sound supervisory practices and are of universal applicability to all countries,"[1011] and they specify certain policies that supervisors are expected to comply with.[1012] The nature of the 'Additional Criteria' ('AC') are equivalent to best practices on effective banking supervision. They reflect the highest standard and exceeds the baseline expectations, and thereby contributes to the robustness of the individual supervisory framework.[1013] As the Additional Criteria are best practices, then "all countries should strive to implement [them] to improve financial stability and effective supervision."[1014] Countries or regions may elect to be graded only against the Essential Criteria,[1015] but it is anticipated that the jurisdictions having important financial centres will lead the way in the adoption of the highest supervisory standards and best practices.[1016] Despite these methodologies deploys different terminologies, the compliance assessments nonetheless allows for very similar judgements,[1017] particularly by taking each of the methodologies' benchmarking system into regard. They requires an "exercise of disciplined flexibility,"[1018] and they are intended to provide for objectivity and consistency to an inherent subjective assessment process.[1019]

III. INTERNATIONAL STANDARDS AND PRINCIPLES

1. The nature and objectives of the standards and principles

The (2012) Basel Core Principles for Effective Banking Supervision was developed by the BCBS "as its contribution to strengthening the global financial system."[1020] The Core Principles provide for a framework of minimum standards for sound prudential regulation and supervision of banks and banking systems, and they are considered universally applicable.[1021] They have become the key global standards for prudential regulation and supervision of banks, and they provide the benchmarks for assessing compliance and effectiveness (quality) of

[1011] BCP, para. 31.
[1012] IMF, HB, Ch. 5, p. 116.
[1013] BCP, para. 32. Furthermore: "As supervisory practices evolve, it is expected that upon each revision of the Core Principles, a number of additional criteria will migrate to become essential criteria as expectations on baseline standards change. The use of essential criteria and additional criteria will [...] contribute to the continuing relevance of the Core Principles over time."
[1014] IMF, HB, Ch. 5, p. 116. The Additional Criteria are particularly relevant to the supervision of more sophisticated banking organisations where international business is significant, ibid.
[1015] BCP, para. 59.
[1016] BCP, para. 33.
[1017] IMF, HB, Ch. 8, p. 214; BCP, para. 38.
[1018] IMF, HB, Ch. 5, p. 147. For instance, the BCP assessment is graded in a scale system that consists of four grades: 'compliant', 'largely compliant', 'materially non-compliant', and 'noncompliant', with a fifth category that considers a Principle as 'not applicable', cf. BCP, paras. 61-62. Similar rating systems are also provided by the IOSCO and FATF Methodologies. See further the IOSCO Methodology, p. 19, and FATF Methodology, para. 33, p. 12.
[1019] IMF, HB, Ch. 5, p. 144.
[1020] BCP, para. 39. The vast majority of countries have also endorsed and implemented the Core Principles.
[1021] BCP, paras. 1, 39 and 65.

banking supervisory systems, as well as for identifying future work to achieve a global baseline level of sound supervisory practices.[1022] In the 2012 BCP framework there are 29 Core Principles. Their primary objective is to promote the safety and soundness of banks and banking systems. National law may nevertheless provide for different objectives and tasks to the banking supervisors, but the 2012 BCP makes it clear that any other type of responsibility conferred on the banking supervisors should be subordinate and not in conflict with the primary objective.[1023] In the pursuit of the primary objective, the 2012 BCP undertakes a proportional approach designed in a manner capable of being applied to a wide range of national or regional jurisdictions, and so that each principle can be applied to the supervision of all types of banks and banking groups, independent of their size and complexity.[1024]

The (2017) IOSCO Principles sets out a general framework for the regulation of securities, and provides three core objectives for securities regulation: (1) investor protection; (2) ensuring that markets are fair, efficient and transparent; and (3) reduction of systemic risk.[1025] These objectives are closely related and overlaps in many respects.[1026] Regarding the first objective (1), then investors should be protected against "misleading, manipulative or fraudulent practices, including insider trading, front running or trading ahead of customers, and the misuse of client assets."[1027] Because of such fraudulent schemes, the complex character of securities transactions, and that investors are particularly vulnerable to unlawful behaviour by intermediaries, a strong enforcement of securities laws and regulations are necessary.[1028] In this way, there is a clear interlinkage established to the second objective (2) as it not only aims at ensuring fair, efficient and transparent securities markets,[1029] including a fair access to market

[1022] BCP, paras. 1, 11-13 and IMF, HB, Ch. 5, p. 110. The Core Principles was originally issued in 1997, but revised in 2006 and again in 2012 for its latest revision. The intention behind the 2012 review was to balance the objective of raising the bar for banking supervision by incorporating the lessons learned from the global financial crisis ('GFC') of 2007-09 "against the need to maintain the universal applicability of the Core Principles and the need for continuity and comparability," cf. BCP, paras. 1 and 11. The revised Core Principles strengthens, inter alia, the requirements for supervisors and the powers that the supervisors should have in order to address safety and soundness concerns, and emphasises the need for early intervention and to take timely supervisory actions, as well as to tailor the supervisory actions to the banks individual circumstances in order to be effective. The BCP considers it crucial that supervisors use their powers once weaknesses and deficiencies are identified, and by adopting a forward-looking approach through early intervention it may prevent identified weaknesses from developing into a threat to safety and soundness of (highly complexed) banks and banking groups. See further, BCP, paras. 11-13.
[1023] BCP, para. 16. In particular: "It should not be an objective of banking supervision to prevent bank failures. However, supervision should aim to reduce the probability and impact of a bank failure, including by working with resolution authorities, so that when failure occurs, it is in an orderly manner."
[1024] BCP, paras. 17, 19 and 43. Despite the aftermath of the GFC has focused much on the global systemically important banks ('G-SIBs' or 'SIBs'), the BCBS considered it unnecessary to include specific stand-alone core principles for SIBs.
[1025] IOSCO Principles, p. 3, and IOSCO Methodology, p. 10.
[1026] IOSCO Methodology, p. 10.
[1027] Ibid.
[1028] See further IOSCO Methodology, p. 10.
[1029] Pursuant to fn1 of the IOSCO Principles, the terms "securities markets" and "securities regulations" "are used, where the context permits, to refer to compendiously to the various market sectors. In particular, where the context permits they should be understood to include reference to derivative markets," cf. p. 3. See also IOSCO Methodology, p. 15.

facilities and price information as well as a fair treatment of orders, but also at the prevention of improper trading practices. Securities laws should therefore "detect, deter and penalize market manipulation and other unfair trading practices."[1030] The third objective (3) acknowledges that risk taking is essential to an active market and that securities regulations should not unnecessarily stifle legitimate risk taking. However, securities regulation should also aim to reduce the risk of failure and seek to reduce the impact of failure by attempting to isolate the risks to failing institutions. Such matters reaches beyond securities laws and into insolvency laws, but securities regulation should provide "effective and legally secure arrangements for default handling."[1031] The three objectives are further articulated in the total of 38 IOSCO Principles, which are intended to give "practical effect" [1032] to the objectives.

International standards and principles on anti-money laundering ('AML') and countering the financing of terrorism ('CFT') are provided by the (2022) FATF Recommendations and are based on the FATF's mandate "to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and the financing of proliferation, and other related threats to the integrity of the international financial system."[1033] Hence, their main objective is financial integrity.[1034] The FATF Recommendations set out a comprehensive framework of measures that countries must implement to combat money laundering and terrorist financing, including "preventive measures for the financial sector and other designated sectors" and "powers and responsibilities for the competent authorities (e.g., investigative, law enforcement and supervisory authorities) and other institutional measures."[1035] Many of the FATF Recommendations are closely connected with and provides for integration with the BCP and IOSCO Principles because some of the key elements of AML-CFT regimes are covered and a part of the BCP and IOSCO assessments of financial supervision standards.[1036] For instance, Recommendation 27 provides standards and principles for the "Powers of supervisors." Such standards would not be meaningful based on the FATF Recommendations own merits, because Recommendation 27 presumes the

[1030] IOSCO Methodology, p. 11.
[1031] Ibid. Even though the three objectives are presented on an equal footing as equally important then the IOSCO Methodology underscores statements provided in the IOSCO bylaws, which requires that IOSCO members at all times should be guided by their concern for investor protection, cf. IMF, HB, Ch. 5, p. 141.
[1032] IMF, HB, Ch. 5, p. 141; IOSCO Principles, p. 3; and IOSCO Methodology, p. 10.
[1033] FATF Recommendations, p. 6.
[1034] Mark T Nance, 'The Regime That FATF Built: An Introduction to the Financial Action Task Force' (2018) 69 Crime, Law and Social Change 109, 115.
[1035] FATF Recommendations, p. 6. Brackets maintained.
[1036] IMF, HB, Ch. 8, p. 210. Pursuant to IMF, HB, Ch. 8, p. 211-212: "Many of those issues are likely to be covered as part of the assessments of preconditions for other supervisory standards, and information from the other assessments can help inform AML–CFT assessments."

existence of an established legal framework for financial supervision under which authorities supervise and enforce the rules. Nevertheless, the "AML–CFT standards go beyond financial supervision aspects and cover legal, institutional, and law enforcement aspects."[1037] In particular, through the criminalization of money laundering and the obligation to provide for criminal sanctions, the FATF Recommendations consequently provides depth to the countries' financial sanction regimes and a stronger integration into the legal and criminal justice system.

2. The 2012 Basel Core Principles for Effective Banking Supervision

A. Standards and Principles for legal responsibilities, objectives and powers

Under the first group of (thirteen) Principles, "Supervisory powers, responsibilities and functions," the first Core Principle on effective banking supervision is titled: "Responsibilities, objectives and powers." Core Principle 1 ('CP1') reads:

> "An effective system of banking supervision has clear responsibilities and objectives for each authority involved in the supervision of banks and banking groups. A suitable legal framework for banking supervision is in place to provide each responsible authority with the necessary legal powers to authorise banks, conduct ongoing supervision, address compliance with laws and undertake timely corrective actions to address safety and soundness concerns."[1038]

Principle 1 carries three interdependent presumptions. The first presumption concerns the existence of an authority (or more than one) responsible for conducting banking supervision. The second presumes that a suitable legal framework for banking supervision is in place, and the third presumes that the legal framework provides legal powers to the responsible authority. These presumptions are of a constitutive nature and in the Essential Criteria to CP1 they manifest in fundamental requirements to the (i) supervisor, (ii) legal framework, and (iii) legal powers conferred on the supervisor. The requirements to the supervisors (i) relates to the responsibilities and objectives of one or more authorities responsible for conducting supervision of banks and banking groups, which in the BCP are referred to as supervisor(s).[1039] EC1 to CP1 requires that where the supervisory framework provides for more than one supervisor, then "a credible and publicly available framework [must be] in place to avoid regulatory and supervisory gaps."[1040] The obligation to provide for a credible supervisory framework also

[1037] IMF, HB, Ch. 8, p. 210.
[1038] CP1 at BCP, p. 21.
[1039] According to fn21, p. 21 of the BCP, such 'authority' is regarded as 'supervisor' throughout the document. Principle 11 use the term 'supervisor' in the same meaning.
[1040] BCP, p. 21. The requirement for having a credible supervisory framework is also reinforced by other Core Principles in more specific aspects. CP2 requires that the supervisor possesses operational independence, transparent processes, sound governance and adequate resources, and that the supervisor is both legally protected and may be held legally accountable. CP12 considers consolidated supervision of the banking group as an essential element of banking supervision in order to adequately

manifests in the requirements to the legal framework (ii), where EC1 and EC4 to CP1 requires that the country have a suitable legal framework in place, and that the responsibilities and objectives of the supervisor(s) is clearly defined in legislation and publicly disclosed. These initial and constitutive requirements reflects an observance of the rule of law principle.[1041]

The legal powers (iii) conferred on the supervisor must also be viewed on this background. A credible supervisory framework requires that the supervisor has legal powers that are clearly defined in law in order to exercise credible and effective supervision.[1042] CP1 provides four types of legal powers conferred on the supervisor: (1) the power to authorise banks and equip them with a banking licence; (2) the power to conduct ongoing supervision of banks and banking groups; (3) the power to address compliance with banking laws and regulations; and (4) the power to undertake timely corrective actions to address safety and soundness concerns. Almost the entire BCP framework is devoted to these powers. However, with respect to sanctions, then EC3 and EC5-7 to CP1 and CP11 are the two key Core Principles.

The supervisor or other licensing authority must have 'licencing powers' (1), which concerns the power to authorise banks with a banking licence. This positive licencing power provides to the supervisor the power to grant the applicant bank with an operational licence that allows the bank to pursue banking business activities. It is mirrored in the negative licencing power to withdraw or revoke the banking licence, which precludes the bank from continuing its operations.[1043] While the positive licencing power, provided in CP1, must be read in conjunction with CP4-5,[1044] then the negative licencing power is provided in EC6(c) to CP1 and must be read in conjunction with CP11. CP5 provides that the licencing authority has the power to set and reject applications submitted by establishments for obtaining a banking licence. The rejection-power is not a negative licencing power in a strict sense, because that power (withdrawal) presumes that the banking licence already have been granted to the applicant bank and that the bank is operating. Therefore, it is closer to the positive licencing power as it concerns an assessment of whether the applicant bank meets the prudential licencing criteria necessary for obtaining the right to conduct business as a bank.[1045] The application of the

monitor and apply prudential standards to all aspects of the business conducted by the banking group. See further CP2, CP12, CP13 and the EC and AC thereto.

[1041] The BCP often refer to phrases such as: "to clearly define" or "laws, regulations and the supervisor requires." See, for instance, also: CP3; CP4; EC1 to CP6; EC1 to CP7; and the ECs to CP14-29.

[1042] EC3 to CP1 thereby also has a clear and meaningful basis for requiring that the laws and regulations provide a framework for the supervisor to set and enforce minimum prudential standards for banks and banking groups.

[1043] CP1 and EC6(c).

[1044] See further EC1-5 to CP4, and EC1-11 and AC1 to CP5.

[1045] EC2 to CP5 further provides that the banking laws and regulations give the licensing authority the power to set criteria for licensing banks, and where these criteria are not fulfilled, or where the information provides is inadequate, the licensing

withdrawal and revocation power is rather reserved for more serious situations, for instance, where it turns out that the banking licence was granted on the basis of false information.[1046] The characteristics of the negative licencing power is further developed by CP11 as discussed below.

The supervisor must also have the power to conduct ongoing supervision of banks and banking groups (2). EC5 and EC7 to CP1 clarifies that this power includes 'access to information' necessary for conducting supervision as well as to 'review the activities' of the banks and banking groups.[1047] EC5 to CP1 reflects on the close link between the access to information and the review of that information as EC5 requires that the supervisor has full access to banks' and banking groups' boards, management, staff and records in order to review compliance with internal rules and limits as well as with external laws and regulations.[1048] CP10 also elaborates with the requirement that the "supervisor collects, reviews and analyses prudential reports and statistical returns from banks on both a solo and consolidated basis."[1049] EC1 to CP10 also provides the power to require banks to submit information about their financial condition, performance and risks, on demand or at regular intervals.[1050] Therefore, having access to information is a necessary prerequisite for exercising the power to review the information.

The power to the conduct ongoing supervision is further specified by EC3 to CP1. EC3 prescribes that the banking "[laws] and regulations provide a framework for the supervisor to *set* and *enforce* minimum prudential standards for banks and banking groups."[1051] The power to 'enforce' prudential standards is not a reference to the other legal (enforcement) powers referred to in (3) and (4) as it first and foremost includes the power to *'set'* minimum prudential standards as well as "to *increase* the prudential requirements for individual banks and banking groups based on their risk profile and systemic importance."[1052] Similar powers are also found in the second group of the BCP framework on "Prudential regulations and requirements," where CP14-29 literally stipulates that the supervisor have the power to 'set', 'require',

authority has the power to reject the application. The power to 'reject' thereby only reflects the power to judge whether the application meets the criteria.

[1046] EC2 to CP5, third sentence.

[1047] EC7 to CP1 is devoted to the scope of the 'review power' as it considers it necessary that the supervisor has the power to review the activities of the parent companies and those companies affiliated with the parent companies in order to determine their impact on the safety and soundness of the bank and the banking group.

[1048] EC5(a) to CP1. See also EC5(b)-(c) to CP1.

[1049] CP10, but see further EC1-11.

[1050] EC6 to CP10 complements both EC5 to CP1 and CP10.

[1051] EC3. Italics added.

[1052] EC3. Italics added. See BCP, p. 22, fn22 and fn23 for the definitions of 'risk profile' and 'systemic importance'.

'control', or otherwise 'determine' certain prudential requirements. Such prudential powers are also found in CP6-7, which requires the supervisor to have the powers:

> [CP6]: "to review, reject, and impose prudential conditions on any proposals to transfer significant ownership or controlling interests"[1053]
>
> [CP7]: "to approve or reject [...] and impose prudential conditions on, major acquisitions or investments by a bank, against prescribed criteria"[1054]

The nature of the power to conduct ongoing supervision is therefore twofold with the powers to: (2)(i) access and review information and (2)(ii) the judgement and enforcement powers of the prudential framework. The judgement and enforcement powers provide the bulk of the total legal powers as they allow the supervisor to review, determine, approve, control, reject, increase, impose and thereby enforce prudential standards. The prudential and discretionary character of these powers keeps them closely tied in with the day-to-day supervision of banks and banking groups. Instead, the last two forms of legal powers (3)-(4) share a common nature in their ability to *"address,"* which indicates that something more serious is at stake.

Finally, the supervisors must also have powers to address compliance with laws and regulations (3) and timely corrective actions that addresses safety and soundness concerns (4).[1055] EC6 to CP1 elaborates on these two powers by requiring the following:

> 6. When, in a supervisor's judgment, a bank is not complying with laws or regulations, or it is or is likely to be engaging in unsafe or unsound practices or actions that have the potential to jeopardise the bank or the banking system, the supervisor has the power to:
> (a) take (and/or require a bank to take) timely corrective action;
> (b) impose a range of sanctions;
> (c) revoke the bank's licence; and
> (d) cooperate and collaborate with relevant authorities to achieve an orderly resolution of the bank, including triggering resolution where appropriate.

Accordingly, the powers referred to in EC6(a)-(d) applies in two fundamental situations: (i) where the bank is not complying with banking laws and regulations; and (ii) where the bank is or likely to be engaging in unsafe or unsound practices or actions which have the potential to jeopardise the bank or the banking system. EC6 to CP1 expressly places the legal powers in (a)-(d) on an equal footing with respect to their ability to address those two fundamental situations, despite CP1 implies a preference for applying corrective actions in order to address the safety and soundness concerns. Unfortunately, the BCP does not define when a conduct amounts to a violation of the banking laws or regulations, neither when unsafe or

[1053] CP6. The supervisor also has the power to take appropriate action to *modify*, *reverse*, or otherwise *address* a change of control that has taken place without necessary notification to or approval from the supervisor," cf. EC5 to CP6. Italics added. See further EC1-6 to CP6.
[1054] CP7. See further EC1-1 and AC1 to CP7.
[1055] CP1.

unsound practices or actions are having the potential to jeopardise the bank or the banking system. EC6 to CP1 and EC3 to CP8 nonetheless confers this judgement to the supervisor.[1056] It is also the supervisor's judgement power to determine which of the four distinct powers are most appropriate to be applied in order to address these two fundamental situations.[1057] Setting aside the restricted resolution-power of the prudential supervisor, which also follows its own very distinct purpose, EC6 to CP1 makes it relevant to ask: why are the corrective actions and the revocation- and withdrawal-power not sanctions? Any answer must first consult CP11.

B. Standards and Principles on corrective and sanctioning powers

The Core Principles should be read in conjunction and towards consistency with each other. This includes, in particular, Principle 1 and 11.[1058] Principle 11 reads:

> "The supervisor acts at an early stage to address unsafe and unsound practices or activities that could pose risks to banks or to the banking system. The supervisor has at its disposal an adequate range of supervisory tools to bring about timely corrective actions. This includes the ability to revoke the banking licence or to recommend its revocation."[1059]

CP11 contains three sentences, which provides for two fundamental principles. The first principle (i) is based on the first sentence and is further elaborated by EC1 and AC1-2 to CP11 and EC1-10 to CP9. It relates mostly to the supervisory process that addresses the fundamental situations referred to above. The second principle (ii) is based on the last two sentences and is further elaborated by EC2-7 to CP11. The second principle relates mostly to the adequate and available powers to address. In this respect, it should already be noted that the title of CP11, "Corrective and sanctioning powers of supervisors," distinguishes between corrective actions and sanctioning powers. It should also be noted that footnote 42 to that title intends to clarify that "corrective and remedial powers are considered to be one and the same."[1060] This should allow us conclude that corrective actions have a remedial nature and purpose, and that remedial powers have a corrective nature and purpose.

Considering the first principle (i), then CP11 applies the second of the two fundamental situations introduced in EC6 to CP1. However, where EC6 to CP1 referred to "actions" and "jeopardise", then CP11 refers to "activities" and "could pose risks." Nonetheless, these terms

[1056] EC3 to CP8 provides an obligation to the supervisor to assess banks' and banking groups' "compliance with prudential regulations and other legal requirements."
[1057] EC1 to CP2 also requires that the supervisor "has full discretion to take any supervisory actions or decisions on banks and banking groups under its supervision," cf. BCP, pp. 22-23.
[1058] See, for instance, fn43 in EC3 to CP11, BCP, p. 34.
[1059] CP11.
[1060] BCP, p. 34, fn42.

must be considered synonyms and thus to provide for the exact same meaning. The assessments that relates to the second fundamental situation may result in, and be referred to by terms such as, 'supervisory concerns' and 'safety and soundness concerns'. Otherwise, EC1 to CP11 in conjunction with EC1-10 to CP9 provides the requirements for addressing the supervisory and safety and soundness concerns. In this respect, the following observations are made:

First, even though there is no definition of 'unsafe and unsound practices or activities', then CP1, CP9 and CP11 seems to imply that whenever a safety and soundness assessment raises safety and soundness concerns, the supervisor has an obligation to act at an early stage in order to address the concerns. The legal power to address safety and soundness concerns is closely connected with the judgement and enforcement powers categorised under the second group of legal powers to conduct ongoing supervision. EC1 to PC11 also affirms that the corrective actions are the preferred remedial powers to address safety and soundness concerns.[1061]

Second, whenever the safety and soundness assessments have resulted in supervisory concerns, the supervisor must then raise the concerns to the bank's management or board, as appropriate, and require that these concerns are addressed in a timely manner.[1062] This is in accordance with EC6(a) to CP1, which requires that the supervisor either takes, and/or require from the bank to take, timely corrective actions, but EC1 to CP11 emphasises that it is first and foremost the bank itself that addresses the supervisory concerns raised. The 'timely' standard is not defined, but it carries a flexibility to it that depends on the seriousness of the specific supervisory concerns raised and the types of corrective actions needed. Therefore, the more pressing that the supervisory concern is, the shorter the time should be to resolve the supervisory concerns by means of corrective actions.

Third, "[where] the supervisor requires the bank to take significant corrective actions, these are addressed in a written document to the bank's Board."[1063] There are no definition of what is "significant corrective actions," but they must be formally raised by the supervisor to the bank's board in a written document, and thus not to its management. This requirement allows us to make two new distinctions between significant and insignificant and formal and informal corrective actions, based on a presumption which acknowledges that the safety and soundness concerns can be of more or less serious nature.[1064] Therefore, where the assessment

[1061] EC4(a)-(e) to CP9 exemplifies the variety of tools that the supervisor uses to regularly review and assess the safety and soundness of banks and the banking system.
[1062] EC1 to CP11.
[1063] Ibid.
[1064] See also AC1 to CP11.

of the bank raises serious supervisory concerns to the supervisor, there is a call for applying a formal and written procedure that requires the bank to take significant corrective actions in order to remedy the concerns raised. Conversely, concerns that are not posing any serious threat to the bank or banking system requires only an informal procedure, where the supervisory concerns are communicated and discussed between the bank and the supervisor. CP11 seems mainly to be devoted to the significant corrective actions, while EC1-10 to CP9 is more concerned with the general supervisory process and insignificant corrective actions.[1065] In this way, there seems to be full identity between the judgement and enforcement powers under the second legal power and the insignificant corrective actions, as well as full symmetry between the serious supervisory concerns and significant corrective actions.

Fourth, in particular where the supervisory concerns are serious, the supervisor has an obligation to require the bank to submit regular written progress reports; to check whether the corrective actions are completed satisfactorily; and to follow through conclusively and in a timely manner on concerns that are identified and raised.[1066] These procedural obligations are more obvious for the formal and significant corrective actions, and with respect to these, it is considered a best practice that the supervisor informs the relevant supervisor(s) of non-bank related financial entities of its (intended) actions in order to coordinate its actions with them, where appropriate.[1067] It is also a best practice that the country or region have laws or regulations which guards against supervisors that unduly delays appropriate corrective actions.[1068]

With respect to the second principle, that the supervisor must have adequate powers at its disposal to address (ii). Footnote 43 to EC3 first of all refers to CP1, meaning that the framework provided in CP1, and particularly in EC6 to CP1, is now operating in CP11. However, EC3 to CP11 not only applies that framework, it also builds on it. Where EC6 to CP1 prescribed four types of powers to be available to the supervisor in two fundamental situations, then EC3 to CP11 now provides for an additional situation in which the supervisor may apply the same powers: "or when the interests of depositors are otherwise threatened."[1069] EC3 to CP11 also includes the situations where the bank is not complying with banking laws and regulations that the lack of compliance may also occur with respect to the supervisor actions

[1065] EC9 to CP9 entails that less serious supervisory concerns can become serious supervisory concerns, where the bank has not addressed the supervisory concerns in an adequate or timely manner. Such situations further includes an early escalation to the appropriate level of the supervisory authority and the bank's Board.
[1066] EC1 to CP11.
[1067] AC2 to CP11.
[1068] AC1 to CP11.
[1069] EC3 to CP11.

(decisions), including corrective actions, taken against the bank.[1070] Conclusively, this entails that the four legal powers contained in EC6 to CP1 must be available in three fundamental situations:

> (1) the bank is engaging, or likely to be engaging, in unsafe or unsound practices or activities that that could jeopardise, impair or otherwise pose risks to the safety or soundness of the bank or the banking system *[significant safety and soundness concerns]*; and
>
> (2) the bank is not complying with the banking laws and regulations or supervisory actions *[violations of banking law and supervisory decisions]*; and
>
> (3) the interests of depositors are otherwise threatened.

Where the first situation is based on a safety and soundness assessment, and the second situation is based on a compliance assessment, then it is not clear whether the third situation is an entirely distinct situation or embedded within the two others, in particular the former. The BCP is silent about when the interests of the depositors are threatened. However, both EC6 to CP1 and EC3 to CP11 affirms that it is the supervisor's judgement to assess the situation and apply the appropriate powers to address the situation with a preference for applying timely corrective actions in the first situation (1).[1071] The rest of EC4-7 to CP11 deepens this framework and continues on the nature of the powers to address the three fundamental situations.

First, EC4 to CP11 reaffirms that the supervisor must have a broad range of available measures to address the three situations at an early stage, including "the ability to require from the bank to take timely corrective action or to impose sanctions expeditiously."[1072] This entails that the requirement as well as the ability of a measure to be taken 'at an early stage' is not a feature that in a strict sense only is characterising the corrective actions but also the sanctions. On that basis, it is thus not possible to distinguish between corrective actions and sanctions, despite the corrective actions often are referred to in a context where there is a need for the supervisor to act at an early stage.[1073] On the other hand, it may also be logical to impose sanctions at an early stage before the violations materialises into serious safety and soundness concerns. Corrective actions must be timely, while sanctions must be imposed expeditiously.

[1070] Ibid. The concept of 'supervisor actions' is wider than the concept of 'corrective actions'. EC3 to CP9 does not consider the supervisory and corrective actions as identical measures. However, where the corrective actions are included among the supervisory actions then that is not the case for supervisory actions as the term seems to include actions that are not corrective in nature. However, the content of the supervisory actions is not clear.
[1071] EC1 to CP2 expressly prescribes that "[the] supervisor has full discretion to take any supervisory actions or decisions on banks and banking groups under its supervision," cf. BCP, p. 23.
[1072] EC4 to CP11.
[1073] See, for instance, CP11 and EC1 to CP11.

Second, EC4 to CP11 then continues by emphasising that: "[in] practice, the range of measures is applied in accordance with the gravity of the situations."[1074] This sentence implies that the more serious the situation is, the stronger the call is for heavier measures. In this way, it also seems to be implied that the more serious the situation is, the stronger the call is for imposing sanctions rather than taking, or requiring the bank to take (significant) corrective actions. However, the sentence does not preclude an appropriateness assessment, where a particular situation rather calls for remedial powers (corrective actions) than to inflict some kind of punishment on the bank (sanctions),[1075] and neither does the sentence preclude the possibility of applying both remedial and punitive measures at the same time.[1076]

Third, EC4 to CP11 abruptly continues by prescribing that "[the] supervisor provides clear prudential objectives or sets out the actions to be taken."[1077] It is a sentence that is similar to EC6(a) to CP1, where the supervisor has the power to "take (and/or require a bank to take) timely corrective action."[1078] Where the supervisor sets out the corrective actions to be taken, it is similar as to 'impose' corrective actions on the bank as no choice is granted to the bank with respect to which actions the bank may choose to apply in order to comply with the prudential objectives and address the concerns raised. On the other hand, when the supervisor requires the bank to take corrective actions, then such a choice is implied. This very abrupt sentence therefore only applies to corrective actions.[1079] When EC4 then continues in listing a number of examples on "actions to be taken," it is first and foremost considered as examples on corrective actions rather than sanctions, despite EC4 seems devoted to the characterisation of both corrective actions and sanctions. This list of examples are therefore types of corrective actions:

- restricting the current activities of the bank;
- imposing more stringent prudential limits and requirements;
- withholding approval of new activities or acquisitions;
- restricting or suspending payments to shareholders or share repurchases;
- restricting asset transfers;
- barring individuals from the banking sector;
- replacing or restricting the powers of managers, board members or controlling owners;
- facilitating a takeover by or merger with a healthier institution;

[1074] EC4 to CP11. It is difficult not to read CP1 and CP11 as to implying a very general assumption that sanctions are more severe and punitive than corrective actions. In comparison, the significant corrective actions may instead be viewed as very intrusive and burdensome remedial powers that intervenes in the private realm of the bank.
[1075] For instance, where there is no liability on the basis of a culpability assessment of the bank or its employees.
[1076] In this way, not only a severity assessment of the *gravity* of the situation is conducted, but also an appropriateness and suitability assessment that considers the *nature* of the particular situation of the bank.
[1077] Ibid.
[1078] EC6(a) to CP1.
[1079] Only the corrective actions are characterised as having a remedial nature. The sentence also applies the term 'actions'. It is also not logical or intuitive if it is necessary to provide for clear prudential objectives when the supervisor imposes (or intends to impose) sanctions.

- providing for the interim management of the bank; and
- revoking or recommending the revocation of the banking licence.

If it is assumed that sanctions are to be more severe than corrective actions, then the nature of these measures certainly are questionable. For instance, to bar individuals from the banking sector seems more like a punitive than remedial measure. The same must be said with respect to revocation of the banking licence, which is such a severe power that might result in the liquidation of the bank.[1080] Despite, the content and legal consequences of these examples are not clear, then most of the examples do seem to have a remedial rather than punitive nature and purpose. However, on the basis of this wording, it is not possible to provide for any such clear-cut argument in that favour. Hence, the BCP leaves it open for the country or region to decide whether the nature of the measures may be classified as corrective actions or sanctions in their jurisdiction, but the 2012 BCP carries a presumption for the former.

Fourth, pursuant to EC7 to CP11, it is nonetheless clear that the concept of 'corrective actions' includes the power to ring-fence the bank from the actions of parent companies, subsidiaries, parallel-owned banking structures[1081] and other related entities. The ring-fencing power is therefore a remedial power, which is mostly relevant to address the first of the fundamental situations (1) as EC7 expressly considers the ring-fencing power to apply in situations that could impair the safety and soundness of the bank or the banking system.[1082]

Fifth, as EC4 to CP11 already considered it a corrective action to impose "more stringent prudential limits and requirements,"[1083] then it also seems logical to consider the concept of corrective actions to include "the power to act where a bank falls below established regulatory threshold requirements, including prescribed regulatory ratios or measurements,"[1084] because ensuring that the bank upholds or re-stablishes compliance with regulatory thresholds is a less severe power than the power to impose *more* stringent prudential limits or requirements. EC5 to CP11 also prescribes that the supervisor must have "the power to intervene at an early stage to require a bank to prevent its regulatory requirements from reaching the threshold" and that "[the] supervisor has a range of options to address such scenarios."[1085] In such scenarios, the supervisor intervenes in a similar fashion as when it takes, or requires the bank to take, timely corrective actions, but the range of *options* to address those scenarios are nonetheless

[1080] Equivalent to a "death sentence" of a natural person.
[1081] BCP, at page 34, also refer to document published by the BCBS in 2003 on "Parallel-owned banking structures."
[1082] However, as with the other examples on corrective actions above, the content of the ring-fencing power and the legal consequences that follows from its application, is still not clear. It may therefore also qualify, and be classified, as a sanction.
[1083] EC4 to CP11.
[1084] EC5 to CP11.
[1085] Ibid.

envisaged to be of a different nature than the examples provided of corrective actions in EC4. In this respect, EC5 to CP11 may be read in conjunction with EC3 to CP16 as it requires that the supervisor has the power to impose a specific capital charge and/or limits on all material risk exposures.[1086] The corrective and remedial purpose of the power shines through when they aim at ensure compliance with regulatory thresholds or prevent the bank from falling below. In this way, the power to act with respect to regulatory threshold is a power that is suitable to both address compliance with laws (2) and safety and soundness concerns (1).

Sixth, CP11 also reflects on the negative licensing power to withdraw or revoke the banking licence. The wording of CP11 as well as EC4 to CP11 considers the revocation of the banking licence as a sub-type to corrective actions. EC6(c) to CP1 nonetheless considers the revocation of the banking licence as a distinct power different from both corrective actions (EC6(a)) and sanctions (EC6(b)). The previous 2006 Core Principles for Effective Banking Supervision[1087] considered the revocation of the banking licence as a sanction.[1088] However, if the corrective actions are characterised as remedial powers that should be taken at an early stage, then the revocation of the banking licence seems counterproductive to these purposes. Afterall, what does the revocation of the banking licence remedy, if it results in the liquidation of the bank? And, should such a deadly power be taken at an early stage? As the 2006 BCP, it seems natural to consider the revocation of the banking licence as a sanction, even as the most severe one, and not a corrective action.[1089] Nonetheless, the power to withdraw or revoke the banking licence is considered a power, which may be applied to address all of the three fundamental situations referred to above, as well as where it turned out that the applicant bank provided false information in the application procedure for obtaining the banking licence.[1090]

Seventh, EC6(d) to CP1 provided that the supervisor has the power to cooperate and collaborate with the relevant authorities to achieve an orderly resolution of the bank, including, where appropriate, the triggering of resolution.[1091] In this respect, EC2 to CP11 specifies that the supervisor cooperates and collaborates with the authorities "in deciding when and how to effect the orderly resolution of a problem bank situation (which could include closure, or assisting in restructuring, or merger with a stronger institution)."[1092] In accordance with the

[1086] EC3 to CP16. See further EC1-6 to CP16.
[1087] https://www.bis.org/publ/bcbs129.pdf.
[1088] The 2006 BCP expressly provided with respect to the concept of legal powers that the supervisor has that power to "impose a range of sanctions (including the revocation of the banking licence)." Brackets maintained. See EC3 to CP1(4), p. 9.
[1089] EC4 to CP11, BCP, p. 35, and as emphasised above in the examples.
[1090] EC2 to CP5, third sentence.
[1091] EC6(d) to CP1.
[1092] EC2 to CP11.

primary objective of the BCP it follows that the supervisor does not have real resolution powers, but is instead placed in a legal position where it may provide assistance to the relevant authorities that are responsible for the resolution of banks or banking groups within the limits of the prudential tasks and powers that are conferred on the supervisor.[1093] The power to cooperate and collaborate with the resolution authorities is also necessary, and must be appreciated, when the supervisor has the power to revoke the banking licence. Despite the resolution powers of the supervisor are restricted to cooperation for the orderly resolution then, contrary to the other powers, it seems more obvious that they may be applied in order to address situations, which are threatening the interests of the depositors ((3)).

Finally, EC6 to CP11 reflects directly on sanctions. It prescribes that "the supervisor applies sanctions not only to the bank but, when and if necessary, also to the management and/or Board, or individuals therein."[1094] However, this criteria only emphasises a principle, which requires that sanctions are to be imposed against the bank (as a legal person) and the individuals acting on behalf of the bank (natural persons).[1095] EC6 to CP11 does not provide any indication for determining when sanctions are envisaged to be imposed against legal persons in contrast to natural persons. CP1 and CP11 does also not describe what constitutes a sanction, despite EC6 to CP1 and EC6 to CP11 envisage that the nature of the sanctions are distinct and different from both corrective actions and the revocation of the banking licence.

There is nonetheless some evidence for assuming when sanctions should be imposed, namely: to address those situations where a bank is not complying with the banking laws and regulations or supervisory actions.[1096] A violation of supervisory actions can be both a violation of a decision where the supervisor exercise its power to conduct ongoing supervision as well as its decisions to impose, or require the bank to take, corrective actions. With respect to the latter situation, the sanctions are then the ultimate power placed at a higher threatening default position that compels compliance with the less severe corrective actions. This further

[1093] EC5 to CP3 requires that the supervisor must have processes in place to support the "resolution authorities (e.g. central banks and finance ministers as appropriate) to undertake recovery and resolution planning and actions," cf. BCP, p. 24.
[1094] EC6 to CP11. EC9 to CP14 also requires that "[the] supervisor has the power to require changes in the composition of the bank's Board if it believes that any individuals are not fulfilling their duties related to the satisfaction of [the Essential Criteria to CP11 on Corporate governance]", which includes the duty of care, the duty of loyalty and the fit and proper requirements. Despite this power intervenes in the private realm of the bank, the power is still exercised in a manner similar to corrective actions as the supervisor require the bank to make changes in the bank's board. The actual change in the composition of the board is not directly imposed by the supervisor on the bank, which would seem to favour a qualification as a sanction.
[1095] EC7 to CP29 requires that "[the] supervisor has adequate powers to take action against a bank that does not comply with its obligations related to laws and regulations regarding criminal activities." It would be reasonable to read EC7 to CP29 in conjunction with the FAFT framework.
[1096] For instance, EC8 to CP10 with respect to the reporting requirements requires that the supervisor "imposes sanctions for misreporting and persistent errors."

emphasises that the concept of 'sanctions' is associated with an illegal behavior (misconducts) as embedded in the notion of the second fundamental situation ((2)), while the concept of 'corrective actions' is rather associated with imprudent (mis-)behaviour of the bank as opposed to prudent behavior where the bank satisfies the prudential requirements. However, the power to sanction is provided in such a way that they may be imposed in the first (1) and third of the fundamental situations (3) as well, despite the imposition of sanctions against banks for safety and soundness concerns and threats to depositors seems rather inappropriate. This open-ended scope of application makes the distinction between 'sanctions' and 'corrective actions' difficult. Furthermore, when EC6(b) to CP1 prescribes that the supervisor may "impose a range of sanctions,"[1097] then it provides some support for considering the examples on corrective actions in EC4 to CP11 rather as a range of sanctions. In this way, the 2012 BCP is undecisive and inconclusive about what is the nature of corrective actions and sanctions.

C. Conclusions

The 2012 BCP aim to provide for a credible legal framework with clear responsibilities and objectives for the supervisor(s) as well as clear and distinct legal powers. On the basis of CP1, the supervisor has four types of legal powers: (1) a positive licencing power; (2) a power to conduct ongoing supervision, which on the one side allows the supervisor to access and review the information necessary for conducting its supervisory tasks, and on the other side allows the supervisor to judge and (re-)enforce compliance with the prudential framework; (3) the power to address safety and soundness concerns preferably by timely corrective actions; and (4) the power to address violations of banking laws and regulations. However, as the third and fourth power in light of CP11 shares a common feature in their ability to address serious situations, the third and fourth power may also be considered as one single and distinct form of power ((3)) to address serious situations. These concerns situations, where (i) the bank is engaging, or likely to be engaging, in unsafe or unsound practices or activities that could jeopardise, impair or otherwise pose risks to the safety and soundness of the bank or the banking system; (ii) the bank is not complying with banking laws and regulations or supervisory actions and decisions, including the corrective actions; and (iii) the interests of the depositors are otherwise threatened. The specific powers to address these three serious situations are then: (3)(a) corrective actions; (3)(b) sanctions, (3)(c) revocation of the banking licence; and (3)(d) the

[1097] EC6(a) to CP1.

restricted resolution (cooperation) powers. There are no definition of these powers, and their nature and categorisation are quite controversial. While the BCP framework mostly engages in a description of the powers to conduct ongoing supervision, it lacks deductive certainty with respect to a description and characterisation of the powers referred to in (3)(a)-(d).

Some characterisation of the powers is nonetheless possible. The insignificant corrective actions seems to be remedial measures that similar to the power to conduct ongoing supervision aims at enforcing compliance with the prudential requirements. The significant corrective actions are then the formal remedial measures that aim to address serious safety and soundness concerns and/or violations of laws. The sanctions seems to be the power preferred to address violations of laws and supervisory actions, including non-compliance with insignificant and significant corrective actions. The revocation of the banking licence is categorised, controversially, as a corrective action, while it seems more like a sanction. The other examples on corrective actions are not precluded from being viewed as examples of sanctions, nor from being qualified as sanctions. Finally, the lack of a clear and strict categorisation of the legal powers to address the serious situations amplifies a key characteristic of the BCP framework, that the supervisor is placed in its centre and conferred with wide judgement powers for the administration of its prudential responsibilities and the enforcement of banking laws.

3. The 2017 IOSCO Objectives and Principles of Securities Regulation

A. Principles for the regulator

Section A of the IOSCO Principles provides eight Principles relating to the regulator in the securities sector of which Principles 1, 3, including Section B and Principle 9, are relevant for the enforcement and sanctioning powers conferred on the regulator. Principles 1 and 3 requires that the responsibilities of the regulator are clear and objectively stated, preferably in law, and that the regulator should have adequate powers, proper resources and the capacity to perform its functions and exercise its powers. The IOSCO Principles do not prescribe specific structures for the 'regulator' and uses the term compendiously, as generally referring to: "the authority or authorities responsible for regulating, overseeing and supervising securities and/or derivatives markets."[1098] On the other hand, the term 'responsible or competent authority' "are those with

[1098] IOSCO Methodology, p. 20. The IOSCO framework also reflects "the broad scope of responsibilities possessed by most securities regulators. Securities regulators are responsible for a much broader array of activities than banking supervisors. Like banking supervisors, securities regulators supervise the activities of market intermediaries. However, they also supervise securities markets, collective investment schemes, investment managers or advisers, and issuer disclosure. Some securities

jurisdiction over each of the issues addressed in the [IOSCO Principles and Methodology] under the headings: Issuers; Auditors; Credit Rating Agencies and Other Information Service Providers; Collective Investment Schemes; Market Intermediaries; and Secondary and Other Markets (including clearing and settlement), and may include other law enforcement, governmental and regulatory bodies."[1099] The IOSCO Principles thus acknowledges that there can be more than one regulator, but where there is such a division of responsibilities, then it is required that the legislation should avoid gaps and inequities,[1100] which entails that "similar types of conduct or products should be subject to similar regulatory requirements regardless of how responsibility is divided among regulators."[1101]

Principle 3 provides that the regulator should have 'adequate powers', which relates to licensing, supervision, inspection, investigation and enforcement. The overall and general requirement that follows from Principle 3 is that the regulator's powers must be "consistent with the size, complexity, and type of the markets that it oversees."[1102] The powers falls into two fundamental categories: (1) preventative measures for surveillance, inspection, investigation; and (2) credible and effective corrective measures that "detect, deter, enforce, sanction, redress and correct violations of securities laws."[1103] However, Principle 3 must be read in conjunction with Section "C. Principles for the Enforcement of Securities Regulation," Principles 10-12, to give a full account of the nature and requirements to the regulator's enforcement powers.

Self-Regulatory Organizations ('SROs') "can be a valuable complement to the regulator in achieving the objectives of securities regulation."[1104] Section B and Principle 9, therefore lays down the "Principles for Self-Regulation." It reads:

> 9. Where the regulatory system makes use of Self-Regulatory Organizations (SROs) that exercise some direct oversight responsibility for their respective areas of competence, such SROs should be subject to the oversight of the Regulator and should observe standards of fairness and confidentiality when exercising powers and delegated responsibilities.

Principle 9 applies, if an entity has one or several of the key features of an SRO.[1105] It recognises that various models of self-regulation exists, and that variations on the extent of

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regulators also have responsibility for enforcing company law. The core principles thus cover a large range of issues," cf. IMF, HB, Ch. 5, p. 142.

[1099] IOSCO Methodology, p. 20.

[1100] KI2 to Principle 1. The investors and market participants must have certainty "about the degree to which the regulator is able to protect the market's integrity through fair and effective oversight," cf. IOSCO Methodology, p. 22.

[1101] IOSCO Methodology, p. 22.

[1102] IOSCO Methodology, p. 30.

[1103] Ibid.

[1104] Ibid, p. 55.

[1105] Ibid, p. 53.

self-regulation thus also exists. The Preamble to Principle 9 therefore makes some effort to define when an organization should be classified as an SRO:

> "An organization should be classified as an SRO [...] *if it has been given the power or responsibility to regulate and its rules are subject to meaningful sanctions regarding any part of the securities market or industry*. One typical feature of an SRO is that the organization establishes rules relevant for a certain industry, e.g. on eligibility of individuals/firms, on (market) conduct or qualifications of staff or disciplinary rules *which could trigger sanctions in case of infringements*. *Another typical feature of SROs is that the organization also enforces such rules*."[1106]

The IOSCO Methodology elaborates on this definition by emphasising three fundamental characteristics of an SRO, including [my numeration]:

> "[1] Establish rules of eligibility that must be satisfied in order for individuals or firms to participate in any significant securities activity or
>
> [2] Establish and enforce binding rules of trading, business conduct and qualification for individuals and/or firms engaging in securities activities or
>
> [3] Establish disciplinary rules and/or conduct disciplinary proceedings, which would enable the SRO to impose appropriate sanctions for non-compliance of its rules."[1107]

In this context, the SRO's functions to conduct direct oversight over its members, establish disciplinary rules and proceedings, and impose sanctions for non-compliance with the disciplinary rules are of particular importance, because Principle 9 requires that such a SRO oversight and sanction regime are subject to the oversight of the regulator. As it is presumed that a SRO must obtain an authorisation before the SRO exercises its authority, then the SRO must also demonstrate under the application procedure that it has the capability to meet appropriate standards of fairness,[1108] including, inter alia, to:

> "Maintain the organization and capacity to monitor compliance and have a disciplinary mechanism to enforce rules, *inter alia*, expulsion; suspension; limitation of activities, functions, and operations; fine; censure and suspend or bar."[1109]

These provided examples on sanctions are implied to be of a disciplinary nature as they are imposed under disciplinary proceedings for the violation disciplinary rules.[1110] All this entails that the SRO must have an appropriate disciplinary sanction regime available for when the members commit violations of either the SRO's own rules or the securities laws of which the SRO have been delegated responsibilities to monitor and enforce. Principle 9 therefore requires that the regulator must conduct ongoing oversight of the SRO, and that the government regulator retains the authority to inquire into matters affecting investors or the market.[1111] In

[1106] Ibid. Italics added.
[1107] IOSCO Methodology, p. 54.
[1108] KI1-4 provides the more specific authorisation requirements, but amongst them is the requirement that the SRO must have its "own rules which are enforced and whose non-compliance is appropriately sanctioned," cf. KI(3), p. 57.
[1109] IOSCO Methodology, p. 55. Italics maintained.
[1110] The term 'disciplinary' seems to be derived from the "membership" function of the SRO, cf. IOSCO Methodology, p. 55.
[1111] KI5(b) to Principle 9.

particular, once the SRO is operating, then the regulator must "assure itself that the exercise of [the SRO's powers] is in the public interest and protects investors, and results in fair, effective and consistent enforcement of applicable securities laws, regulations, and appropriate SRO rules."[1112] The SRO's decision, including its decisions that imposes sanctions on its members, must also be subject to regulatory review.[1113] In this way, the assessment of the regulator also includes an assessment of the regulator's functional and complementary relationship with a SRO, including the disciplinary sanction regime of the SRO.

B. Principles for enforcement of securities regulation

Section C, Principles 10-12 of the IOSCO Principles, provides three Principles that relates to enforcement and of which mostly Principles 10-11 are relevant.[1114] Principles 10-11 prescribes that the regulator should have comprehensive inspection, investigation and surveillance powers and enforcement powers. In accordance with the two first core objectives for securities regulation, the Preamble to Section C emphasizes that "[s]trong and rigorous enforcement of securities laws is fundamental to help foster investor confidence and maintain fair and efficient markets."[1115] Principles 10-12 contemplates both civil law and common law systems, but they do not prescribe a specific enforcement model.[1116] Instead, they:

> "seek to determine a regulator's ability to monitor the entities subject to its supervision, to collect information on a routine and ad hoc basis, and to take enforcement action or otherwise effect corrective action by regulated entities to ensure that persons and entities comply with relevant securities laws or are sanctioned for non-compliance."[1117]

Principles 10-12 are therefore based on a central concept of 'enforcement'. Where the IOSCO Principles make use of the term enforcement, then it "should be interpreted broadly enough to encompass powers of inspection, investigation and surveillance such that the regulator should be expected to have the ability, the means, and a variety of measures to detect, deter, enforce, sanction, redress and correct violations of securities laws."[1118] In this way, the

[1112] IOSCO Methodology, p. 55.
[1113] Ibid, p. 56.
[1114] Principle 12 is mostly outside the descriptive framework of the regulator's enforcement powers as it "is designed to measure the ability of the regulator to use these powers," cf. IOSCO Methodology, p. 63. In particular, Principle 12 requires the regulator to demonstrate that there is system to take effective inspection, investigation, surveillance and enforcement actions and that enforcement actions have been undertaken to address misconduct and abuses. In this way, Principle 12 covers the regulator's use of resources "in the performance of its functions and exercise of its enforcement powers," cf. IOSCO Methodology, p. 74. For these reasons, mainly Principles 10-11 are of importance.
[1115] IOSCO Methodology, p. 63.
[1116] The assessment must nonetheless carefully consider the characteristics of the legal system in which the regulator operates, including the delegation of responsibilities to the SROs, cf. IOSCO Methodology, p. 63.
[1117] IOSCO Methodology, p. 63.
[1118] Ibid.

concept of enforcement captures the two fundamental categories powers, namely the preventative and the credible and corrective measures. This broad understanding of enforcement entails that the powers of inspection, investigation and surveillance as referred to in Principle 10 are considered enforcement powers in the broad sense, while the powers referred to in Principle 11 provides for a more narrow understanding of enforcement powers. The broad conceptualisation of enforcement also reveals certain activity and processual aspects of enforcement as the regulator must take enforcement actions, and thereby opens the enforcement proceedings, in order to exercise of the enforcement powers contained in Principles 10-11. The process may ultimately result in the imposition and enforcement of sanctions.

The narrow enforcement powers provided by Principle 11 is in our main interests, but a few observations on the broader enforcement powers provided by Principle 10 should also be given. First, Principle 10 requires that the regulator has comprehensive inspection, investigation and surveillance powers, and it covers the circumstances and methods by which the regulator may obtain information from regulated entities, and it "addresses the regulator's authority to conduct ongoing oversight and supervision of regulated entities as a preventive measure."[1119] Therefore, the powers to inspect, investigate and conduct surveillance are measures of a preventive nature used in order to monitor and assess compliance with securities laws.[1120] In this way, they are also similar in nature of the power to conduct ongoing supervision of the supervisor under the BCP framework as they concerns: (i) the access and review information and (ii) judgement and broader enforcement powers.

Second, the IOSCO Methodology defines the concept of 'enforcement' as a broad concept that includes a range of different activities and processes, such as [my numeration]:

> "[1] routine, risk-based and ad hoc inspections of regulated entities, including collecting information from regulated entities necessary to establish and assess compliance, and inspections prompted by tips and complaints from investors;
>
> [2] surveillance of trading on organized platforms and gathering market intelligence more generally;
>
> [3] investigations in respect of regulated or unregulated entities, which may be prompted by suspicion of misconduct; and
>
> [4] taking action against non-compliance and misconduct, which may include enforcement proceedings and seeking appropriate remedies and sanctions."[1121]

[1119] IOSCO Methodology, p. 65.
[1120] Ibid.
[1121] Ibid, p. 63.

Therefore, the broader aspects of the concept of enforcement powers refer to activities and processes referred to in [1]-[3], while the narrower aspect of the concept of enforcement power is primarily covered by [4]. Their availability and application is nevertheless interdependent as is most evident in respect of the concepts of 'investigation and 'investigation powers'. The Interpretative Text considers the concept of 'investigation' to generally include activities that the regulator may undertake to obtain information.[1122] The concept of 'investigation powers' may then be distinguished from 'inspection powers' in the way that an investigation "may be prompted by findings from an inspection, or by suspicion of a breach of securities law, with a view to determining if further enforcement proceedings should be commenced."[1123] In this processual aspect, the activities referred to in [1]-[4] reveals that enforcement of securities laws by the regulator contains a move from the application of the broader enforcement powers [1]-[3] towards an application of the narrower enforcement powers [4].

Principle 11 applies within this processual enforcement range. Its scope is narrower in the sense that it concerns rather specific course of actions available to the regulator, including investigations and proceedings, "where a breach of relevant securities laws by any person is suspected or identified."[1124] From a processual perspective, Principle 11 thus applies where the exercise of the powers contained in Principle 10 has detected, or at least provided a suspicion of, a potential violation of securities laws. Pursuant to the Interpretative Text to Principle 11, the regulator, or another competent authority, should therefore have comprehensive investigation and enforcement powers, such as, the power to [my numeration]:

> "[1] obtain information, records and statements from any entity or any persons involved (whether regulated or unregulated), directly or indirectly, or who may possess information relevant to an investigation;
>
> [2] commence actions and lay charges against persons suspected of misconduct or breach of securities laws, and/or seek orders from courts or tribunals and/or to refer matters for civil and/or criminal actions;
>
> [3] seek or impose a range of effective, proportional and dissuasive administrative sanctions where a breach is found, and to seek to enforce such sanctions where necessary;
>
> [4] make or seek temporary orders (for example, the suspension of trading) while an investigation is, or proceedings are, taking place against the person suspected of breaching securities laws;
>
> [5] compel the attendance, statement or testimony of individuals or representatives of entities who have been charged or asked to provide evidence;

[1122] Ibid.
[1123] Ibid.
[1124] Ibid, p. 69.

> [6] allow for outcomes arrived at through alternative resolution mechanisms (for example, through settlement, mediation or arbitration processes that may or may not be binding on parties);
>
> [7] appeal decisions and/or allow for appeals to be made."[1125]

These seven types of 'enforcement powers' must be viewed in the light of the Key Issues to Principle 11. Two general observations should be given. First, the IOSCO Methodology also acknowledges that some of these seven enforcement powers also are investigation powers,[1126] in particular the first [1] and fifth power [5]. Second, despite there is a presumed distinction between public enforcement (powers) and civil enforcement (powers), KI3 only requires that the enforcement powers should not compromise any private rights of action, because private persons "should be able to seek their own remedies (including, for example, for compensation, damages or specific performance of an obligation)."[1127] Principle 11 does not deal any further with civil enforcement and its relationship to public enforcement.

The other enforcement powers are in our main focus, because the scope of the investigation and enforcement powers should be "sufficient" and "comprehensive."[1128] KI1 to Principle 11 includes among the investigation and enforcement powers, the powers: "to seek court or judicial orders, or to take action to enforce regulatory, administrative, or investigative requirements or decisions; or to seek or impose effective sanctions; or to initiate criminal proceedings or refer matters to the criminal authorities."[1129] This sentence seems mainly to summarise the content of the seven types of enforcement powers just referred to above. The first and third part of this sentence, "to seek court or judicial orders, or to take action to enforce regulatory, administrative, or investigative requirements or decisions; [...]; or to initiate criminal proceedings or refer matters to the criminal authorities," provides for further processual characteristics of the enforcement powers as they refer to the second [2], fourth [4], sixth [5] and seventh [7] powers above. These enforcement powers may be considered as 'forum-powers', because they all concern the regulator's power to enforce the securities laws within different forums, such as, alternative resolution mechanisms, tribunals, and courts, and irrespective of whether the proceedings classify as civil, administrative, and criminal. Even in respect of [3], the administrative sanctions should be capable of being enforced. Therefore, it is very general characteristic of these powers that they allow the regulator to decide in which forum the enforcement proceedings must be initiated in order to enforce securities laws. This is a key

[1125] Ibid.
[1126] Ibid.
[1127] IOSCO Methodology, p. 70. Brackets maintained.
[1128] Ibid.
[1129] Ibid.

difference between the powers provided in the BCP and IOSCO frameworks, and it emphasises that the banking supervisor are not provided with any direct forum-powers.

This leads to the final and most important observation. The second sentence above (KI1) included among the enforcement powers, the power "to seek or impose effective sanctions." There are no standards and principles for what 'effective sanctions' means. The regulator, or other competent authority, should also have the power to: "seek or impose a range of effective, proportional and dissuasive administrative sanctions where a breach is found, and to seek to enforce such sanctions where necessary."[1130] There are no standards and principles for the general requirements to sanctions of effectiveness, proportionality, and dissuasiveness, just as there are no standards and principles for what is an 'administrative' sanction and in the presumed distinction to 'criminal' sanctions.

The Explanatory Notes to Principle 11 nevertheless requires from the assessors of the IOSCO framework that they should inquire from the regulator as to its views of the "adequacy of available sanctioning powers and power to take corrective action."[1131] Just like the BCP Framework, this entails that the IOSCO framework provides for a distinction between corrective actions and sanctions. Only the latter are supposed to be effective, proportionate and dissuasive. The distinction is also operating in the Interpretative Text to Principle 12, where it is required from the regulator to demonstrate how its powers are exercised by:

> "The sanctions imposed, or other corrective action effected, with respect to misconduct detected within the jurisdiction. Regulators may have and use a range of regulatory responses and sanctions to deter potential misconduct, which will allow the regulator to seek remedies that are effective, proportional and dissuasive."[1132]

However, this phrase is ambiguous and provides for confusion. The first sentence does not uphold a strict distinction between sanctions and correction actions in the sense that the sanctions imposed may be another correction action effected. The second sentence seems at first sight to provide for a distinction between regulatory responses and sanctions, where the regulatory responses could be identified with corrective actions in the first sentence, but the regulatory responses and sanctions are both applied in order to deter potential misconducts, and they further allows the regulator to seek ""remedies" that are effective, proportional and dissuasive." In this way, there is no strict division between corrective actions, remedies and sanctions, and this phrase considers these powers as almost identical powers.

[1130] IOSCO Methodology, p. 69.
[1131] Ibid, p. 72.
[1132] Ibid, p. 74.

The Explanatory Notes to Principle 11 does nonetheless provide for *some* clarification as it provides a list of "[examples] of measures used to enforce securities regulatory requirements and to deter and *sanction* securities violations,"[1133] including [my numeration]:

> "[1] fines;
> [2] disqualification;
> [3] suspension and revocation of authority to do business;
> [4] injunctions or cease and desist orders, directly or through court order;
> [5] asset freezes, directly or through court order;
> [6] action against unlicensed persons in conducting securities transactions;
> [7] referral of such activities to the criminal authorities;
> [8] measures to enforce disclosure and financial reporting requirements for issuers;
> [9] measures to enforce conduct of business, capital requirements and other prudential rules;
> [10] measures to enforce recordkeeping and reporting by market intermediaries, operators of authorized exchanges, regulated trading systems and collective investment schemes, and other regulated securities entities.[1134]

These "sanctions are examples only,"[1135] and they are required to be examples of measures that deter and sanction securities violations. Therefore, the nature of these measures are therefore sanctions rather than corrective actions or remedies.

Principles 11-12 nevertheless allows for quite some confusion of the concepts. This confusion is expressed in the Interpretative Text to Principle 12, where the regulator should "provide documentation that demonstrates that sanctions available *(whatever their nature)* are effective, proportionate and dissuasive."[1136] The powers referred in [8] to [10] seems also not to qualify as enforcement powers but rather to identify with what the BCP framework considered as corrective and remedial powers. However, for an assessment in accordance with the IOSCO Principles, it matters less so long as the measures are effective, proportionate and dissuasive, and the regulator can demonstrate a compliance and enforcement program which are capable to "combine various means to identify, detect, deter and sanction such misconducts."[1137]

[1133] Ibid, p. 72. Italics added.
[1134] IOSCO Methodology, p. 72. See also Supervisory Framework for Markets, Report of the Technical Committee of IOSCO, May 1999 (https://www.iosco.org/library/pubdocs/pdf/IOSCOPD90.pdf). The report prescribes that where market authorities are responsible for parts of the oversight system, then the regulators should be able to sanction market authorities that fail to perform their regulatory responsibilities. The regulator must therefore be able to monitor the market authority's performance of its enforcement function. Where the market authority fails in its monitoring or enforcement function, the regulator "should have the authority to use a combination of or all of the following non-exclusive alternative *sanctions* on market authorities: a. censure (public criticism); b. monetary sanctions; c. remedial measures, including requirements for independent reviews or monitors; d. limitations on activity; e. requirement that market authority make special reports; f. suspension or revocation of approval of a market to act as a market authority; and g. judicial orders," cf. p. 9-10. Italics added.
[1135] IOSCO Methodology, p. 72.
[1136] IOSCO Methodology, p. 74. Brackets maintained, italics added.
[1137] Ibid.

A final observation should be given with respect to [3] 'the revocation of authority to do business'. In Principle 34, the IOSCO Methodology, in relation to the ongoing regulatory supervision of exchanges and trading systems, reflects on the revocation-power:

> "Since licence revocation is such a serious disciplinary action, in many cases, market operators will not believe it would ever be used and therefore it may not be an effective deterrent. The regulator also should have the clear power to impose an escalating range of disciplinary actions, such as conditions or restrictions on the market operator. While imposition of these restrictions should be subject to some procedural fairness conditions, the process must not be so slow, or cumbersome, so as to prevent regulators acting swiftly and effectively when required. [...]. If not, the regulator should be invited to discuss how revocation power can be used to buttress its ability to use moral suasion to achieve corrective action."[1138]

As in the BCP framework, the IOSCO framework seems to strongly imply that the revocation and withdrawal-powers are sanctions, in this context a disciplinary sanction so serious that it can be used *"as moral suasion to achieve corrective action."*

C. Conclusions

Based on the two main objectives of ensuring that the investors are protected and that markets are fair, efficient and transparent, the IOSCO Principles places one or more regulators at its centre and equip them with legal powers in order to live up to their supervisory and enforcement responsibilities. The responsibilities of the regulator(s) must be clearly stated in law, and any shared responsibilities with other regulators or authorities must avoid gaps and inequities. Determined on the basis of the size, complexity and the type of markets that the regulator oversees, the regulator must have comprehensive powers with respect to inspection, investigation, surveillance and enforcement of securities laws. Where securities laws have delegated responsibilities to the SROs, it is required that the SROs' regulatory and disciplinary sanction regime is subject to the regulator's oversight.

Both the BCP and IOSCO framework thus places the regulator (supervisor) at the centre of the framework. However, the IOSCO framework recognises to a greater extent the shared, as well as delegated, responsibilities between the different competent authorities and other bodies involved in the supervision and enforcement of securities law. While the power to conduct ongoing banking supervision is very similar to the broad scope of enforcement powers in terms of the inspection, investigation and surveillance powers, the more narrow conceptualisation of the enforcement powers with respect to the forum-powers do not have any clear equivalence in the BCP framework. In this way, the IOSCO framework is more integrated in legal

[1138] IOSCO Methodology, p. 234.

and criminal justice system and thereby in the interplay between the jurisdictions of the different authorities and bodies involved in the compliance and enforcement of securities law. On this background the more narrow and specific enforcement powers must be understood.

The specific enforcement powers of the regulator, or other competent authority, is reflected in the enforcement actions that the regulator initiates through enforcement proceedings. The first essential element of the narrow enforcement powers concerns the regulator's ability to initiate enforcement proceedings through the exercise of its investigatory powers as well as to decide in which forum the enforcement actions must be pursued. The other essential element of the specific enforcement power concerns the regulator's sanctioning powers. The IOSCO framework does not expressly provide for criminal sanctions, however, that criminal sanctions are available is presumed, because the regulator may, and should, have the power to initiate enforcement actions in a forum governed by criminal law. Otherwise, the regulator's sanctioning power are administrative and the sanctions must be effective, proportionate and dissuasive. These three requirements to sanctions are requirements that only are established in the IOSCO framework, not in the BCP Framework. However, the IOSCO framework does not define what it means for sanctions to be effective, proportionate and dissuasive.

Both the IOSCO Principles and the BCP have an inner conflict with respect to the nature of sanctions, where some of the measures provided as examples are not excluded from being considered as corrective actions, remedies and sanctions at the same time. However, across the sector standards and principles, there is some merit in the BCP and IOSCO frameworks to consider corrective actions and remedies as identical powers that focuses at ensuring compliance, and thereby also to identify as enforcement powers, where sanctions instead also covers punitive measures with more serious and severe consequences than the corrective and remedial measures. Afterall, it is not logical, if measures like corrective actions and remedies are punitive, because deterrence and dissuasiveness seems to be function of the punitive aspect of a sanction rather than its ability to ensure or restore compliance. However, there is no sufficient basis for making such conclusions in neither the BCP and IOSCO framework as both frameworks are indecisive with respect to the nature and categories of the legal consequence imposed by the relevant authority for the violations of banking and securities laws.

The IOSCO CDESR also runs into the same dilemma. There are no references to the concept of corrective actions, but in a number of places there are references and a distinction

operating between remedies and sanctions,[1139] although without there being any definition of the two concepts. A notion of 'sanctions' is nonetheless embedded in this description:

> "The sanctions should be greater than the costs of the misconduct so that the threat of the penalty removes the incentive for choosing not to comply. Sanctions should reflect the seriousness of the misconduct and aim to deter it. Sanctions that account for wrongful profits, compensate and restore victims *and have an appropriate penal element* can be expected to enhance deterrence."[1140]

This description of the notion of 'sanction*s*' *(plural)* seems to imply a view of a range of sanctions available and that more than one sanction are, or can be, imposed in one sanctioning decision or judicial order. Irrespective thereof, the notion of one or more sanctions cannot be separated from the view that sanctions must have "an appropriate penal element" in order to be expected to enhance deterrence. Therefore they should also be greater than the costs of the misconduct so that the threat of the penalty removes the incentive for choosing not to comply.[1141] This notion is difficult to reconcile with the idea that there can be sanctions without a punitive element. If that is so, then such measures seems not to be true sanctions but more like remedies. Such view would have some merit for considering the 'restorative measures' discussed in the IOSCO CDESR as equal to the 'corrective' and 'remedial' powers:

> "92. Competent authorities should consider the deterrent value of restorative measures *that aim to compensate victims for their losses or restore them to the position they occupied before the misconduct occurred*.
>
> 93. The restoration of victims and the acknowledgement of misconduct by wrongdoers are becoming more prevalent in the orders some regulators are seeking from judicial and administrative decision makers. *Restorative measures focus on two principal themes: strengthening the accountability of the offender; and restoring the victim (as an individual person or entity, or society as a proxy victim) to their pre-misconduct position.* The application of restorative measures to cases involving serious criminal offences may be effective in reducing recurrent misconduct. They can help promote the message that genuine accountability requires wrongdoers to do more than write a cheque.
>
> 94. Restorative orders may include orders for compensation, orders requiring the implementation of compliance or educative programmes, and reformative measures that involve the offender acknowledging their conduct and its impact. A measured and consistent strategy of seeking such orders in appropriate cases can assist to achieve credible deterrence."[1142]

Is it not a remedy if the natural or legal person or the society is compensated for their losses or otherwise restored to their pre-misconduct position they occupied before the misconduct occurred? Are such remedies also not corrective actions when restorative measures may

[1139] IOSCO CDESR, inter alia, para. 73, p. 29; para. 76, p. 29-30; para. 77, p. 31; para. 87, p. 35; para. 97, p. 38.
[1140] IOSCO CDESR, para. 86, p. 35. Italics added.
[1141] In the IOSCO CDESR, Factor 5 is also titled: "Sanctions: Strong punishments – no profit from misconduct." The following statements also go in the same direction: "For instance, fines should not simply be a cost of doing business and recidivists should know that they will find themselves subject to tougher sanctions should they reoffend. A robust sanctioning regime provides a deterrent to misconduct if the potential costs of committing the violation are perceived to outweigh the potential benefits," cf. para. 89, p. 35; "penalties should constitute fines above and beyond unlawful profits", cf. para. 97(b)), p. 38; "criminal sanctions should be available for egregious violations," cf. para. 97(h)), p. 39.
[1142] IOSCO CDESR, paras. 92-94. Brackets maintained. Italics added.

be effective in reducing recurring misconduct and include compliance, educative and reformative orders?[1143] If so, then corrective actions and remedies, similar to restorative measures, aim at re-establishing the (legal) pre-misconduct position, while sanctions aim to go beyond the re-establishment of the pre-misconduct position in its ability to punish the wrongdoer. In this way, only sanctions seems truly dissuasive and to constitute a real deterrent. This may also explain why corrective actions, remedies and restorative measures may be considered, or confused as, dissuasive, in particular in the legal systems that allow for sanctions in one and the same administrative decision or judicial court order to be imposed together with other corrective actions, remedies and/or restorative measures, as the latter owe their dissuasiveness and/or deterrent effect to the sanctions contained in that same decision or order. Thus, punitive sanctions "transmit" some of their dissuasiveness and deterrent effect to the corrective actions, remedies and restorative measures,[1144] and provides the punitive leverage necessary for the effectiveness of any other less severe measure sto be imposed or required by the regulator or court.

4. The 2022 FATF Recommendations

A. Recommendations for the regulation and supervision of money laundering

The standards and principles (recommendations) for the regulation and supervision of money laundering is from a country and legislative perspective provided by Recommendations 3 and 26. Recommendation 3 provides first and foremost and obligation to criminalise money laundering on the basis of the Vienna Convention,[1145] the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances from 1988, and of the Palermo Convention,[1146] the United Nations Convention against Transnational Organized Crime from 2000.[1147] It also requires that the crime or offence of money laundering applies to all serious predicate offences as well as with a view to include the widest range of predicate offences.[1148]

[1143] IOSCO CDESR, para. 97(e)), stipulates that "remedies should seek to strengthen the integrity and governance of regulated entities and public companies," cf. p. 38.
[1144] In the same way, where the legal framework allows for corrective, compensating, remedial, or restoring measures to be imposed in one decision or order without any punitive measures, but punitive measures can be imposed against the non-compliance with such decision or order, then the corrective, compensating, remedial, or restoring measures still owes, or borrows, their "dissuasiveness" to the threat of the sanctions.
[1145] See this link: https://www.unodc.org/pdf/convention_1988_en.pdf.
[1146] See this link: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf.
[1147] IN1 to Recommendation 3, p. 32.
[1148] FATF Recommendations, p. 10. On the legislative techniques to prescribe the criminal offence of money laundering, see further IN2-6 to Recommendation 3, p. 32. The definition of 'designated categories of offences' also includes insider trading and market manipulation. See FATF Recommendations, p. 113-114.

In this way, "[the] offence of money laundering should extend to any type of property, regardless of its value, that directly or indirectly, represents the proceeds of crime."[1149] However, "when proving that property is the proceeds of crime, it should not be necessary that a person be convicted of a predicate offence."[1150] Countries must also criminalise appropriate ancillary offences to the offence of money laundering and allow that the intent and knowledge required to prove money laundering may be inferred from objective factual circumstances.[1151]

Recommendation 26 mainly provides for some general obligations to be observed. Countries must ensure that financial institutions are subject to adequate regulations and supervision and that the financial institutions are effectively implementing the FATF Recommendations. For those financial institutions, which also are subject to the 2012 Basel Core Principles, Recommendation 26 expressly provides that the regulatory and supervisory measures that apply for prudential purposes also are relevant to money laundering and terrorist financing. The regulatory and supervisory measures should therefore also apply for AML/CFT purposes.[1152] As the extent of this obligation is not clearly demarcated then this obligation seems to imply that all the legal powers provided to the banking supervisor equally applies under the FATF framework for the AML/CFT purposes. This also seems to be in line with Recommendation 27, as discussed just below, and with BCP 29, which are governing the "Abuse of financial services," because EC1 and EC7 to CP29 requires that the laws or regulations establishes the powers to the banking supervisor related to the supervision and enforcement of the relevant laws and regulations regarding criminal activities.[1153]

B. Recommendations on sanctions and powers of the supervisor

FATF Recommendation 3 on "Money Laundering offence," Recommendation 4 on "Confiscation and provisional measures," Recommendation 27 on "Powers of supervisors," and Recommendation 35 on "Sanctions" provides the standards and principles on sanctions as well as the powers of the supervisor. While Recommendations 3, 4 and 35 are addressed to the

[1149] IN4 to Recommendation 3, p. 32. Predicate offences should also extend to conduct that occurred in another country. See further IN5 to Recommendation 3, p. 32.
[1150] IN4 to Recommendation 3, p. 32.
[1151] IN7(a) and (d) to FATF Recommendation 3, p. 32-33. The ancillary offences includes: "participation in, association with or conspiracy to commit, attempt, aiding and abetting, facilitating, and counselling the commission, unless this is not permitted by fundamental principles of domestic law."
[1152] FATF Recommendations, p. 21. In particular, this includes applying consolidated group supervision. The designated supervisor pursuant to the BCP framework seems also to be presumed applicable in the FATF Recommendations as the concept of 'financial supervisors" is embedded in the concept of 'supervisors'. See further the FATF Recommendations, including fn61, p. 122, and also the FATF Methodology, para. 25, p. 10.
[1153] See further 2012 BCP, p. 64.

countries and provides more general requirements to their legislative framework, then Recommendation 27 are more engaged with the powers of the supervisor.

Aligned with the BCP framework, Recommendation 27 requires that the financial supervisors should have adequate powers to supervise or monitor, and ensure compliance by financial institutions with the requirements that aim to combat money laundering and terrorist financing. Among the adequate powers are included the powers: to compel the production of any information; to conduct inspections; and to impose sanctions in accordance with Recommendation 35 for the financial institutions' failure to comply with the requirements.[1154] With respect to the supervisor's sanctioning powers, Recommendation 27 requires that the supervisors have available "a range of disciplinary and financial sanctions, including the power to withdraw, restrict or suspend the financial institution's license, where applicable."[1155] As already argued, these powers should be viewed in accordance with the BCP framework, but the FATF framework here re-introduces the category of 'disciplinary sanctions' applied under the IOSCO framework and Principle 9 with respect to the SROs' disciplinary sanction regime. Recommendation 27 also refers to restrictions, suspensions and withdrawals of the financial institution's licence as sanctions, and not as corrective actions or remedies.

Recommendation 35 requires that countries provides for a range of sanctions in their legislative framework that may be of either a criminal, civil or administrative nature so long that these sanctions are effective, proportionate and dissuasive. Recommendation 35 also requires that the sanctions are available against natural or legal persons, including the directors and senior management of the financial institutions, which fails to comply with the AML/CFT requirements.[1156] Recommendation 3 and 4 builds on this sanction regime, in particular with respect to an obligation to provide for criminal sanctions. The Interpretative Notes to Recommendation 3 takes the view that the criminalisation of money laundering must also be targeted with criminal sanctions. Therefore, it is expressly required that effective, proportionate, and dissuasive criminal sanctions must apply when natural persons are convicted of money laundering.[1157] The legal situation is slightly different for legal persons where the main rule still is that legal persons should be subject to criminal liability and sanctions that are effective, proportionate and dissuasive.[1158] However, due to certain fundamental and constitutional

[1154] The requirements mainly follows from Section D on "Preventive Measures" of the FATF Recommendations.
[1155] FATF Recommendation, p. 21. There are no Interpretative Notes to Recommendation 27.
[1156] FATF Recommendations, p. 24. There are no Interpretative Notes to Recommendation 35.
[1157] IN7(b) to Recommendation 3, p. 32.
[1158] IN7(c) to Recommendation 3, p. 32-33. In such countries, where legal persons may be subject both to administrative and criminal liability and sanctions, then parallel administrative, civil and criminal proceedings should not be precluded.

principles of domestic law, an exemption exists for countries where it is not possible for legal persons to be subject to criminal liability and sanctions.[1159] In these countries, legal persons must instead be subject to civil or administrative sanctions, which nonetheless still are required to be effective, proportionate and dissuasive.[1160] Therefore, irrespective of whether the sanctions classify as disciplinary, civil, administrative or criminal sanctions, it is required that all sanctions imposed for the commission of a money laundering offence, must be effective, proportionate, and dissuasive.[1161] However, there is no definition of these three requirements to sanctions despite Paragraph 26 of the FATF Methodology reflects on these three requirements to sanctions in relation to the compliance and effectiveness assessments:

> "Different elements of these requirements are assessed in the context of technical compliance and effectiveness. In the technical compliance assessment, assessors should consider whether the country's framework of laws and enforceable means includes a sufficient range of sanctions that they can be applied proportionately to greater or lesser breaches of the requirements. In the effectiveness assessment, assessors should consider whether the sanctions applied in practice are effective at ensuring future compliance by the sanctioned institution; and dissuasive of non-compliance[1162] by others."[1163]

It follows that the compliance assessment is mainly a proportionality assessment that considers whether the sanctions can be applied to greater or lesser breaches of the FATF requirements. In this respect, a footnote is provided with examples of 'a sufficient range of sanctions'. This range of sanctions includes:

> "written warnings; orders to comply with specific instructions (possibly accompanied with daily fines for non-compliance); ordering regular reports from the institution on the measures it is taking; fines for non-compliance; barring individuals from employment within that sector; replacing or restricting the powers of managers, directors, and controlling owners; imposing conservatorship or suspension or withdrawal of the license; or criminal penalties where permitted."[1164]

Which of the sanctions that are proportionate to greater or lesser requirements is not explained, and why all these measures are sanctions, for instance, ordering regular reports from the institution on the measures it is taken, and not just an inspection or investigative (review) power is not clear. The last reference to criminal penalties also implies that the other sanctions are of an administrative, civil or disciplinary nature. A full and concrete description of these

[1159] IN7(c) to Recommendation 3, p. 32, and FATF Recommendations, p. 118.
[1160] IN7(c) to Recommendation 3, p. 32-33. In situations where legal persons are subject to civil, administrative or criminal liability and sanctions, it should still be possible to subject natural persons to criminal liability and sanctions, cf. ibid.
[1161] IN7(b)-(c) to Recommendation 3, p. 32-33. The same rules apply with respect to the Recommendation 5 on "Terrorist financing offence." See IN8-9 to Recommendation 5, p. 35.
[1162] Non-compliance is identical to the failure to comply, cf. fn70, FAFT Methodology, p. 84.
[1163] FATF Methodology, para. 26, p. 10.
[1164] FATF Methodology, Fn2, p. 10. In a number of places in the FATF Methodology, there are also references to the concept of 'corrective actions' and 'remedial actions'. See, for instance, p. 21, 100, 101, 105, 106, 121, 138, 139, 140, 141, 142, 143. However, there are no definitions or examples that clearly reflects on the nature and types of these measures.

three requirements as well as lack of a definition of the nature of these measures are missing for the purpose of the compliance and effectiveness assessment.

A higher level of conceptual clarity is provided by Recommendation 4, which governs "Confiscation and provisional measures," and requires that countries enable their competent authorities[1165] with legal powers that may order the (1) 'freezing', (2) 'seizing' and (3) 'confiscation or forfeiture' of property. In this respect, the Glossary in the FATF Recommendation provides the definitions:

> (1) "In the context of confiscation and provisional measures [...], the term *freeze* means to prohibit the transfer, conversion, disposition or movement of any property, equipment or other instrumentalities on the basis of, and for the duration of the validity of, an action initiated by a competent authority or a court under a freezing mechanism, or until a forfeiture or confiscation determination is made by a competent authority."[1166]
>
> (2) "The term *seize* means to prohibit the transfer, conversion, disposition or movement of property on the basis of an action initiated by a competent authority or a court under a freezing mechanism. However, unlike a freezing action, a seizure is effected by a mechanism that allows the competent authority or court to take control of specified property. The seized property remains the property of the natural or legal person(s) that holds an interest in the specified property at the time of the seizure, although the competent authority or court will often take over possession, administration or management of the seized property."[1167]
>
> (3) "The term *confiscation*, which includes *forfeiture* where applicable, means the permanent deprivation of funds or other assets by order of a competent authority or a court. Confiscation or forfeiture takes place through a judicial or administrative procedure that transfers the ownership of specified funds or other assets to be transferred to the State. In this case, the person(s) or entity(ies) that held an interest in the specified funds or other assets at the time of the confiscation or forfeiture loses all rights, in principle, to the confiscated or forfeited funds or other assets. Confiscation or forfeiture orders are usually linked to a criminal conviction or a court decision whereby the confiscated or forfeited property is determined to have been derived from or intended for use in a violation of the law."[1168]

It follows that the freezing and seizure *(control)* orders are provisional measures that contains a temporary prohibition on any dealing, transfer or disposal of the frozen or seized property.[1169] In addition thereto, the seizure order also allows the relevant authority or court to

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[1165] The concept of 'competent authorities' "refers to all public authorities [including financial supervisors established as independent non-governmental authorities with statutory powers] with designated responsibilities for combating money laundering and/or terrorist financing. [However], SRBs [Self-regulatory bodies] are not to be regarded as a competent authorities," cf. FATF Recommendation, p. 112 and 122.

[1166] FATF Recommendations, p. 118. Italics added. The definition also describes that: "In all cases, the frozen property, equipment, instrumentalities, funds or other assets remain the property of the natural or legal person(s) that held an interest in them at the time of the freezing and may continue to be administered by third parties, or through other arrangements established by such natural or legal person(s) prior to the initiation of an action under a freezing mechanism, or in accordance with other national provisions. As part of the implementation of a freeze, countries may decide to take control of the property, equipment, instrumentalities, or funds or other assets as a means to protect against flight," cf. p. 118.

[1167] FATF Recommendations, p. 121-122. Italics added.

[1168] FATF Recommendations, p. 112-113. Italics added.

[1169] According to the Recommendation 4, second subparagraph, the measures to be adopted by the countries must include the authority to: "(a) identify, trace and evaluate property that is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation; and (d) take any appropriate investigative measures," cf. FATF Recommendations, p. 10.

take control over the property. In comparison, the confiscation and forfeiture orders are permanent orders that deprives the owner of all her or his rights to the property and transfers the ownership to the state. As the exercise of the provisional measures will ensure that there continues to be property available for a potential later confiscation or forfeiture, the freezing and seizure orders have a clear link, and may thus lead, to confiscation and forfeiture.[1170]

Recommendation 4 requires that the competent authorities must have the power to freeze, seize, forfeit and confiscate: (i) property laundered; (ii) proceeds from, or instrumentalities used in, or intended for use in, money laundering or predicate offences; or (iii) property of corresponding value.[1171] Despite there here, or in the provided definitions, are a number of references to different concepts such as: 'property',[1172] 'proceeds',[1173] 'funds',[1174] and 'funds or other assets',[1175] then hardly any kind of property to which the money launderer has ownership, or at least claimed ownership, can be considered excluded from the scope of these powers. It seems to be the intention that in this unrestricted or unlimited meaning, the term 'property' must be used.[1176] In addition thereto, the FATF Methodology also requires that these provisional measures should allow the initial application to freeze or seize property, subject to confiscation, to be made ex-parte or without prior notice.[1177] Recommendation 4 also suggests that countries should allow proceeds or instrumentalities to be confiscated without requiring a criminal conviction, referred to as 'non-conviction based confiscation',[1178] or require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation.[1179]

C. Conclusions

[1170] Pursuant to the Interpretative Notes to Recommendations 4 and 38, p. 34, then "[countries] should establish mechanisms that will enable their competent authorities to effectively manage and, when necessary, dispose of, property that is frozen or seized, or has been confiscated. These mechanisms should be applicable both in the context of domestic proceedings, and pursuant to requests by foreign countries."
[1171] Recommendation 4 also requires that the competent authorities must have the power to freeze, seize, forfeit and confiscate: "(c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations."
[1172] See the definitions in the Glossary Section of the FATF Recommendations from p. 111, and on 'property, at p. 121.
[1173] FATF Recommendations, p. 121.
[1174] Ibid, p. 119.
[1175] Ibid.
[1176] However, the Recommendation 4 also expressly provides that freezing, seizure or confiscation orders is without prejudice to "the rights of bona fide third parties," cf. p. 10.
[1177] FATF Methodology, fn13, p. 29. However, unless it is inconsistent with fundamental principles of domestic law.
[1178] The concept of 'non-conviction based confiscation' "means confiscation through judicial procedures related to a criminal offence for which a criminal conviction is not required," cf. FATF Recommendations, p. 10.
[1179] FATF Recommendations, p. 10. However, only to the extent it is consistent with the principles of domestic law. Recommendation 38 also requires that countries have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered, cf. FATF Recommendations, p. 26.

In comparison to the BCP and IOSCO Framework, the language of the FATF Recommendations and Methodology is very prescriptive, but less explanatory and coherent. Except from the provisional measures and confiscation powers, the standards and principles on the sanctions provided in the FATF are not informative, particularly not with respect to the nature and classification of sanctions as it is almost entirely irrelevant so long as the sanctions are effective, proportionate and dissuasive. Criminal sanctions are nevertheless presumed to have a higher level of dissuasiveness in comparison to disciplinary, civil and administrative sanctions. There are no clear definitions of three general requirements to sanctions of effectiveness, proportionality and dissuasiveness, only a very general requirement to proportionality that requires the sanctions to be proportionate to greater or lesser violations. What makes a sanction classify as a disciplinary, civil, administrative or criminal sanction is also not clear. However, because the provisional freezing and seizure orders and the confiscation and forfeiture orders are to be applicable against the criminal offence of money laundering, they are envisaged to be applicable in a criminal context, which gives them a criminal colour. However, because the freezing and seizure orders are considered as 'provisional measures' that may, or may not, result in the confiscation or forfeiture of property, it is not obvious whether a freezing and seizure order qualifies as a sanction. The FATF framework therefore runs into the same dilemma that are inherent to the BCP and IOSCO frameworks: what is (the definition of) a sanction? What is a disciplinary, administrative, civil or criminal sanction and how are they to be distinguished? The FATF Framework does also not have a clear answer to this question. It nevertheless very clearly considered the withdrawal of an authorisation as a sanction.

IV. CONCLUSION

The international and principles provided by the BCP, IOSCO, FATF frameworks do not have a compelling answer to what is a sanction. The individual framework as well as a cross-comparison of the frameworks nonetheless have and applies some of notion of what is a sanction and how sanctions should be applied, but it is not provided in express terms. The purpose here is therefore to point at those features, which across the frameworks characterises the concept of sanctions and distinguishes it from the other types of legal powers.

A sanction is one form of a legal power conferred on a sanctioning authority, which may be either a banking supervisor, securities regulator, self-regulatory body, court or other judicial authority. They are typically imposed for the violation of laws as well as for non-

compliance with decisions adopted by the supervisory or regulatory authority. The may be imposed against natural persons and legal persons. In the enforcement proceedings, they are the ultimate and final measures to be applied for compelling compliance with laws and supervisory decisions. Where the other types of legal powers conferred on the supervisor or regulator seems to have a preventative and restorative purpose, there is some evidence for considering sanctions to reach beyond the preventative and restorative purpose in its ability to punish the offender. In this way, the distinctive feature of sanctions versus other legal powers is that sanctions are punitive rather than corrective or remedial. The punitive feature of sanctions seems to be a function of the requirement to be dissuasive rather than the requirements to be effective or proportionate. However, the frameworks do not provide full certainty in this regard. For instance, the BCP framework does not even require that sanctions are effective, proportionate and dissuasive, but nonetheless considers sanctions as a distinct power different from corrective actions and the revocation of the banking licence. In certain contexts, the IOSCO framework sometimes also considers corrective actions and remedies as effective, proportionate and dissuasive, despite they in most contexts seems to be a distinct requirement for sanctions as opposed to the other types of legal powers. This is also supported by the FATF framework.

The BCP, IOSCO and FATF frameworks therefore also provides for a number of uncertainties, in particular, in a comparison of the different powers within the individual framework and across the frameworks. While it seems close to settled that the power to conduct ongoing banking supervision under the BCP framework is very similar, if not identical, to the broad enforcement powers for conducting inspections, investigations and surveillance under the IOSCO framework, then uncertainties emerge with respect to the more narrow form of enforcement where the nature of corrective actions, remedies, and sanctions is unclear, just as it is unclear what classifies and makes up a disciplinary, administrative, civil or criminal sanction. The BCP and IOSCO frameworks avoids the classification and do not expressly require that criminal sanctions are available powers to a court or judicial authority. However, this is nonetheless strongly presumed in the IOSCO, and required in the FATF, frameworks.

The BCP framework also makes it difficult to determine whether the safety and soundness concerns that reflects the unsafe and unsound practices and activities amounts to a violation of, or non-compliance with, banking law, or they amount to some sort of wrongful or imprudent risk-calculation and/or -management. If the latter understanding is correct, then the corrective actions are rather measures that intervenes into the business judgement of the bank to restrict its risk-appetite and to compel it to change its (mis-)behavior, rather than to punish

for the commission of a violation. If so, then sanctions do not seems to be a suitable measure to *address* safety and soundness concerns, if sanctions first and foremost are understood as punitive measures. However, if sanctions are understood as the punitive measures, then punishment becomes the feature which characterises sanctions and distinguishes them from corrective actions and remedies. Therefore, across the BCP and IOSCO framework, it will also be reasonable to interpret the notion of corrective actions and remedies in the light of the restorative measures provided in the IOSCO CDESR, thereby as those responsive measures which either aims at re-establishing a safe and sound position from an unsafe or unsound one, or at restoring the legal position into compliance or the pre-misconduct legal position. In that way, corrective actions and remedies are also characterised as (preventive) measures that carries an inherent potential and actual capability to be taken by the legal persons (bank) themselves on a voluntary basis and without the involvement of any enforcement authority. The latter's direct involvement and enforcement will only be necessary if the banks remains unwilling to restore its unsafe or unsound financial situation or its legal position into compliance, whereby corrective actions or remedies should be imposed. In this way, it is a distinctive feature of corrective actions and remedies when EC6 to CP1 in the 2012 BCP describes them as powers, which the supervisor either takes and/or requires the bank to take. Sanctions, on the other hand, can only be imposed by a sanctioning authority as an offender not meaningfully can be said to take sanctions or impose sanctions on her- or himself on a voluntary basis. Certain legal consequences and obligations thereby requires a *true imposition by a sanctioning authority*, but which ones? – And is a revocation or withdrawal of an authorisation a sanction?

PART II

THEORY AND REALITY OF THE EU REGIMES OF SANCTIONS IN THE FINANCIAL SECTOR

"So with Mr. Benn and Professor Flew I shall define the standard or central case of 'punishment' in terms of five elements:

(i) It must involve pain or other consequences normally considered unpleasant.
(ii) It must be for an offence against legal rules.
(iii) It must be of an actual or supposed offender for his offence.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed."

H.L.A Hart, 'Prolegomenon to the Principles of Punishment' (1960), p. 4.

"This Communication refers to sanctioning regimes as the legal framework covering sanctions provided for in national legislation for the violations of EU financial services rules (including the national rules transposing EU directives) by financial institutions and other market participants, and actual enforcement of sanctions."

Communication from the EU Commission, COM (2010) 716 final, p. 5.

§ 5. EU FINANCIAL SANCTION REGIMES I – THE CONCEPT AND ITS PRINCIPLES AND STRUCTURES – ASSESSMENT I

I. INTRODUCTION

In Chapter 3 we were able to give a legal definition of the constitutional concept of sanctions on the basis of a review of the case-law of the ECtHR and CJEU and a deduction of the governing principles following therefrom. These cases before the ECtHR always concerns the national sanction regimes and certain specific areas of law and the available sanctions thereunder. The definition of the concept of a legal sanction is therefore not only a constitutional one, it is also a general one that goes across a number of different areas of national and European law and a number of different national sanction regimes of the EU Member States, just as the concept of a legal sanction has dynamically evolved through the course of time. Hence, the definition provides for a standard concept that was derived from a very large comparative legislative material and case-law and of which certain more specific principles follows.

In Chapter 4 we discussed the international standards and principles on sanctioning. These standards and principles have been adopted and deduced from a comparative look into the national sanction regimes and created towards setting the best practices and most appropriate standards and principles for the sanction regimes operating in the financial sectors under the area of financial law. In Chapter 4 we nevertheless arrived at some rather open-ended and less concrete conclusions in our discussion of the standards and principles that governs the

legal conceptualisation of financial sanctions, which therefore also may influence the quality of the assessments conducted by the IMF under the FSAP. However, on the basis of the discussions and conclusions made in Chapter 2 to 4, we are now in a place where a large comparative legal material and standards and principles on sanctions has become available and discussed, wherefore we are also now in a place where we may critically reflect on the international framework on financial sanctions. Therefore, the first question to be explored in Chapter 5 is whether and how the constitutional concept of sanctions defined in Chapter 3 and the standards and principles that follows therefrom may contribute with standards and principles to and/or fill out any missing gap in the international framework on financial sanctions?

In our attempt to provide an answer, we must be aware and acknowledge that it is an inherent restriction to the validity of our response that any answer given is fundamentally derived from the perspective of EU sanctions law and thus restricted thereby. Nevertheless, we may attempt to abstract away from the particularities of EU sanctions law and aim towards establishing what an international environment may qualify as universal standards and principles for the conceptual minimum requirements for effective, proportionate, and dissuasive financial sanctions. This is the purpose of Section II, and it is referred thereto in the title of Chapter 5 by "Assessment I". In our pursuit of this purpose and to deduce clear answers, but also to provide for an even more consolidated view on the conceptual minimum requirements for financial sanctions, we bring in another set of comparative legal material which motivated the EU Commission after the global financial crisis ('GFC') in 2007-09 to propose policy and legislative actions for the reinforcement of the national financial sanction regimes ('NFSRs'). The policy and legislative actions suggested by the EU Commissions back then are similar in nature to the international standards and principles on sanctioning, because they are derived from an enormous, comprehensive and comparative review of the pre-crisis NFSRs of the EU Member States ('MS'). To a very large extent they also explain and structure the substantive provisions from the post-crisis EU legislation on financial sanctions just as some of the principles and conclusions now can be found in some of the recitals of the most important legislative acts of EU financial law. To establish this more consolidated view on the conceptual minimum requirements for effective, proportionate, and dissuasive financial sanctions we must thus first describe the review of the pre-crisis NFSRs in Section II(1). Then we can use its conclusions to determine what is needed and necessary for an appropriate conceptualisation of effective, proportionate and dissuasive financial sanctions before we focus on the substantive standards and principles that can be derived from the policy and legislative actions proposed by the EU

Commission. When these are determined, we then adhere where appropriate to the constitutional conception of sanctions and compare to the international standards and principles for the purpose of determining whether EU sanctions law can fill out any eventual gap missing in the conceptualisation of financial sanctions with a view towards an universal application.

The discussion in Section II is important for another reason and conceptual purpose. The standards and principles that are governing the conceptual minimum requirements for effective, proportionate, and dissuasive financial sanction will also qualify as the standards and principles of what Section III will consider to be the third constitutive element / pillar of the concept of a 'sanction regime'. In Section III we therefore proceed with a discussion of what Chapter 2 would consider as an institutional concept of a 'sanction regime', and which may take a criminal colour in accordance to what Chapter 3 referred to by adherence to the notion of a 'regime of punishment', and which equals to a 'criminal sanction regime'. After having found a number of weaknesses in the pre-crisis NFSRs and divergences going across the pre-crisis NFSRs, the EU Commission suggested two different definitions for the concept of a sanction regime. However, none of the two definitions proves to be consistent and appropriate with the concept that in reality are structuring EU financial law today. The main purpose of Section III is thus to establish the concept of a sanction regime and to discuss how the concept is and may be suitably applied. The application of the concept will therefore also structure the content and lay out the foundation for discussions in Chapter 6 and 7. Once the concept of a sanction regime has been determined and applied, and we have identified different types of sanction regimes, Section III will then proceed with a discussion of what it identifies as an 'European sanction regime' and 'ECB sanction regime'. Because the ECB sanction regime in its relation to the default 'national sanction regimes' applicable in the EU banking sector has been subject to a FSSA-review under the FSAP, the FSSA-review will also be discussed in Section III, just as the FSSA-review will be used where appropriate in Chapters 6 and 7.

II. CONCEPTUAL MINIMUM REQUIREMENTS FOR EFFECTIVE, PROPORTIONATE AND DISSUASIVE FINANCIAL SANCTIONS

One of the key messages from the de Larosière Report ('the DLG report') was that a number of shortcomings and failures had contributed to the dynamics that led to the GFC and that one

of these shortcomings was referred to as regulatory and supervisory failures.[1180] After the GFC, the EU legislators adopted rules that aimed to repair these failures and strengthen the financial sector, ultimately to ensure the soundness and stability of the entire EU financial system. EU legislation therefore introduced new supervisory regimes and transformed the previous Committee of European Banking Supervisors ('CEBS'), the Committee of the European Securities Regulators ('CESR) and the Committee of the European Insurance and Occupational Pensions Supervisors ('CEIPOS') into the European Banking Authority ('EBA), European Securities and Market Authority ('ESMA') and the European Insurance and Occupational Pensions Authority ('EIOPA'), commonly referred to as the 'ESAs', and centralised the microprudential financial supervision of significant credit institutions at the European Central Bank ('ECB'). This reform agenda that aimed to strengthen the supervisory regimes included a task to ensure that EU financial law was consistently and effectively applied in all EU Member States. While repairing the supervisory regimes, it was thus also necessary to the strengthen the sanction regimes, because "[effective] sanctions and sanctioning powers are a key element of a supervisory regime which should ensure sound and stable financial markets and ultimately the protection of consumers and investors."[1181] Most of the post-crisis EU legislation on financial sanctions have been adopted on the basis of a comprehensive review of the pre-crisis NFSRs that was conducted by the CEBS, CESR, and CEIPOS and published in separate sectoral reports. These sectoral reports provided the foundation on which the EU Commission launched a Communication on "Reinforcing sanctioning regimes in the financial services sector," ('EU Communication on Sanction Regimes'/'EUCSR').[1182] While the sectoral reports examined the pre-crisis NFSRs and concluded on their weaknesses and divergences, the EUCSR rather summarised the most important weaknesses and divergences and introduced the necessary policy actions that aimed at the reinforcement of the NFSRs and in creating converging and deterrent sanction regimes with effective, proportionate, and dissuasive financial sanctions.[1183] The structures of the review of the pre-crisis NFSRs are therefore discussed first in Section II(1).

Just as regulatory and supervisory failures had contributed to the dynamics causing the GFC, it turned out that many of the internal weaknesses of the pre-crisis NFSRs and divergences that were going across they represented very fundamental legislative issues on the

[1180] The High-Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosière, Report, Brussels, 25 February 2009, p. 7-10. Link: https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf.
[1181] IASR, p. 3. The IASR is described below, at fn18.
[1182] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Reinforcing sanctioning regimes in the financial services sector, COM(2010) 716 final, Brussels, 8.12.2010.
[1183] EUCSR, pp. 2-4.

conceptual and substantive regulation of financial sanctions that had either been neglected or rejected in the period leading up to the GFC. However, these fundamental issues were turned into the legal cornerstones that now establishes the legal foundation and principles that governs the architecture of the post-crises EU legislation on financial sanctions, because the reinforcement of the NFSRs was to be achieved through substantive EU legislation on financial sanctions and in satisfying the three general requirements under EU sanctions law for effective, proportionate, and dissuasive sanctions.[1184] Therefore, the policy and legislative actions suggested by the EU Commission were first and foremost aiming to satisfy the general EU requirements of effectiveness, proportionality and dissuasiveness of financial sanctions through substantive legislative provisions on appropriate financial sanctions.

Although the 2012 BCP not expressly requires so, there is thus from an EU sanctions law perspective and international law perspective confluence between the three general requirements to sanctions of effectiveness, proportionality and dissuasiveness. Accordingly, when the EU Commission proposed policy actions for the reinforcement of the NFSRs by way of taking legislation action for the creation of effective, proportionate and dissuasive financial sanctions, the extent to which the nature of these policy actions are comparable and bear resemblance to the nature of the international standards and principles on sanctioning, the policy actions may thus either validate and/or contribute to the international framework on financial sanctions to the extent any missing gap can be identified within the international framework. The review of the pre-crisis NFSRs in terms of their internal weaknesses and inter-state divergences and the reinforcement of the NFSRs through substantive policy and legislative actions on financial sanctions may thus provide new standards and principles for financial sanctions which can contribute to a revision of that framework. This is the purpose of the discussion in Section II(2) and it presupposes a view and aim towards deducing the essential and governing standards or principles underlying the policy actions suggested. Therefore, by bringing together the discussions and conclusions from Chapter 2 to 4 with the conclusions from the review of the pre-crisis NFSRs and the policy and legislative actions suggested by the EU Commission, we are at least from an EU sanctions law perspective able to settle at a more or less consolidating view of what I have referred to as *'the conceptual minimum requirements for effective, proportionate and dissuasive financial sanctions'* to the extent these sources allows so. This includes that the discussion in Section II will disregard and set aside the more specific post-

[1184] Ibid, pp. 4 and 6.

crisis EU legislation on financial sanctions, although I will also refer to the relevant sections of Chapter 6 and 7 to point out where further standards or principles can be deduced.

1. The review and structures of the pre-crisis legislation on sanctions

A. The reports assessing the pre-crisis national sanction regimes

On 4 December 2007, the Ecofin Council under a review of the functioning of the Lamfalussy process invited the EU Commission and the three sectoral Committees of the CEBS, CESR, CEIOPS[1185] to "study the differences in supervisory powers and objectives between national supervisors, to conduct a cross-sectoral stock-taking exercise of the coherence, equivalence and actual use of sanctioning powers among Member States and the variance of sanctioning regimes and where necessary to define an adequate set of powers."[1186] The studies carried out by the three sectoral Committees provided for an enormous level of detail on the national provisions that implemented and governed some of the most important legislative acts of the EU financial sectors before the GFC (see Section II(1)(B) just below). The main purpose of the review was "to ascertain whether such sanctioning regimes were sufficiently equivalent / convergent in their effect."[1187] The sectoral reports comprise the following:

CEBS: CEBS/2009/47;[1188]
CESR: CESR/07-693;[1189]
CESR: CESR/08-099;[1190]
CESR: CESR/08-220;[1191]
CESR: CESR/07-384;[1192]
CESR: CESR/09-058;[1193]

[1185] EUCSR, p. 3.
[1186] IASR, p. 3.
[1187] IASR, p. 4.
[1188] CEBS: 'Mapping of supervisory objectives, including early intervention measures and sanctioning powers', CEBS 2009 47, March 2009. Link: https://www.eba.europa.eu/sites/default/documents/files/documents/10180/16166/4088421b-7a4b-4bf6-bad3-949a7426f769/CEBS%202009%2047%20Final%20_Report%20on%20Supervisory%20Powers_%20post%20written%20procedure_clean%20_2_.pdf.
[1189] CESR: 'Report on administrative measures and sanctions as well as criminal sanctions available in Member States under the Market Abuse Directive (MAD)', CESR/07-693, 17.10.2007. Link: https://www.esma.europa.eu/sites/default/files/library/2015/11/07_693_u_2_.pdf. See also the later report published by European Securities and Markets Authority, 'Actual use of sanctioning powers under MAD', ESMA/2012/270, 26 April 2012. Link: https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-270.pdf.
[1190] As Report CESR/07-693 contains 478 pages, the CESR conducted an 'Executive summary to the report on administrative measures and sanctions as well as the criminal sanctions available in Member States under the Market Abuse Directive (MAD)', CESR/08-099, February 2008. Link: https://www.esma.europa.eu/sites/default/files/library/2015/11/08_099.pdf.
[1191] CESR: 'Report on the mapping of supervisory powers, supervisory practices, administrative and criminal sanctioning regimes of Member States in relation to the Markets in Financial Instruments Directive (MiFID)', CESR/08-220, 16.2.2009. Link: https://www.esma.europa.eu/sites/default/files/library/2015/11/08_220_.pdf.
[1192] CESR: 'Report on CESR members' powers under the Prospectus Directive and its implementing measures', CESR/07-383, June 2007. Link: https://www.esma.europa.eu/sites/default/files/library/2015/11/07_383.pdf.
[1193] CESR: "Report on the mapping of supervisory powers, administrative and criminal sanctioning regimes of Member States in relation to the Transparency Directive (TD)", CESR/09-058, 1.7.2009. Link: https://www.esma.europa.eu/system/files_force/library/2015/11/09_058.pdf.

CEIOPS: CEIOPS-SEC-21/09.[1194]

Together, these sectoral reports contained more than 1200 pages.[1195] Other documents accompanied the EU Communication on Sanction Regimes,[1196] of which the most important one was the accompanying impact assessment ('IASR').[1197] After the sectoral reports were finalised, the EU Commission then carried out an internal analysis of "the type of sanctions envisaged in national legislation, the maximum level of those sanctions, the factors taken into account in determining the level of sanctions and finally, the effectiveness of their application,"[1198] which afterwards were discussed with the EU Member States. The comments provided by the EU Member States were taken into account in the IASR, which then assessed the conclusions and other the findings of the sectoral reports and provided additional background information serving as the justification for the policy and legislative actions to be suggested by the EU Commission. Generally, the EU agreed on "the need to promote further convergence of national sanctioning regimes while underlying the need to be respectful of the different national legal frameworks and judicial systems."[1199] Before discussing and making use of the main findings of the sectoral reports and the EUCSR and IASR in Section II(2), we will need to establish the EU legislative background on which the assessment were carried out in Section II(1)(B).

[1194] CEIOPS: "Report to the European Commission on EU supervisory powers, objectives, sanctioning powers and regimes", CEIOPS-SEC-21/09, 29.5.2009. Link: No longer available. Old link: https://eiopa.europa.eu/CEIOPS-Archive/Documents/Reports/CEIOPS-report-on-supervisory-powers.pdf.

[1195] As this dissertation mainly relates to sanction regimes in the banking and securities sectors, the reports relating to these sectors are prioritised.

[1196] Based on the sectoral reports, the EU Commission presented certain policy actions in the EUCSR for the achievement of greater convergence and efficiency of national sanctioning regimes, and then opened for a public consultation under the headline of "reinforcing national sanctioning regimes in the financial sector," (http://ec.europa.eu/finance/consultations/2010/sanctions/index_en.htm), running from 08/12/2010 to 19/02/2011, and welcoming comments on the policy proposals presented in the Communication. On the basis of the contributions and comments the EU Commission received, the EU Commission published a feedback statement ('SR Feedback Statement') (Feedback Statement on Public Consultation on Commission Communication – Reinforcing Sanctioning Regimes in the Financial Sector: http://ec.europa.eu/finance/consultations/2010/sanctions/docs/feedback_en.pdf), which summarised the 63 responses received, and provided the background information on which the EU Commission would decide for introducing legislation on how to reinforce the sanction regimes at the EU level. A press release, IP/10/1678, was also issued by the Commission on Strengthening sanctions for violations of EU financial services rules: the way forward. Brussels, 8 December 2010. Link: http://europa.eu/rapid/press-release_IP-10-1678_en.htm?locale=en ('IP/10/1678'), and a MEMO for Frequently Asked Questions: Communication on reinforcing sanctioning regimes in the financial services sector. Brussels, 8 December 2010. Link: http://europa.eu/rapid/press-release_MEMO-10-660_en.htm?locale=en ('MEMO/10/660').

[1197] Commission staff working paper, Impact Assessment, accompanying document to Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Reinforcing sanctioning regimes in the financial services sector, SEC(2010) 1496 final, Brussels, 8.12.2010. Link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010SC1496&from=EN. This was summarised in the executive summary of the impact assessment (the 'ESIASR', and 'SEC(2010) 1497'): Commission staff working paper, Summary of the Impact Assessment, accompanying document to Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Reinforcing sanctioning regimes in the financial services sector, SEC(2010) 1476 final, Brussels, 8.12.2010. Link: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010SC1497&from=EN).

[1198] IASR, p. 4.

[1199] Ibid.

B. The pre-crisis EU legislative structures on financial sanctions

The pre-crisis EU legislative acts of the EU banking, securities and insurance sectors that were assessed by the three previous sectoral Committees (CEBS, CESR, CEIOPS) were mainly the following (repealed) EU Directives:

> EU banking sector: CRD;[1200] and AMLD III;[1201]
> EU securities sector: MAD I;[1202] MiFID I;[1203] PD;[1204] TD;[1205] and UCITS;[1206]
> EU insurance sector: SD II;[1207] and IMD.[1208]

All these EU Directives presupposed the existence and institutionalisation of NFSRs, but they contained only few legislative requirements in principle- and clause-based provisions for the substantive quality of the sanction regimes' legal architecture and the substantive legal provisions on financial sanctions. The EUCSR categorised the legal provisions of the pre-crisis EU legal framework into four groups, which more generally characterised the EU legal pillars for the NFSRs and the legal provisions on financial sanctions:[1209]

> (1) The first group of provisions related to the coordination of the power to impose sanctions between several Member States, which have been affected by the infringement, and the obligation of the national competent authorities ('NCAs') to cooperate whenever necessary.[1210]
>
> (2) The second group concerned provisions, which prescribed that the EU Member States must provide for the appropriate administrative sanctions and measures for situations where the EU rules are infringed, and that these sanctions or measures must be "effective, proportionate and dissuasive."[1211]

[1200] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions. OJ L 177, 30.6.2006, p. 1–200.
[1201] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. OJ L 309, 25.11.2005, p. 15–36.
[1202] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). OJ L 96, 12.4.2003, p. 16–25.
[1203] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. OJ L 145, 30.4.2004, p. 1–44.
[1204] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC. OJ L 345, 31.12.2003, p. 64–89.
[1205] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC. OJ L 390, 31.12.2004, p. 38–57.
[1206] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities. OJ L 302, 17.11.2009, p. 32–96.
[1207] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). OJ L 335, 17.12.2009, p. 1–155.
[1208] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation. OJ L 9, 15.1.2003, p. 3–10.
[1209] EUCSR, pp. 5-6.
[1210] See further EUCSR, p. 5, DLG Report, para. 84, p. 23, and Articles 16 MAD I; 30(3) and 132(1)(d) CRD; 32(7) and 62(2) MiFID I; 23 PD; 21(5), 108(1), 108(5) and 109(2) UCITS; 155(3), 158(2); and 250(1)(b) SD II.
[1211] See further EUCSR, p. 5. Articles 14 MAD I; 54 CRD; 39 AMLD I; 51 MiFID I; 25 PD; 28 TD; 99(1) UCITS IV; 34 SD II; and 8 IMD, and Veil R (ed), European Capital Markets Law (Hart Publishing 2013) 125 and Moloney N, EU Securities and Financial Markets Regulation (Third Edition, Oxford University Press 2014) 413 and 967.

> (3) The second group of provisions concerned issues that related to the lack of an obligation to impose certain specific sanctions for certain specific infringements.[1212]
>
> (4) The third group of provisions concerned the rules that required the publication of sanctions and that were not always provided for in the EU legal framework as shown by the three sectoral reports, wherefore sanctions were not always made public on a general basis.[1213]

Section II(2) will dive deeper into the more specific problems which arose on the basis of these four groups of legal provisions that sketched out the structures of the pre-crisis EU legal framework on financial sanctions. As we shall see, it proved to be a major problem that there existed no substantive requirements with respect to the content and application of sanctions and that the framework granted considerable autonomy to the EU Member States in the design of their sanction regimes as well as in their choice and application of sanctions at the national level.[1214] As the NFSRs diverged in key aspects, the sanctions were notably not sufficient nor optimal in terms of effectiveness, proportionality and dissuasiveness.[1215] Accordingly, for financial sanctions to be considered effective, proportionate, and dissuasive, the legislation on sanctions must at least satisfy the principles discussed in the following Section (II)(2).

C. The overall conclusions from the review of the pre-crisis sanction regimes

On the basis of the sectoral reports conducted by the CEBS, CESR and CEIOPS, the EUCSR and IASR then made a number of general conclusions on the pre-crisis EU legislation for the NFSRs and the financial sanctions both in respect of the individual sanction regimes within the EU Member States, i.e. an intra-state perspective, and going across the individual sanction regimes, i.e. inter-state perspective. Here are the most relevant conclusions:

First, it was evident from the reports that some of the individual sanction regimes were weak in terms of effectiveness, proportionality and dissuasiveness of sanctions, while others were strong and deterrent. In turn, this led to very diverging sanction regimes across the EU Member States in terms of effectiveness, proportionality and dissuasiveness of financial sanctions and called for converging sanction regimes and a harmonisation of financial sanctions. This was the main conclusion drawn from the reports and the EUCSR.

[1212] See further EUCSR, p. 6, and Articles 17 CRD; 99(2) UCITS; 62, 144 and 258(2) SD II; and 8(1)-(3) IMD.
[1213] See further Articles 14(4) MAD I; 51(3) MiFID I; 25(2) PD; 28(2) TD; and 99(3) UCITS.
[1214] EUCSR, p. 5.
[1215] Ibid, p. 9.

Second, when the financial sanctions diverged in key aspects, the result was that the financial sanctions were not optimal in terms of effectiveness, proportionality, and dissuasiveness. In particular, the financial sanctions lacked "sufficiently dissuasive effect"[1216] and did "not serve as an effective deterrent."[1217] As this led to diverging sanction regimes it also led to the lack of deterrent sanction regimes, and when the sanction regimes lacked deterrent effect, the effectiveness of EU financial law was also at stake as the sanctions were unable to ensure compliance with the rules.[1218] Therefore, *deterrence* of financial sanctions and the NFSRs was thus the main norm to be enhanced and goal to be pursued by the policy actions, and which would be promoted by the EU commission through the legislative actions.[1219]

Third, the sectoral reports had clearly exposed that similar or even identical violations of financial law provisions were not sanctioned in the same way.[1220] However, "when the rules all financial players are expected to abide to are the same, it is only right for non-respect of those rules to entail similar consequences."[1221] The EU Commission therefore proposed legislative action that laid out common minimum standards on the key weaknesses and divergences identified in the sectoral reports, which ultimately aimed at convergence of the NFSRs through a minimum approximation of the substantive provisions of EU financial sanctions.[1222] Without a minimum approximation and a "lack of dissuasiveness and ineffective application of sanctions [it could] result in a lack of compliance with financial services rule,"[1223] and:

> (i) in creating distortions to the competition in the internal financial market as an unequal treatment of violations in different sanction regimes may result in different costs for companies engaged in financial service activities with a competitive advantage for some over others depending on the MS;[1224]
>
> (ii) in regulatory arbitrage and (forum-, supervisory-, and/or sanctioning- shopping), because cross-border financial institutions would be able to circumvent and exploit a sanction regime by establishing operations in those MSs having least stringent and deterrent sanction regimes, and when supervision is lacking an equal footing and supervision is conducted under divergent standards with different types and levels of sanctions available, any loophole risks being exploited by parties in search for a laxed supervisor;[1225] and
>
> (iii) in increased risks for market manipulation and excessive risk taking by the financial institutions, which might further undermine the confidence in and integrity of the financial markets;

[1216] Ibid, p. 9, and IASR, p. 15.
[1217] IP/10/1678, p. 1.
[1218] Chapter 2, Section I, the "Introduction," asked "whether the existence of sanctions is a primary but necessary prerequisite for the existence of any effective law and norm?"
[1219] Even in respect of administrative fines, the EU Commission stated that, "it is all the more important for the thresholds to be sufficiently high so as to ensure deterrence from all types of infringements," cf. EUCSR, p. 12.
[1220] EUCSR, pp. 6-7.
[1221] MEMO/10/660, p. 1.
[1222] EUCSR, pp. 10-11.
[1223] Ibid, p. 10.
[1224] EUCSR, p. 10 and IASR, p. 15.
[1225] EUCSR, pp. 2-3 and 10, and IASR, pp. 16-17

> the smooth functioning of the financial markets; and consumer protection, when stakeholders, market participants and consumers becomes aware that illegal behaviours are not appropriately sanctioned. Even "serious negative repercussions on the whole economy" is at stake as violations of EU financial law might cause "serious economic damages to a broad range of users of financial services and to financial market safety and integrity."[1226]

Finally, the CEBS report had revealed that the number of imposed sanctions in the banking sector in 2007 varied across the MSs from 0 to more than 100, and that in some MSs no sanctions had been imposed for more than two years. The numbers of imposed sanctions seemed not to depend on the size of the national banking sectors.[1227] More generally, the EU commission therefore concluded that: "effectiveness, proportionality and dissuasiveness of sanctioning regimes depend not only on the sanctions provided for by law but also on their application. In addition to the provision for appropriate sanctions in national legislation, it is key for the effectiveness of sanctioning regimes to ensure that sanctions are actually applied when a violation occur."[1228] These enforcement issues were also linked to the supervisory regimes, the resources available to the financial supervisors and their capability to detect violations of financial laws.[1229] However, when violations were not sufficiently detected, the effectiveness and dissuasive effect of the sanction regimes were also at stake, and "the effectiveness and dissuasive effect of sanctions depend at least partly on them being seen to be applied by the competent authorities."[1230] The latter also called for the publication of sanctions.

2. Standards and principles that governs the conceptual minimum requirements of effective, proportionate and dissuasive financial sanctions

A. The legal concept and conceptualisation of sanctions

(I) The pre-crisis problem

The most fundamental problem which restricted the CEBS and CESR in carrying out their common task to review and compare the NFSRs was the very simple and basic question: *what is a sanction?* – The CEBS and CESR responded to that question in very similar ways and emphasised that without a common legal definition of a 'sanction' for the EU Member States

[1226] Ibid.
[1227] EUCSR, p. 9, MEMO/10/660, Annex, p. 2, and IASR, p. 15.
[1228] IASR, p. 14.
[1229] EUCFR, pp. 2-3 and 9, and IASR, p. 15.
[1230] IASR, p. 15.

major impediments occurred for carrying out the comparative analysis. The following reveals the main problems (p) which can be derived from the reports:[1231]

> (p-1) across the MS there was no common definition of a criminal sanction as opposed to an administrative sanction. Their imposition therefore depended on the characteristics of the MS's national sanction regimes;
>
> (p-2) some MS have a broad approach to the concept of sanctions while others distinguished 'administrative measures' from 'administrative sanctions', but the distinction was ambiguous as there was no definition of a sanction;
>
> (p-3) some MS considered reprimands, orders, disqualifications of individuals, revocations of authorisations as a mean of punishment, while other MS considered these as alternative sanctions or ancillary sanctions to pecuniary sanctions or criminal sanctions;
>
> (p-4) identical conduct could by some MS be punished by the imposition of an administrative sanction and/or measure while in other MS be punished with criminal sanctions. Therefore, without connecting the sanctions with specific conducts the MSs would maintain different approaches and responses to identical misbehaviour.[1232]

Therefore, without a legal definition of a sanction, these four additional problems may follow. It will follow from Section (II)(2) that the main problem manifested and had a decisive influence on the other weaknesses and divergences found in the review of the NFSRs. Although the problem here manifests mostly as an inter-state or regional problem, the vast case-law of the ECtHR and CJEU also carries strong historical evidence for the main problem to be an intra-state problem. The international framework on financial sanctions also faced the same main problem and could not provide a clear answer to what is a sanction.

(II) The principles governing the concept and conceptualisation of sanctions

In order to fulfil their tasks, the CEBS and CESR took a pragmatic approach to the concept of sanctions. They emphasised some common characteristics (cc) on the concept of sanctions, which went across the NFSRs:

> (cc-1) all authorities had the power to punish conduct that *violated* law provisions;
>
> (cc-2) all authorities generally required that sanctions should be *commensurate* to the seriousness and severity of the breach, i.e. proportionality standard and requirement;
>
> (cc-3) criminal sanctions were typically imprisonment and criminal fines, the latter nevertheless to be distinguished from administrative fines;
>
> > "Criminal sanctions can be either criminal fines or imprisonment and are in almost all Member States imposed by the Judicial Authorities. Criminal sanctions mainly serve the following purposes: *punishment and deterrence* in order to punish the guilty individual or the management of the investment firm

[1231] See CEBS/2009/47, para. 18, p. 5. and para. 179, pp. 50, and 59-60; CESR/08-220, paras. 66-70, pp. 12-13 and paras. 386-391, pp. 171-173; CESR/09-058, para. 20, p. 7, and paras. 82-86, pp. 37-38; and EUCSR, p. 4.
[1232] See Section II(1)(B) and the third group of provisions.

> for the infringement in question and deterring the offender from repeating the offences. For the purpose of this report criminal fines and imprisonment will be referred to as criminal sanctions."[1233]

(cc-4) administrative sanctions and measures should be distinguished in terms of their nature and purpose and, accordingly, whether they qualified as 'restorative' or 'punitive':

> - "Administrative measures can be restorative or punitive in nature. Restorative administrative measures are used by issuing orders or injunctions to elicit immediate compliance in order *to restore the situation to the one that existed before the infringement occurred and to prevent continuation of the infringement*. To ensure compliance the restorative administrative measure will be used in combination with a "non-compliance penalty." This gives the infringer a financial incentive to correct his illegal behaviour. These administrative orders for restoration / injunctions may also be combined with an obligation to pay an administrative fine for infringement of a legal provision."[1234]
>
> - "This other type of administrative pecuniary measure that can be imposed is punitive in nature – and is only imposed once after the infringement has occurred. Only these *punitive administrative fines* will for the purpose of this report be referred to as administrative fines."[1235]

These characteristics points to a consolidating view on the concept of sanctions both from EU constitutional perspective, intra-EU Member State perspective, inter-EU Member States perspective and international perspective, because four comparative sets of legal sources and reviews of sanctions (the ECHR, the EUCFR, pre-crisis review of NFSRs, and international standards and principles on sanctioning) verifies the conclusions made in Chapter 3 on the definition of the constitutional conception of sanctions. The definition provided basis for two governing notions of sanctions, that is, reparatory sanctions and punitive sanctions, which here are fully identical with the 'restorative administrative sanctions or measures' and 'punitive administrative sanctions or measures' (cc-4). The criminal sanctions (cc-3) was in Chapter 3 considered as a species and certain class of the punitive sanction. Similarly, Chapter 4 also concluded that the international standards and principles on sanctioning generally distinguished between (i) corrective actions, remedies and restorative measures on the one side, and (ii) sanctions implied as punitive sanctions on the other.[1236] Therefore, we may argued that any legal framework on financial sanctions should provide for both reparatory and punitive sanctions. Hence, we should re-emphasise our point made in Chapter 4 that the international framework on financial sanctions hardly had any clear standards and principles for punitive sanctions.

[1233] CESR/08-220, para. 70, p. 13, and para. 390, p. 172. See also CESR/09-058, para. 86, p. 38. The criminal sanctions were not a part of the CEBS review of the pre-crisis NFSRs.
[1234] CESR/08-220, para. 68, p. 12-13, and para. 388, p. 172. See also CESR/09-058, para. 84, p. 38, and para. 85, p. 38.
[1235] CESR/08-220, para. 69, p. 13, and para. 389, p. 172.
[1236] Chapter 4, Sections (1)(C), (2)(C), (3)(C), and Section (IV).

B. Appropriate types of sanctions

(I) The pre-crisis problem

The review of pre-crisis NFSRs also examined which types of sanctions that were at disposal to the NCAs under the pre-crisis NFSRs. The sectoral reports concluded that the NFSRs did not have the same sanctions available. From an inter-state perspective the problem with a legal framework on sanctions that does not provide for certain specific and appropriate types of sanctions for the same specific violations, as a consequence of the second and third group of provisions as discussed above,[1237] is that the "type of sanctions [may] vary widely across Member States, including for the same type of infringement."[1238] The EU Commission nevertheless also considered it an intra-state problem because the NCAs would "only be able to impose a sanction that is optimal in term of effectiveness, proportionality and dissuasiveness, if they have a wide range of different sanctioning powers."[1239]

The CEBS report are the most illustrative on these points.[1240] In particular with respect to pecuniary sanctions and fines, the report revealed that the conceptualisation and severity of the fines depended on a number of structural legislative factors: (i) whether the amount of the fines were determined as a fixed or variable amount and, for instance, in respect of credit institutions whether the fine was determined and calculated on the basis of a percentage of own funds, registered capital or total annual income, and in respect of natural persons whether the fine was determined on the basis of the net annual income or average monthly salary; (ii) whether the MS provided for minimum fines and maximum fines, including whether there was upper limits for the amount of the fines; and (iii) whether fines could be imposed as one final amount, or it may run and accumulate on a daily or weekly basis.

The CESR reports were less illustrative on the same points.[1241] The EUCSR, IASR and CESR reports nevertheless made a few points. Some of the MS did not provide for: (i) the power to withdraw the license or authorisation or the disqualification or dismissal of the management and/or supervisory body in cases of market abuse; and (ii) public warnings and/or public reprimands for the violations of MiFID I. The CESR also considered that (iii) the lack

[1237] Section II(1)(B).
[1238] EUCSR, p. 6.
[1239] EUCSR, p. 6. See also of MAD-CRIM, Recital 3-4.
[1240] CEBS/2009/47, paras. 182-193, pp. 50-53.
[1241] EUCSR, p. 7; MEMO/10/660, Annex, p. 1; IASR, p. 13. See nevertheless CESR/08-220, paras. 60-65 and 379-380, p. 11-12 and p. 171; and CESR/09-058, para. 28, p. 9.

of certain important and appropriate types of sanctions was symptomatic for all the Financial Services Action Plan (/'FSAP') directives in the EU securities sector because they did not provide a finite list of sanctions to the disposal of the NCAs. They only set out an obligation to ensure that the sanctions were effective, proportionate and dissuasive.

Therefore, it was for each MS to determine which type of sanctions they considered as appropriate, including the availability and appropriateness of administrative and criminal sanctions, and when a fine was appropriate. Hence, the NFSRs were not on an equal footing in terms of the appropriateness and severity of sanctions, and there was no level playing field.

(II) The principles governing the appropriate types of sanctions

Therefore, the solution suggested by the EU Commission was to equip the NFSRs with appropriate types of sanctions available to the NCAs for certain specific violations of the key provisions of EU financial law, and it made some suggestions which now also are reflected in the post-crisis legal framework on financial sanctions.[1242] However, the problem more generally reflects the fact that the (i) very nature and severity of the specific violations committed by (ii) different sanction subjects of natural and legal persons, requires that different types of sanctions must be available to the sanctioning authority. Generally, "sanctions should be of a nature so as to allow the competent authorities to impose, in each specific case, a sanction that is likely to be optimal in terms of effectiveness, proportionality, and dissuasiveness."[1243] On the basis of the conclusions made in Chapter 4, we need to ask how such a toolbox of sanctions should look like, and which standards and principles governs the availability of appropriate sanctions?

The principles that governs the concept and conceptualisation of sanctions in Section II(2)(A) also provides the main principles for conducting an assessment of which types of sanction that are appropriate and should be available to the sanctioning authorities. Accordingly, an appropriate toolbox of sanctions must provide for sanctions that are reparatory and punitive in their nature, purpose and severity and functions to tackle violations of a different nature and as committed by different types of offenders as natural or legal persons.

With respect to reparatory sanctions, this is much less of a problem for the BCP as the corrective and remedial powers it provides for are governed by the notion of reparatory sanctions. Hence, the BCP is overwhelmingly a framework of reparatory sanctions. Although the

[1242] EUCSR, pp. 7, 11-12, and IASR, p. 13.
[1243] EUCSR, p. 11.

IOSCO framework provides for remedies and corrective powers, the examples given on sanctions did not qualify or exemplify which of the sanctions that were reparatory. Thus, when the IOSCO framework already requires for remedies and corrective powers, it should be more clearly indicated which types of powers that qualifies as appropriate remedies and, as in the BCP framework, indicate the situations they would be applicable. Whether the FATF framework should provide for reparatory sanctions is more questionable as the nature of the violations are money laundering and financing terrorism, and these classify as criminal offences and thus call for punitive sanctions. On the other hand, the FATF framework also requires that sanctions are available for other types of violations of a preventive nature. Violations of such rules may call for reparatory sanctions, but the FATF framework are silent on these issues.

With respect to punitive sanctions, the BCP is totally silent. It does not even provide for fines, and therefore also do not share any views on what is an appropriate fine. There is also no express requirement for sanctions to be effective, proportionate and dissuasive, wherefore deterrence is an element lacking in the BCP framework. Instead, the IOSCO and FATF frameworks rather envisage by their examples of sanctions that violations of securities laws and money laundering, etc., should be targeted with punitive sanctions, despite there are no standards and principles on these issues and dissuasiveness is a key requirement.

Therefore, the international framework on financial sanctions runs into two fundamental problem of: (i) which violations should be targeted with reparatory sanctions and punitive sanctions; (ii) and when and what is an appropriate reparatory sanction (IOSCO, FATF) and punitive sanction (BCP, IOSCO, FATF). The standards and principles that governs the appropriateness of sanctions will be made more clear in the following.

C. Appropriate distribution of appropriate sanctions

(I) The pre-crisis problem

In the EUCSR and IASR, the EU Commission concluded by reference to the reports reviewing the pre-crisis NFSRs that in all MS sanctions to be imposed on natural and legal persons were not always an available option to the sanction authorities. From an intra-state perspective natural and legal persons would be treated differently depending on the specific violation committed but also from an inter-state perspective depending on which MS the natural and legal

person had committed the violation.[1244] This conclusion thus revealed a first problem in terms of asymmetry in the sanctioning provisions calling for symmetry so that the legal framework on sanctions must provide for liability to sanctions for both natural and legal persons.

The conclusion nevertheless also pointed to another more specific problem related to asymmetry in the liability to sanctions calling for legal symmetry and proportionality in the distribution of sanctions. One of the main problems relating to liability to sanctions and an appropriate and proportionate distribution of sanctions concerned situations where a natural person such as a manager or other agent (employee) for the benefit of the legal person (employer) has committed a violation of financial law. In these situations, if sanctions only were imposed on the employee, the sanctions would not have a sufficient deterrent effect on the employer and neither would the employer be sufficiently encouraged to take appropriate organisational measures to provide for the necessary staff training to prevent violations from occurring.[1245] Conversely, where an employee has committed a violation for his own benefit, the employee will not be dissuaded from committing violations if the employee runs no risk of being sanctioned for the illegal behaviour because the sanctioning provisions only makes the employer responsible for the violation. Such asymmetries in the sanctioning provisions would risk being exploited and to provide possibilities for regulatory and sanctioning arbitrage.

Therefore, the sanctioning authorities would also "be better able to choose a sanction that is optimal in terms of effectiveness, proportionality and dissuasiveness if sanctions are applicable to both natural and legal persons."[1246]

(II) The principles governing the distribution of appropriate sanctions

The EU commission proposed that sanctions should be imposed on the appropriate offender for the right reasons. Sanctioning the natural persons is more appropriate when the individual exclusively is responsible for the violation, while sanctioning the legal person is more appropriate when a natural person acted for sole benefit of the legal person. The legal framework establishing the substantive provisions on sanctions should thus be symmetrical designed to

[1244] EUCSR, p. 8; IASR, p. 13; MEMO/10/660, Annex, p. 1; and CEBS/2009/47, para. 181, p. 50.
[1245] EUCSR, p. 8, and IASR, p. 13.
[1246] IASR, p. 13. According to the SR Feedback Statement two public authorities argued that NCAs are not well equipped to scrutinise the subjective elements (intent, negligence) of a violation or offence committed by the natural persons, and this is better assessed by courts in criminal cases, cf. SR Feedback Statement, p. 3-4.

exclude any possibility and wrong incentives for legal persons to take organisational measures that exploit asymmetries between potential sanctioning subjects, and vice versa.

It was argued in Chapter 2, that as a matter of justice, all legal systems shares a commitment of not to punish the innocent and only punish the guilty. To observe this fundamental principle, the legal provisions on sanctions must make: (i)(a) sanctions available to be imposed against both natural persons and legal persons; and (ii)(a) liability for the violation committed to be the relevant criterion that determines the appropriate sanctions subjects, and (ii)(b) in contractual relationships, liability to sanctions should also fluctuate with whom that benefitted from the violation committed. Jointly liability should therefore also be available. From the first principle ((i)(a)), in conjunction with the two previous principles, it also follows that the requirement for 'available sanctions' also contains a requirement for (i)(b) the 'appropriateness' of the sanctions to be imposed against both natural persons and legal persons.

The international framework on financial sanctions satisfy the first principle (i)(a), but neither the BCP, IOSCO or FATF satisfies the second (ii). Except from providing certain examples of sanctions to be imposed on natural and legal persons, the international framework does not reflect on the appropriateness of the sanctions to be available against the natural and legal persons (i)(b), including their distribution.

D. Appropriate criminal sanctions

(I) The pre-crisis problem

The CEBS report considered the question of availability of appropriate criminal sanctions to be related with how deep the financial sanction regimes are anchored within the national approaches to sanctions where some of the NFSRs had a preference for criminal sanctions over administrative sanctions, and vice versa.[1247] The CEBS concluded that the national approaches to sanctions varied "in accordance with the local legal, administrative and judicial systems" and that this might have explained the differences "in the actual use of sanctioning powers and in the number and level of sanctions applied."[1248] The result was, for instance, that "similar or even identical conduct could be punished in some countries by an administrative measure or by a sanction imposed by the supervisory authority, while criminal sanctions [...] would be

[1247] CEBS/2009/47, para. 185, p. 51.
[1248] CEBS/2009/47, para. 180, p. 50.

applied in other Member States."[1249] Similar conclusions were also supported by some of the CESR reports. For instance, the CESR found that administrative sanctions were more common throughout the NFSRs than criminal sanctions.[1250] In addition, the CESR also reported that the range of imprisonment periods for offences of the provisions under MiFID I generally ranged from a maximum of four months (DK) to a maximum of ten years (IR, BG);[1251] insider dealing under MAD I ranged between a minimum of 3 months to a maximum of 1 year (BE) and up to a maximum of 15 years (LV); market manipulation under MAD I ranged between a minimum of 1 month to a maximum 2 years (BE) and up to maximum 15 years (LV), whereas 4 out of 29 MSs did not force imprisonment.[1252] Of administrative fines imposed against natural and legal persons for insider dealing and market manipulation under MAD I, the administrative fines ranged between a maximum for €10.000 and up to unlimited administrative fines, which did not diverge substantially from levels of criminal fines imposed against insider dealing.[1253]

Therefore, it was clear to the EU Commission that "[the] range of violations for which administrative or criminal sanctions was envisaged in national legislation diverge[d] across the EU,"[1254] and that "[t]he absence of common criminal sanction regimes across the EU creates opportunities for perpetrators of market abuse to take advantage of lighter regimes in some Member States."[1255] In addition, "when sanctions [...] are not sufficiently strict or their level is particularly low even for the most serious infringements, there is a risk that they will not have a sufficiently dissuasive effect, as the perceived reward from illegal behaviour will far out-weigh the real risk."[1256] Hence, the pre-crisis problem with respect to criminal sanctions were more generally that: (i) criminal sanctions were not always available even for the most serious and reckless of violations; (ii) there were no common agreement to which types of violations that criminal sanctions should be made available; (iii) neither any common agreement on the type criminal sanctions that were appropriate and their level of severity; and (iv) as a species of (iii), when the legal framework provides for both criminal and administrative fines, what should be the appropriate level of severity for the criminal fines (iv).

[1249] CEBS/2009/47, para. 179, p. 50.
[1250] CESR/08-220, paras. 73-76, p. 13; EUCSR, p. 9; MEMO/10/660, Annex, p. 2.
[1251] CESR/08-220, para. 80, p. 14. See also CESR/09-058, paras. 21-23, p. 8, and para. 27, p. 9
[1252] CESR/08-099, pp. 3-4.
[1253] Ibid.
[1254] EUCSR, p. 9. See also IASR, p. 14.
[1255] A conclusion that more clearly derived from MAD-CRIM, Recital 7. See Section III(2)(A)(II) below.
[1256] EUCSR, p. 9.

(II) The principles governing the appropriateness of criminal sanctions

From an intra- and inter-state perspective, the EU commission considered the availability of criminal sanctions important because: "criminal sanctions applicable to the most serious violation of EU financial services rules sends out a strong message of disapproval to individual offenders and could therefore have an important dissuasive effect, if they are appropriately applied by the criminal justice system."[1257] Hence, it followed that the most serious and reckless violations should be targeted with criminal sanctions because they increase the deterrent and stigmatisation effect of sanctions as they are generally the ones considered to be the most severe types of sanctions and the best ones in signalling public disapproval of immoral behaviour.[1258] At the same time, "[not] all types of violations occurring on the financial services area may be considered sufficiently serious so as to warrant criminal sanctions."[1259] This view is also shared by the IOSCO CDESR, which provides that "criminal sanctions should be available for egregious violations."[1260] Therefore, the first question is to which types of violations that criminal sanctions should be made available?

With respect to the banking sector, this has to a very far extent been addressed. When the banking system is exploited for money laundering and financing of terrorism, then such offences are subject to criminal liability and sanctions. On the other hand, violations of prudential law is generally not considered to warrant criminal sanctions. This question is thus addressed in respect of the BCP and FATF frameworks, but it is not addressed in the IOSCO framework. Nevertheless, from an EU sanctions law perspective, market abuse violations such as insider dealing, unlawful disclosure of inside information, and market manipulation should provide for liability to criminal sanctions at least in the serious and reckless cases. This will follow more clearly from Section III below and Chapter 6 and 7.

As related to the first question, the second question is which types of criminal sanctions should be considered as appropriate? – The question presumes the very general principle that criminal sanctions are the most severe of the punitive and deterrent sanctions. The FATF framework already required the availability of the confiscation power against natural and legal persons, supported by the provisional measures of the powers to freeze and seize property. Otherwise, the international framework on financial sanctions were silent on the issue.

[1257] IASR, p. 14. Now reiterated in MAD-CRIM, Recital 6.
[1258] EUCSR, p. 9; IASR, p. 34; CESR/08-220, para. 70, p. 13, and para. 390, p. 172; and CESR/09-058, para. 86, p. 38.
[1259] EUCSR, p. 14.
[1260] IOSCO CDESR, para. 97(h), p. 39.

The EU Commission has nevertheless stated that: "Criminal sanctions, in particular imprisonment, are generally considered to send a strong message of disapproval that could increase the dissuasiveness of sanctions, provided that they are appropriately applied by the criminal justice system."[1261] This is thus a concrete additional suggestion to the international framework for criminal sanctions to be available on natural persons.

The international framework on financial sanctions also provided for a withdrawal or revocation of a licence hold by a natural person and legal person. Although the ECtHR considers a withdrawal-power imposed on a natural person as a disciplinary sanction, Chapter 3 argued that disciplinary sanctions may in reality be punitive and deterrent sanctions, when they share the common nature with all punitive sanctions: deprivation of a right. The fact that the ECtHR does not classify withdrawal-powers as criminal sanctions is rather a function of a long-standing tradition shared between the parties to the ECHR of distinguishing between disciplinary and criminal law. Chapter 4 nonetheless showed evidence for a view on the withdrawal- and revocation-power that it is such a severe sanction that market players do not even believe the sanctioning authorities will ever use it.[1262] To reserve and actually apply the withdrawal- and revocation-power against the most serious and reckless violations is another suggestion.

The problem with fines is reserved for the following section. However, according to the governing principle, criminal fines should be more severe than administrative fines.

E. Appropriate fines

(I) The pre-crisis problem

From the inter-state perspective, one of the best illustrated problems of weaknesses and divergences in the sectoral reports, was the severity and conceptualisation of fines. Because all the sectoral reports provide very similar examples on the weak and diverging severity levels of fines, I will generally refer thereto.[1263] However, one very illustrative example should be given. In the securities sector with respect to insider dealing and market manipulation (Articles 2 and 5 of MAD I), the picture for administrative and criminal fines (mainly administrative fines and maximum levels) were almost identical. Here it is exemplified with market manipulation:

> "In the UK the authority may impose unlimited financial penalties.

[1261] Ibid.
[1262] Chapter 4, Section III(3)(B) and IOSCO Methodology, Principle 34, p. 234.
[1263] CEBS/2009/47, paras. 185-193, p. 51-53; CESR/08-099, p. 2-3; CESR/08-220, para. 74-79, pp. 13-14; CESR/09-058, paras. 24-26, pp. 8-9. See also EUCSR, p. 7; and MEMO/10/660, Annex, p. 1.

> In IT the authority may impose max € 75.000.000 or 10 times the profit.
> In SI the authority may impose to individual persons max € 1,200 to legal entities max € 125,000 and to persons responsible within a legal entity MAX € 1,400.
> In LT the authority may impose to individuals max € 1,450 and to legal entities max € 30,000 or 3 times the profit.
> In FI the authority may impose to individuals max € 10,000 and to legal entities max € 200,000.
> In BG the authority may impose to individuals max € 25,000 and to legal entities max € 50,000.
> In AT the authority may impose max €50,000. In PL the authority may impose max €52,910 or 10 times the profit."[1264]

Because this picture were general for the banking and securities sector, the EU Commission concluded that the main problem with the diverging levels of fines was that the minimum and maximum levels of fines were too low and unlikely to be sufficiently dissuasive, because a fine of "a few thousand euros cannot be considered sufficiently dissuasive."[1265] Violations could lead to gains in several million euros in excess of maximum level of fines and a "fine that is lower than the gains that can be expected from the violation is unlikely to have much of a deterrent effect."[1266] Such diverging and weak fines would also produce a high risk for violations to go undetected, in particular where a large number of potential offenders are cross-border financial institutions with considerable turnovers, because such "rational market operators would take into account the likelihood of detection in deciding whether to commit an offence, and that not all infringements would be actually detected."[1267] In addition, we must also recall from above that a number of legal factors, which structured the conceptualisation of fines also had an influence on the sufficient severity of the fines.[1268] Therefore, more generally, the main problems with the fines were: (i) the legal conceptualisation of fines; (ii) an appropriate level of severity of fines, including for large financial institutions.

(II) The principles governing the concept of appropriate and dissuasive fines

The EU Commission argued that to "ensure that a fine has a sufficiently deterrent effect on a rational market operator, the possibility that an infringement will remain undetected must be offset by imposing fines which are significantly higher than the potential benefit deriving from a breach of the financial services legislation."[1269] The fines should also to be set so high that they "could reasonably be considered to exceed the potential financial benefits that could be gained from a violation, even where those benefits are not capable of calculation."[1270] In a

[1264] CESR/08-099, p. 3.
[1265] EUCSR, p. 7.
[1266] EUCSR, p. 7; and IASR, p. 7.
[1267] EUCSR, p. 12.
[1268] Section II(2)(B)(I).
[1269] EUCSR, p. 7.
[1270] Ibid, p. 12. Compare with p. 13.

number of places, the same view is also provided in the IOSCO CDESR. Generally, only sanctions that "have an appropriate penal element can be expected to enhance deterrence,"[1271] and fines should be "above and beyond the unlawful profits."[1272] Otherwise they would just be as a "cost of committing the violation."[1273] The view was also shared by Posner as discussed in Chapter 2 with respect to economic (classical) deterrence,[1274] because otherwise the amount of the fine would just be equal to the level of restitution. All these views confirms the fine theory provided in Chapter 3, which argued that only when the total amount of money goes beyond the level of legal restoration will there be a punitive and deterrent amount, and only thereby can a pecuniary sanction qualify as a fine. Otherwise, the amount imposed only qualify as a reparatory pecuniary sanction and is therefore similar to a cost for the commission of the violation. Therefore, it was also argued that the level of legal restoration is the criterion that determines whether sanctions are reparatory or punitive in nature. Mere repayments are not punitive, and not a fine.[1275] Hence, a first principle for fines is that they must go beyond the level of legal restoration. This principle also implies that were a violation does not provide for a profit or pecuniary advantage, any amount imposed will qualify as beyond legal restoration and as a fine.

The EU Commission also argued for a benchmark for the severity levels of fines that would be sufficiently high in order to "dissuade a rational market operator from breaching the law."[1276] These benchmarks are now provided in the post-crisis EU legislation on financial sanctions. However, the problem here is which principles that determines the severity of the fines for rational market players that also may be cross-border financial institutions and calculate the risk for being detected and the costs of being sanctioned. Under such circumstances, a dissuasive fine must be significantly higher than the potential benefit deriving from the violation and so severe that the possibility of a violation to remain undetected will be offset by the severity of the fine in order to have a sufficiently deterrent effect on rational market participants. The sanctioning factors discussed (right below) will also require that the amount of the available types of fines are linked with the financial strength of legal persons, including financial institutions, and natural persons for the fines to be optimal in terms of dissuasiveness.

[1271] IOSCO CDESR, para. 86, p. 35.
[1272] Ibid, para. 97(b), p. 38.
[1273] Ibid, para. 89, p. 35.
[1274] Chapter 2, Section II(1)(B)(I).
[1275] Chapter 3, Sections II(1)(B)(II)(1), III(1)(A)(II)(2), and IV.
[1276] Ibid, p. 12.

The IOSCO and FATF frameworks only requires the availability of (administrative and/or criminal fines), and the BCP does not contain such a requirement. The two principles discussed for the conceptualisation of fines *(f-i)* and a benchmark for the severity of fines *(f-ii)* are nevertheless two principles that governs the dissuasiveness and deterrent effect of fines.

F. Appropriate sanctioning factors

(I) The pre-crisis problem

When deciding on the appropriate type of sanctions to be imposed and when calculating the appropriate amount of the fine, an important problem and question turned out to be which factors that are relevant for the sanctioning authorities to take into account?[1277] This problem was best illustrated in the CEBS' report, where the CEBS asked the MSs to indicate whether the sanctions imposed (including the amounts of the pecuniary sanctions) depended on the following eight factors:[1278] a) the seriousness of the breach; b) the level of the institution's own funds; c) the legal status of the institution; d) the cooperative behaviour of the natural person or the bank during the investigation; e) whether or not the natural person or the bank has been sanctioned before for non-compliance to the same provisions; f) the benefit (earnings) derived from the offence; g) the loss incurred by third parties as a consequence of the offence; and h) any other criterion. The MSs' answers revealed a large divergences across the NFSRs with respect to the applicable sanctioning factors.[1279] The reviews of the NFSRs in the EU securities sector were much less sophisticated, but the overall picture seems to have been similar to the one of the banking sector.[1280] An interesting observation was nevertheless found in the review of the NFSRs under MAD I. In cases of insider dealing only twelve MSs had provided for pecuniary sanctions that corresponded to the pecuniary benefit derived from the violation, and "of the 4 Member States with the lowest maximum administrative pecuniary sanctions (200 000 euros or less) only 1 provides for sanctions related to the illegal profit obtained."[1281] Whether this actually entailed that the fines imposed were lower than the level of legal restoration was unclear, but it nevertheless points to previous problem, need and call for an appropriate legal design and conceptualisation of fines. However, the EU Commission concluded more generally (across the sectors) on the problem: "The effectiveness, proportionality and

[1277] EUCSR, p. 8, and MEMO/10/660, Annex, p. 2.
[1278] CEBS/2009/47, Annex 3, p. 74-75.
[1279] See the results in CEBS/2009/47, para. 191-193, p. 53.
[1280] CESR/08-220, para. 89-91, pp. 16-17 and para. 452-454, p. 202, and CESR/07-384, para. 352, p. 67.
[1281] EUCSR, p. 8, and IASR, p. 14.

dissuasiveness of sanctions depend also on the factors, including aggravating and mitigating circumstances, taken into account by the competent authorities when deciding the sanctions to be applied to the author of a specific violation."[1282]

(II) The principles governing appropriateness of sanctioning factors

When sanctions are required to be appropriate as well as effective, proportionate, and dissuasive, and sanctions at the same time are imposed on the basis of very specific factual circumstances that qualifies and are deemed to be a violation of laws, the obvious practical question is how the sanctioning authorities are going to satisfy the requirements for the appropriateness and effectiveness, proportionality and dissuasiveness, and which sanctioning factors, including aggravating and mitigating circumstances, that are relevant?

The EU Commission highlighted certain relevant sanctioning factors, which at least should be included.[1283] For instance: (i) the seriousness of the violation; (ii) the financial (pecuniary) benefits resulting from the violation (if calculable) "to better reflect the impact of the violation and discourage further violations;"[1284] and (iii) the financial strength of the offenders which may be indicated by the annual turnover of a legal person and the annual income of a natural person responsible by the violations, "which would help in ensuring that sanctions are sufficiently dissuasive even for large financial institutions."[1285] Thus, it follows that these three sanctioning factors would help satisfying the two principles for fines, because they will require that the amount imposed will go beyond the level of legal restoration *(f-i)* and they provide a benchmark for the severity of fines *(f-ii)* even for large financial institutions.

The EU Commission also considered other sanctioning factors to be relevant and appropriate: (iv) the 'level of cooperation' of the natural or legal person in breach with the relevant authorities would encourage the offenders to cooperate with the authorities and increases their investigatory capacity, ultimately contributing to the better detection of the financial violations.[1286] For the international framework on financial sanctions, other sanctioning factors may also be relevant and appropriate for ensuring the effectiveness, proportionality and dissuasiveness of the sanctions, but the point to made here is that the international framework

[1282] EUCSR, p. 13.
[1283] EUCSR, pp. 13-14.
[1284] Ibid, p. 13.
[1285] Ibid, p. 13, and IASR, p. 14.
[1286] EUCSR, p. 8 and 13-14, and IASR, p. 30.

does not provide for any sanctioning factors, and those ones provided for fines seems to be a of very principled nature when fines and sanctions are required to be dissuasive.

G. Publication of sanctions and reputational sanctions

(I) The pre-crisis problem

The issues related to the publication of sanctions concerned two inter-connected problems. First, the review of the pre-crisis NFSRs revealed a number of divergences in the manner in which sanctioning decisions / sanctions were published, if the sanctions were disclosed to the public at all. In the securities sectors, it was observed under MiFID I that only seven of the MSs required the publication of sanctions.[1287] The CEBS review was more informative on the large inconsistencies there existed: (i) the publication of sanctions was made on a named basis informing about the sanctioned natural or legal person; (ii) sanctions were made public on systematically basis and the systems and mechanisms used for the publication; (iii) the sanctioning authority had any discretionary powers for deciding to publish the sanctions on an unnamed basis and to exempt from the obligations to publish the sanctions; and (iv) the nature and types of the violations and the sanctions formed part of the disclosed information.[1288] Moreover, harmonised obligations for the practical publication of sanctions were missing.

Second, without a general obligation for the publication of sanctions, financial institutions and other types of offenders would not be subject to any reputational damages (/ sanctions), if the legal sanctions were not disclosed to the public, thereby implying a logical and direct legal relationship between the obligations to publish legal sanctions and the offenders' liability to reputational damages. In the IASR, it was explained that "the reputational damages depends also on the level of fines imposed: very low fines may be associated to minor violations which are unlikely to seriously undermine the reputation of their perpetrator."[1289] The reverse would thus also hold true so that very high fines would be associated with more reckless and serious violations. Therefore, the main justification for constructing a general legal obligation to publish legal sanctions was to make the offenders subject to reputational damages.

(II) The principles governing the publication of sanctions

[1287] EUCSR, p. 7; MEMO/10/660, Annex, p. 1.
[1288] CEBS/2009/47, paras. 215-217, p. 58. See also (PD) CESR/07-384, para. 109, p. 18, and paras. 353-354, p. 67.
[1289] IASR, p. 19.

The EU Commission proposed that the NCAs / sanctioning authorities should be required to disclose the imposed sanctions as a general and main rule. Exceptions thereto should also be allowed, for instance, when the disclosure of sanctions would seriously jeopardise the proper functioning of the financial markets. The underlying concern was crises scenarios where the publication of sanctions would further disrupt the financial markets and pricing mechanisms and, for instance, cause or accelerate bank runs. In such situations, the disclosure of sanctions should be on an anonymous basis.[1290] In addition, specific disclosure-sanctions were proposed, such as, public warnings and public reprimands because, just like the publication of sanctions, they both "make a significant contribution to general prevention, since they act as reminders of the sanctions applicable to certain types of behaviour and show that there is a real danger that such behaviour will be discovered and punished by the authorities."[1291]

The practical rule for how sanctions should be published is less of our concern here. Our main concern and question is whether the publication of sanction is more of a political desire, or there are more principled-based arguments that considers it logical necessary and therefore also reasonable for international framework on financial sanctions to provide for a general obligation to publish sanctions. The question is controversial because, at that time, the financial industry also revealed their concern for the "high reputational damage this could create for an individual company."[1292] This concern carries some merit judged on the basis of the EU Commission's own arguments, because if the publication of sanctions have the potential to jeopardise the financial stability and cause and accelerate bank runs, the publication of sanctions provides for a stigmatisation and deadly mechanism that may be extremely severe.

On the other hand, the deterrence theory is very clear on these issues. When sanctions are required to be effective, proportionate and dissuasive, the dissuasiveness requirement cannot be fully effective if the legal sanctions imposed on the offenders will not be brought to the attention of the public, including the contractual parties (and potential contractual parties) and the financial markets. It would also minimise the leverage which the supervisory authorities need in their support for making any reparatory or corrective changes to financial institutions and other legal persons subject to supervision. Moreover, the effectiveness of the supervisory regimes is also at stake without any obligation to publish sanctions. Deterrence works by force

[1290] EUCSR, p. 12, and the SR Feedback Statement, p. 2-3.
[1291] EUCSR, p. 7.
[1292] SR Feedback Statement, pp. 3-4.

and threat, and the threats creates a legitimate scope for applying measures of force, that is, reparation through application of corrective, remedial and restorative sanctions.

Therefore, when the international framework on financial sanctions do not provide for a general obligation to publish sanctions, the deterrence theory will require so. This requirement may also be viewed in accordance with the "Precondition for effective banking supervision" under the 2012 BCP and the precondition of "Effective market discipline."[1293]

3. Conclusions

EU sanctions law and the international framework on financial sanctions requires both that sanctions must be effective, proportionate, and dissuasive. On the basis of the discussions and conclusions in Chapter 2 to 4, the review of the pre-crisis NFSRs by CEBS and CESR, and the policy actions and legislative actions proposed by the EU Commission as discussed in Section II(1)-(2), it is from an EU sanctions law-perspective possible to suggest what was argued to be the standards and principles that governs the conceptual minimum requirements for effective, proportionate, and dissuasive financial sanctions with a view towards a universal application and to be applicable in an international environment with cross-border participants.

First, it was found that the governing notion of sanctions in the international framework is similar to the constitutional conception of sanctions as defined in Chapter 3, wherefore there are two main archetypes and species of sanctions: (i) reparatory sanctions and (ii) punitive sanctions. The conclusions made in Chapter 4 revealed that the international framework on financial sanctions already apply these concepts in their distinction between restorative, corrective, and remedial powers ((i)) on the one side, and sanctions implied as punitive sanctions on the other side ((ii)), where criminal sanctions and fines are a class and species of the latter. This served as our starting point from which we could argue for the following additional standards and principles, and wherefrom we pointed out that the international framework on financial sanctions mostly lacked standards and principles for the punitive sanctions (ii).

Second, as a consequence of the first point it therefore followed that any appropriate tool-box of sanctions requires the availability of a number of different types of reparatory and punitive sanctions. The appropriateness-standard for sanctions required that the sanctioning authorities should be able to imposed sanctions that were optimal in terms of effectiveness,

[1293] BCP, paras. 46-53. The 2012 BCP framework recognises that certain structures are fundamental to effective banking supervision, including 'effective market discipline'. See para. 53.

proportionality, and dissuasiveness. Accordingly, the appropriateness-standard required that the sanctions should reflect (i) the nature and seriousness of the specific violations; and (ii) that the sanction subjects are both natural and legal persons. The reparatory and punitive sanctions should and will often reflect both aspects, but the reparatory sanctions are strongly associated with the nature of a violation and punitive sanctions with the seriousness of violations.

While the BCP framework is mostly a reparatory framework, it lacked standards and principles on punitive sanctions, just as it contained no express requirements for sanctions to be effective, proportionate and dissuasive. The FATF framework lacked standards and principles on reparatory sanctions for the violations of preventive rules, but less on punitive sanctions. The IOSCO framework required the availability of both reparatory and punitive sanctions, but lacked clear standards and principles on their appropriateness, including how these sanctions should be appropriately applied in practice. A general problem for the BCP, IOSCO, and FATF framework was the absence of pointing out which types of violations that should be targeted with reparatory and punitive sanctions, including criminal sanctions (IOSCO).

Third, because all legal systems shares a commitment of not to punish the innocent and to only punish the guilty, the appropriateness of sanctions also requires that: (i) appropriate sanctions are available to be imposed against both natural and legal persons; and (ii) liability for the violation committed to be the relevant criterion that determines the appropriate sanctions subjects, including in contractual relationships where the liability to sanctions should fluctuate with the specific natural person or legal person that benefitted from the violation committed, just as it should be possible to establish jointly liability.

The international framework on financial sanctions are satisfying the first principle (i) by the requirement of making sanctions available to be imposed on natural and legal persons, but less so with respect to which sanctions that are appropriate. Neither the BCP, IOSCO nor FATF satisfies the second (ii).

Fourth, irrespective of whether the sanction regime distinguishes between criminal and administrative sanctions, the principle that governs criminal sanctions is that these are the most severe of the punitive sanctions intended to be imposed on natural or legal persons for the most serious and reckless of violations. Accordingly, the most serious and reckless of violations should be targeted with the most severe of the punitive sanctions. Therefore, this principle require that the most severe sanctions and serious violations can be identified in any legal

framework, including, in particular the legal framework that distinguishes between criminal law and sanctions and administrative and civil law and sanctions.

The international framework on financial sanctions have already singled-out money laundering and financing terrorism as criminal offences, which should be targeted with the power to confiscate property. Market abuse was also suggested to require the availability of criminal sanctions. Otherwise, the international framework was mostly silent on which criminal sanctions that were deemed appropriate. On the basis of the governing principle, imprisonment was suggested for natural persons, and the power to withdraw or revoke a licence or authorisation was for legal persons suggested to be reserved for the most serious violations. Finally, it was require that criminal fines should be more severe than administrative fines.

Fifth, what appeared to be one of the most underestimated and general problems under the review of the pre-crisis NFSRs, was the appropriate legal conceptualisation of fines. Per definition, the nature of a fine is to result in a deprivation of property, i.e. own funds, whereby the fine meets the purpose of punishment and deterrence. Accordingly, were a fine is imposed for a violation of which the offender derived a pecuniary profit, the amount imposed must be higher than pecuniary profit derived, i.e. the level of legal restoration. Such an amount is punitive and deterrent. An amount equal to the profit derived is a reparatory pecuniary sanction, and amount below is a cost for the commission of the violation. Therefore, as a minimum conceptual requirement, a fine must, per se, go beyond the level of legal restoration, and reparatory pecuniary sanctions are only a repayment of illegal obtained profit. This was the first principle governing the fines (i), and the second was that (ii) the severity of the fines must be defined by reference to some legal benchmark or structural standard to satisfy the requirement of dissuasiveness, in particular for large rational cross-border financial institutions.

The international framework on financial sanctions only required the availability of fines (administrative, civil or criminal fines), and did not satisfy the two principles.

Sixth, for sanctions to be effective, proportionate and dissuasive in their practical application, the sanctioning authorities needs to be able to adhere to certain sanctioning factors, including aggravating and mitigating circumstances. Accordingly, on the basis of the previous principles, it followed that certain sanctioning factors were deemed appropriate, including: (i) the seriousness of the violation; (ii) the pecuniary benefits derived from the violation; and (iii) the financial strength of the natural or legal person, for instance, by taking into account the annual turnover of the legal person or annual income of natural persons. When these three

sanctioning factors are taking into account by the sanctioning authority for the imposition of fines, the two previous principles that governed the minimum conceptualisation of fines will be formally satisfied. Other sanctioning factors may be relevant, e.g. the level of cooperation.

The international framework on financial sanctions did not provide for any sanctioning factors, and do not satisfy these standards and principles.

Seventh, as a matter of confluence between the deterrence theory, the stigmatising effect of legal sanctions, and the dissuasiveness requirement for sanctions, the proper functioning of the financial markets and the aim at creating a level playing field and to protect investors, there are strong arguments for a general requirement for the publication of sanctions, whereby the publication discloses the identity of the offender, the nature and character of the violation committed and the sanctions imposed for the violation committed. Otherwise, there would hardly be any stigmatisation of the offender and any appropriate incentives to reform, correct and improve any misbehaviour, and neither to inform the markets of proper market conduct. Therefore, the justification for the rules on the publication of sanctions is not only a matter of legal justice, but also one of satisfying the preconditions for effective market discipline.

The international framework on financial sanctions did not provide for any rules on the publication of sanctions, and do not satisfy this standard or principle.

III. THE CONCEPT OF A SANCTION REGIME

1. The general concept of a sanction regime

A. Two definitions of sanction regimes

The GFC clearly put into question whether financial rules always are respected and applied as they should.[1294] From the GFC and onwards a tsunami of legislative and legal acts therefore followed and changed the financial landscape. A major improvement of the reform was the "new" supervisory architecture, which, inter alia, transformed the three sectoral Committees into the European Supervisory Authorities (ESAs) and charged the ECB with the main responsibility of conducting prudential supervision of significant credit institutions. In addition, the financial reform rules aimed to provide for a "better monitoring of financial markets and better safeguard of market stability, security and integrity," whereto: "[e]fficient and sufficiently

[1294] EUCSR, p. 2; and ESIASR, p. 2. See also Chapter 2, Section I, the "Introduction."

convergent sanctioning regimes are the necessary corollary to the new supervisory system."[1295] This rationale had already been presented in the DLG Report:

> "The European Institutions should also set in motion a process which will lead to far more consistent sanctioning regimes across the Single Market. Supervision cannot be effective with weak, highly variant sanctioning regimes. It is essential that within the EU and elsewhere, all supervisors are able to deploy sanction regimes that are sufficiently convergent, strict, resulting in deterrence. This is far from being the case now. The same exercise should be initiated with respect to supervisory powers. These also differ greatly from one Member State to another. This cannot be conducive to coherent and effective supervision in the Single Market."[1296]

Therefore, Section 2 of the EUCSR and the IASR each provided a definition of the concept of a 'sanction regime' with the purpose to reinforce the national sanction regimes applicable for the financial sectors. In the EUCSR, the EU Commission provided the following definition of 'national financial sanction regimes' (the 'first definition'):

> "[T]he legal framework covering sanctions provided in national legislation for the violations of EU financial services rules (including the national rules transposing EU directives) by financial institutions and other market participants, and actual enforcement of sanctions."[1297]

This definition was slightly different from the same concept of 'national financial sanction regimes' provided in the IASR (the 'second definition'):

> "[T]he legal framework covering sanctions provided for in national legislation for the violations of EU financial services rules - including: type (administrative and criminal, pecuniary and non-pecuniary) and level of sanctions, addressees of sanctions, factors to be taken into account in the application of sanctions - and actual enforcement of sanctions."[1298]

Despite these two legal definitions of sanctioning / sanction regimes are not fully identical, the two definitions nevertheless share some common and fundamental traits which together establishes the constitutive elements ('pillars') for the attempt to create a consistent and coherent concept of 'sanction regimes'. However, none of these two definitions are sufficient to entirely capture the notion of sanction regimes as it is found, applied and operating under EU financial law today. This I argue on the basis of four lines of criticism and arguments:

A first point of criticism is an intuitive one going to the very core of the definitions. In Chapter 2, Section II(2) attempts in the philosophical literature have already proposed a definition for an institutional and standard concept of punishment established on the basis of five constitutive elements similar to those of the EUCSR and IASR. The fifth element of the

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[1295] EUCSR, p. 2. The ESAs were therefore conferred with the task to bring improvements in the coordination of the NCAs' enforcement activities.

[1296] DLG Report, para. 201, pp. 50-51. This view has also later been confirmed. See the High-Level Expert Group on reforming the structure of the EU banking sector, Chaired by Erkki Liikanen, Final Report, Brussels, 2 October 2012 (Link: https://www.pruefungsverband-banken.de/en/infobereich/downloads/Documents/Liikanen_report_en.pdf) at p. 107: "Sanctioning: *In order to ensure effective enforcement, supervisors must have effective sanctioning powers* to enforce risk management responsibilities, including sanctions against the executives concerned, such as lifetime professional ban and claw-back on deferred compensation." Italics added.

[1297] EUCSR, p. 4, and MEMO/10/660 p. 1.

[1298] IASR p. 4.

institutional concept of punishment suggests that punishment "must be imposed and administered by an authority constituted by a legal system against which the offence is committed."[1299] Hence, it follows that a constitutive element of a 'sanctioning authority' is missing in the first and second definitions provided by the EUCSR and IASR.

Second, although there in principle is no legal commitment nor binding force to adopt a pure conceptual (Chapter 2-) notion in the EU legal framework on sanctions and sanction regimes, the same notion of a sanction regime and element of requiring a sanctioning authority is also supported by a second observation and argument deriving from Chapter 3. When the ECtHR applies the Engel-test, the ECtHR adheres to whether the particular sanction regime operating within the legislative and institutional architecture of a state's legal system of criminal justice contains elements that resembles the abstract but yet applicable notion of *'regime of punishment'*, which is similar to a criminal sanction regime. Within these contexts, it is a matter of fact that sanctions always are imposed by a sanctioning authority, which is an authority that either qualifies as a court, administrative authority, or other type of authority. To the extent that the criminal classification factors, which are linked to the sanctions, offences or proceedings, and which takes into account whether the police, public prosecutor and criminal courts are involved in the enforcement, can be identified within the legislative acts applied or administered by the sanctioning authority, the legislation and/or institutional settings, the criminal classification factors points to the existence of a criminal sanction regime. Depending on the particular context of the case, the identification of criminal classification factors may, or may not, point to considering the offender subject to a criminal sanction or criminal charge, thereby triggering the criminal guarantees. The Chapter 2-notion was thus taking form and materialising in Chapter 3 and has found its way into the EU legal order by the EU commission's application of the notion of a sanction regime. Hence, Chapter 3 contributed with criminal classification factors that provides criminal colours to a sanction regime, and two of them are the involvement of the criminal prosecutors and criminal courts. This is an additional argument for the definition to contain an element and pillar of a sanctioning authority.

Third, Chapter 3 also discussed the case-law of the ECtHR and CJEU with respect to the principle of ne bis in idem contained in Articles 4-P7 and 50 EUCFR. That case-law in particular almost always concerns the involvement of an administrative sanctioning authority and a criminal sanctioning authority (criminal courts) and thus also to an institutional setting

[1299] See Chapter 2, Section II(2).

where the offender either has been prosecuted and / or punished twice for the same offence in two separate sets of administrative or criminal proceedings. The principle of ne bis in idem therefore already indirectly includes an adherence to whether it is an administrative sanction regime and / or criminal sanction regime operating. To determine whether the ne bis in idem principle has been observed, one of the first elements to identify is which types of actors that are involved in the prosecution, conviction, and sanctioning of the offender, and this first and foremost includes an adherence to the character of the sanctioning authorities involved.

Fourth, from Chapter 4 it followed from the international standards and principles on sanctioning that they all required, as a prerequisite for the implementation of the standards and principles, the existence of an authority in the form of either a supervisor and/or regulator or court vested with sanctioning powers.[1300] In addition, the international framework are build upon the rule of law, and the supervisors and/or regulators operating the financial system are either implied or directly required to co-operate with authorities operating and performing different tasks within the legal system of the state or region. The international framework is thus depending on the idea as well as promoting a further integration between the actors involved in the financial system and the actors involved in the legal system, including the sanctioning authorities within the legal system of criminal justice of that state or region.

Fifth, as a matter of logical consistency and coherence, the EU Commission itself, as just quoted, considered "efficient and sufficiently convergent sanctioning regimes as the necessary corollary to the new supervisory system,"[1301] or even more clearly that "efficient sanctioning regimes are a key element of the supervisory regime which should ensure sound and stable financial markets and ultimately, the protection of consumers and investors."[1302] The scope of the supervisors' competences is thus essential to the scope of the sanction regimes.

Sixth, as perhaps the most crucial and straightforward argument for integrating the sanctioning authority as a constitutive element of the concept of sanction regimes is that the financial supervisors, resolution authorities and courts have been equipped with the task and sanctioning powers to sanction natural and legal persons for violations of the post-crisis EU legislation of financial law. Numerous legal provisions depends upon that notion. In fact, the main bulk of EU financial law today is constructed upon the idea that competent authorities

[1300] BCP, Core Principle 1, IOSCO Principles, by Principles 1 and 3, and the FATF Recommendations, by Recommendations 26, 27 and 35, builds on the Basel and IOSCO frameworks.
[1301] Supra, fn154.
[1302] COM (2010) 716, p. 4.

have been conferred with the responsibility to administer, supervise and enforce compliance with EU financial law, ultimately by means of administrative and criminal sanctions.[1303]

This view entails, first, that the supervisory regimes and sanctioning regimes are integrated with each other, which is also now mirrored in the 'supervisory powers' and 'sanctioning powers' granted to the supervisors. Second, as the supervisory authorities should be able to 'rely' or rest on equal, strong and deterrent sanction regimes, the sanction regimes may be viewed as built upon, or as on top of, the supervisory regimes. Third, the 'equal, strong and deterrent sanction regimes' is a call for an authority to combat "all financial [misconduct and crimes]" in order to preserve the integrity of the financial markets and for which the supervisory authorities are equipped with sufficient supervisory or sanctioning powers to act. Fourth, and finally, the concept of a sanctioning authority is not restricted to the financial supervisors or resolution authorities, but also covers the judicial authorities in form of national courts as these typically are the competent authorities vested with the criminal sanctioning powers.

B. A new definition of the general concept of a sanction regime

Thus having established that the sanctioning authority is a constitutive element of the concept of sanction regimes, we can now derive five constitutive elements, referred to as 'pillars' for the concept of 'sanction regimes' from the two definitions above: (A) the legal framework; (B) the violations; (C) the sanctions; (D) the sanctioning authority; and (E) the enforcement of sanctions. On the basis of these five pillars, a third more general definition follows:

> The legal framework covering sanctions for the violations of laws under which one or more sanctioning authorities are responsible for the imposition and enforcement of sanctions.

By including the sanctioning authority as a pillar for the third definition of a sanction regime, it is possible to characterise and determine a number of different sanction regimes. When the sanctioning authority is either a 'European' or 'national' authority, respectively the sanction regimes will be a 'European / EU sanction regime' ('ESR') and 'national sanction regime' ('NSR'). If the sanctioning authority is an 'administrative authority' or 'criminal court', respectively the sanction regimes will be either an 'administrative sanction regime' or 'criminal sanction regime'. When the sanctioning authority is operating within the financial system either as a European authority or national authority, respectively the sanction regimes will be a 'European financial sanction regime' ('EFSR') and 'national financial sanction

[1303] For instance, see Recital 70 MAR and Recital 3 MAD-CRIM. The introduction of MAR and MAD-CRIM is found in Section III(2)(A) below.

regime' ('NFSR'). In this way, the concept of a sanction regime proves to be a functional and flexible concept that is methodologically relevant for conducting comparisons between the different sanction regimes established and operating at the EU level and national level as well as to distinguish between the different scope of their tasks that the sanctioning authorities are charged with for the supervision and sanctioning of different actors in the financial sector. The concept of a sanction regime also proves useful for the observation of the constitutional principles and guarantees, including in particular the ne bis in idem principle in Articles 4-P7 ECHR and Article 50 EUCFR as the double jeopardy clause protects against the (double) imposition of criminal sanctions in two separate and distinct proceedings on the basis of the same offence (idem), wherefore the ECB and ESMA have an obligation to refer criminal matters to the national authorities for further prosecution.[1304] Hence, the distinction between European and national sanction regimes is first and foremost a distinction relevant for EU and national criminal law, because the enforcement of criminal law and imposition of criminal sanctions are conducted at the national level (setting aside the substantive results derived from the Engel-test here). Furthermore, the concept of a sanction regime is now being used in the post-crisis EU financial framework to promote "deterrent sanctions regimes" with a commitment to establish "equal, strong and deterrent sanctioning regimes" across the EU Member States; to enhance the sanctions' "deterrent effect;"[1305] and to ensure a level playing field and a sound prudential and conduct of business framework for the EU financial sectors. The main purpose of Section III(2) is therefore to unfold the concept of a 'sanction regime' to the post-crisis EU legal framework on financial sanctions by first establishing the concept of each pillars and apply them to EU financial law to set the background for the discussions in Chapters 6 and 7.

2. The pillars of sanction regimes and its application under EU financial law

A. The legal framework

(I) The pillar

The first pillar is the (EU) 'legal framework'. The two definitions introduced the concepts of sanction regimes by referring to the "the legal framework covering sanctions provided in national legislation for the violations of EU financial services rules," among which the first definition also explicitly includes the national rules transposing EU rules laid out in EU directive.

[1304] Articles 136 SSMFR, 23(8) CRAR; and 25i(8) and 64(6) EMIR as introduced in Section III(2)(A).
[1305] Recitals 70-71 MAR; 56 BR; 74 PR; and 3 MAD-CRIM as introduced in Section III(2)(A).

However, there are no compelling reasons to restrict the first pillar only to EU directives as the first pillar may cover all EU financial laws regardless of their type, such as, EU regulations, directives or decisions so long as they form part of EU banking and securities laws, and that they satisfy the other pillars. In principle, this entails that each of the EU legislative or legal acts also provide for their own individual sanction regime, which are comparable to the sanction regime of the other legislative and legal acts, irrespective of, as the discussion will show, that the sanction regimes governed by those acts are very similar in their structure and content. Therefore, the first pillar covers all the sanction regimes provided in the individual 'EU financial laws' as restricted by the application of the first pillar. However, the national laws transposing the EU Directive and EU Decisions do not form part of this Thesis.

(II) Its application

Only the sanction regimes found in the following EU legislative and legal acts will be analysed and subject to discussion. Of the main legislative and legal acts belonging to EU banking law, the following acts will form part of the discussion:

(i) On prudential supervision:

(a) SSMR;[1306]
(b) CRD;[1307]
(c) CRR;[1308]
(d) SSMFR;[1309]
(e) ECBSR I.[1310]

(ii) On banking resolution:

(a) SRMR;[1311]
(b) BRRD.[1312]

[1306] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. OJ L 287, 29.10.2013, p. 63-89.
[1307] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC. OJ L 176, 27.6.2013, p. 338-436. The latest consolidated version is from 01/01/2022.
[1308] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012. OJ L 176, 27.6.2013, p. 1-337. The latest consolidated version is from 01/01/2023.
[1309] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17). OJ L 141, 14.5.2014, p. 1-50.
[1310] Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions. OJ L 318, 27.11.1998, p. 4-7 (ECB/2014/19). The latest consolidated version is from 04/02/2015.
[1311] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and Resolution Fund and amending Regulation (EU) No 1093/2010. OJ L 225, 30.7.2014, p. 1-90. The latest consolidated version is from 12/08/2022.
[1312] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and

(iii) On anti-money laundering (the 'AML-regime'):

(a) AMLD-CRIM;[1313]
(b) AMLD IV.[1314]

These legal instruments are legislative acts, except from the SSMFR and ECBSR I, which are (ECB) legal acts.[1315] A few other legal instruments forms part of the AML-regime, but will not form part of the discussion for reasons of simplicity and that the two documents referred to covers the most important parts of the anti-money laundering legal framework.[1316]

Of the main legislative and legal acts belonging to the EU securities sector, the following forms part of the discussion:

(i) On market abuse:[1317]

(a) MAD-CRIM;[1318]
(b) MAR.[1319]

(ii) On market infrastructure:

(b) EMIR;[1320]
(c) CRAR.[1321]

Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council. OJ L 173, 12.6.2014, p. 190-348. The latest consolidated version is from 14/11//2021.

[1313] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. OJ L 284, 12.11.2018, p. 22-30.

[1314] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC. OJ L 141, 5.6.2015, p. 73-117. This latest consolidated version is from 30/06/2021.

[1315] The SSMFR and the ECBSR I are ECB Regulations (referred to as 'legal acts') as they are adopted by the ECB on the basis of Article 132 TFEU and Articles 25(2) and 34 of the ESCB/ECB Statute, which allows the ECB to make regulations to extent necessary to implements its tasks, including the ECB's task relating to the prudential supervision of credit institutions and other financial institutions (Article 127(6) TFEU).

[1316] Two legal instruments needs to be mentioned. *First*, Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime ('2001/500/JHA'). OJ L 182, 5.7.2001, p. 1-2. *Second*, Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime, Strasbourg, 08/11/1990 ('the 1990 Convention). The 1990 Convention entered into force 01/09/1993. Link: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/141. It is also accompanied by an Explanatory Report, European Treaty Series No. 141: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5de. Today, the AML-regime covers most of the previous framework on AML-issues. See Recitals 3, 4 and 24, and Article 12 of the AMLD-CRIM. Some excursions are nevertheless made in Chapter 6.

[1317] MAR, Recital 7, defines the concept of 'market abuse' as: "Market abuse is a concept that encompasses unlawful behaviour in the financial markets and, for the purposes of [MAR], it should be understood to consist of insider dealing, unlawful disclosure of inside information and market manipulation."

[1318] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse. OJ L 173, 12.6.2014, p. 179-189.

[1319] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. OJ L 173, 12.6.2014, p. 1-61. The latest consolidated version is from 01/01/2021.

[1320] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. OJ L 201, 27.7.2012, p. 1-59. The latest consolidated version is from 12/08/2022.

[1321] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies. OJ L 302, 17.11.2009, p. 1-31. The latest consolidated version is from 01/01/2019.

(iii) On markets of financial instruments and investment services:

(a) BR;[1322]
(b) MiFID II;[1323]
(c) MiFIR;[1324]
(d) PR.[1325]

(iv) On investment firms and other market participants:

(a) IFD;[1326]
(b) IFR;[1327]
(c) UCITS;[1328]
(d) AIFMD.[1329]

In addition to the AMLD-CRIM and MAD-CRIM, another EU criminal law-instruments to be discussed is the EU Directive concerning the freezing and confiscation of instrumentalities and proceeds of crime in the EU, the 'CFD',[1330] of which other legal instruments is closely associated.[1331] Other EU legislative acts governing the more general relationship between EU financial law and EU criminal law can also be found.[1332] Finally, it will be necessary to take certain specific excursions and make certain specific comparisons to:

[1322] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014. OJ L 171, 29.6.2016, p. 1-65. The latest consolidated version is from 01/01/2022.
[1323] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. OJ L 173, 12.6.2014, p. 349-496. The latest consolidated version is from 28/02/2022.
[1324] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012. OJ L 173, 12.6.2014, p. 84-148. The latest consolidated version is from 01/01/2022.
[1325] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 2014 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. OJ L 168, 30.6.2017, p. 12-82. The latest consolidated version is from 10/11/2021.
[1326] Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2014/59/EU and 2014/65/EU. OJ L 314, 5.12.2019, p. 64-114. The latest consolidated version is from 05/12/2019.
[1327] Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulation (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) 806/2014. OJ L 314, 5.12.2019, p. 1-63. The latest consolidated version is from 05/12//2019.
[1328] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities. OJ L 302, 17.11.2009, p. 32-96. The latest consolidated version is from 02/08/2021.
[1329] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010. OJ L 174, 1.7.2011, p. 1-73. The latest consolidated version is from 02/08/2021.
[1330] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. OJ L 127, 29.4.2014, p. 39-50. The latest consolidated version is from 19/05/2014.
[1331] *(1)* Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. OJ L 303, 28.11.2018, p. 1–38; *(2)* Council Framework Decision 2005/212/JHA of 24 February 2005 on the confiscation of crime-related proceeds, instrumentalities and property. OJ L 68, 15.3.2005, p. 49-51; *(3)* the 2001/500/JHA (supra fn137); *(4)* Joint Action 98/699/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime ('98/699/JHA). OJ L 333, 9.12.1998, p. 1-3. The latest consolidated version is from 05/07/2001; and *(5)* the 1990 Convention (supra fn137).
[1332] See, in particular: Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain

(i) Transparency Directive ('TD');[1333]
(ii) Regulation (EC) 1/2003;[1334] and
(iii) Regulation (EC) No 2988/95.[1335]

Except from the two latter (ii) and (iii), all the other EU legislative and legal acts will be referred to by the functional phrase of 'EU financial law(s)' being well-aware that not all of the legislative and legal acts composing the entire body of EU financial law has been included. However, these are the main EU legislative and legal acts which satisfies the definition of the concept of financial sanction regimes, and therefore only these will be taken into account. On this basis, it now also becomes possible to consider the second pillar of sanction regimes, and in Chapter 6, Section II, to apply the Engel-test for the of assessment of the classification of the EU legislative and legal acts of EU financial law.

B. The violations

(I) The pillar

The second pillar is the 'violations'. More precisely, it is the violations of rules and requirements provided under EU financial law as narrowed by the scope of the first pillar. The EU concept of violations are often regarded as an 'infringement', 'breach' or 'non-compliance' when pertains to the violation of rules and requirements found in EU administrative law, but as 'offences' or 'crimes' when pertains to the violation of rules and requirements found in EU criminal law. The term 'violation' is therefore used as a neutral non-classified concept that reflects their essential nature: the breach of law that triggers the application of sanctions. As argued in Chapter 3, and as given in the definition of the concept of a legal sanction, it is the very existence of violation that *sanctions* the imposition of sanctions, whereby the retributive requirement will be satisfied. This contains and establishes a premise for the discussions to be carried in Chapter 6 and 7 that our discussion primarily will be based upon the presumption that the retributive requirement is satisfied, unless the context stipulates otherwise.

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criminal offences, and repealing Council Decision 2000/642/JHA. OJ L 186, 11.7.2019, p. 122–137. More generally on EU criminal law, see: Klip A, 'European Criminal Law: An Integrative Approach' (4th Edition, Intersentia 2021); and Ambos K, 'European Criminal Law' (Cambridge University Press 2020).

[1333] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC. OJ L 390, 31.12.2004, p. 38–57. The latest consolidated version is from 18/03/2021.

[1334] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003. The latest consolidated version is from 01/07/2009.

[1335] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests. OJ L 312, 23.12.1995, p. 1–4. The latest consolidated version is from 23/12/1995.

Under EU financial law it is a common trait of the legislative and legal acts that they contain law provisions which enumerates different types of violations that should be sanctioned. At least with respect to these enumerated violations, the EU Member States have an obligation to provide the sanctioning authorities with appropriate sanctioning powers. In this way, each of the legislative acts contains their own legal framework of certain enumerated violations, referred to as: 'violation-regimes', but without excluding from the scope of sanctioning powers the ability to sanction violations that are not enumerated among the listed infringements or offences. The phrase 'at least' is often used as the standard phrase, which indicates that the scope of administrative and criminal sanctions can be broadened to cover violations not expressly included in the violation-regimes under the NFSRs.

(II) Its application

On that basis, the following violations provided in the violation-regimes of the following legislative and legal acts of EU banking law must at least be sanctioned: Articles 18(1) and 18(7) SSMR; Article 1a(1) ECBSR I; Articles 66(1) and 67(2) CRD IV; Articles 38(2) and 39(1) SRMR; Article 111(1) BRRD; Article 59(1) AMLD IV; and Articles 3-4 ALMD-CRIM. The following violations provided in the violation-regimes of the following legislative and legal acts of EU securities law must at least be sanctioned: Annex III and Articles 24(1), 36(1), 36a(1), and 36b(1) CRAR; Annex I and III and Articles 20(1), 25j(1), 25k(1), 25p(1), 25q(1), 65(1), 66(1), 71(1), and 73(1) EMIR; Article 70(3) MiFID II; Article 38(1) PR; Article 18(1) IFD; Article 99a UCITS; Article 42(1) BR; Article 30(1) MAR; and Articles 3-6 MAD-CRIM.

Because these violation-regimes covers an enormous amount of enumerated and varying types of violations, the aim of the discussion in Chapter 6, Section II, is to assess and discuss on the basis of the Engel-test the classification of the violation-regimes in generally as well as those types of administrative infringements which will be of particular relevance for the Engel-test and the classification of the EU financial sanctions. Together, the discussion will provide the structures for the classification of the entire body of EU financial law on the basis of the first Öztürk criterion as well as determine the most relevant of the administrative infringements that rather classifies as a criminal offence under the Engel-test.

With respect to the NFSRs, it is also a general trait of the financial violation-regimes provided under EU administrative law that the violations provided therein may be sanctioned by criminal sanctions instead of administrative sanctions to the extent that the EU Member

States for the implementation (directives) and application (regulations) of EU financial law decide to exercise the options contained therein. Such options are not provided for the European sanction regimes as they are built on rules belonging entirely to EU administrative law and the sanctioning authorities are only vested with administrative sanctioning powers. At the national level there is thus the possibility to treat the administrative infringements as criminal offences by providing criminal sanctions to these infringements under the NFSRs.

C. The sanctions

(I) The pillar

The third pillar is the 'sanctions'. The first and second definition introducing the concept of sanction regimes commonly referred to the "legal framework covering sanctions provided in national legislation for the violations of EU financial services rules." Therefore, the third pillar relates to the sanctions having a legal basis within EU financial laws as imposed against the violation-regimes narrowed by the first pillar and second pillar. The main difference between the first and second definition of sanction regimes is the element: "type (administrative and criminal, pecuniary and non-pecuniary) and level of sanctions, addressees of sanctions, factors to be taken into account in the application of sanctions." These elements included in the second definition amounts to the EU Commissions' policy and legislative actions proposed for the reinforcement of the NFSR, which the previous Section II argued to contain the principles and structures that governed the conceptual minimum requirements for effective, proportionate, and dissuasive financial sanctions. Because these conceptual minimum requirements are general in nature and all classes of sanctions are required to be effective, proportionate and dissuasive, there are no compelling reasons for restricting the conceptual minimum requirements to the financial sanctions provided for the NFSRs, but they may also be used to analyse and discuss the financial sanctions provided for what the following Section (D) will identify as the European sanction regimes. By the third pillar on sanctions, the conceptual minimum requirements for effective, proportionate and dissuasive financial sanctions are brought within the scope of the concept of sanction regimes. Together they thus provide a conceptual structure- and principle-based framework that can be used to identify the sanction regimes and the available sanctions provided in any legal framework and serve as analytical framework.

(II) Its application

The sanctions for the violations of rules provided under EU banking law, including the factors for the imposition of sanctions, follows from the following provisions: Article 18 SSMR, Articles 120-137 SSMFR; Articles 1, 1a, 2, 4a and 6 ECBSR I; Articles 64-67 and 70 CRD; Articles 38-39 SRMR; Articles 110-111 and 114 BRRD; Articles 58-60 AMLD IV; Articles 5 and 8-9 AMLD-CRIM. The sanctions for the violations of rules provided under EU securities law, including the factors for the imposition of sanctions, follows from the following provisions: Annex IV and Articles 24, 36, 36a, and 36b CRAR; Annex II and IV and Articles 20, 25j, 25k, 25p, 25q, 65, 66, 71, 73 EMIR; Articles 70 and 72 MiFID II; Articles 38-39 PR; Article 18 IFD; Article 99 and 99c UCITS; Articles 41-43 BR; Articles 30-31 MAR; Articles 7 and 9 MAD-CRIM.[1336] The CFD framework on the confiscation and assets freeze belongs to EU criminal law and is entirely devoted to the freezing and confiscation of property.

The EUCSR explained that sanctions "are an important part of any regulatory system" mostly because sanctions are the source of deterrence and therefore acts "as a catalyst to ensure that EU legislation is complied with."[1337] The sanctioning provisions are thus also typically found in the end of the particular EU legislative or legal act, and Chapter 7 is entirely devoted to an discussion of the sanctions on the basis of the Engel-test. Because of this very specific purpose pursued in Chapter 7, it is necessary to make some initial and general observations that shed some "constitutional light" on the sanctioning provisions just referred.

EU financial law is still characterised by not containing any legal definitions of the concepts of a 'sanction' or 'penalty',[1338] wherefore the EU Commission in the EUCSR took a broad approach to sanctions.[1339] This view is now reproduced in Recital 41 CRD, but it also generally governing the structures of the sanctions provisions. EU financial law also more generally applies the concept of a 'sanction' synonymously with the concept of a 'penalty'.[1340] Therefore, under EU financial law, there is no real conceptual differences between the two concepts.[1341] The term 'sanction' is nevertheless preferable for the following reasons:

[1336] The sanction regime of the AIFMD is outdated. The relevant provision is Article 48 and it resembles the provisions found in the pre-crisis national sanction regimes. The AIFMD does not provided for different types of sanctions.
[1337] EUCSR, p. 4.
[1338] An exception is found in Article 1(7) ECBSR I. However, the definition is very specific to the particular legal act.
[1339] "This communication refers to "sanctions" as a broad notion covering the whole spectrum of actions applied after a violation is committed, and intended to prevent the offender as well as the general public from committing infringements," cf. EUCSR, p. 4. Emphasis maintained.
[1340] Compare the terminology of the sanctioning provisions referred to above.
[1341] Sanctions are penalties and penalties are sanctions. Because the legislative and legal acts belonging to EU financial law overwhelmingly prefers the concept of 'sanctions', I follow through and apply it accordingly, as well as for the reasons stated in the main text above.

First, the constitutional concept of sanctions was argued to consists of two subspecies and governing notions of 'punitive sanctions' and 'reparatory sanctions'. However, the term 'penalty' hardly brings along any reparatory connotations, wherefore the penalty only identifies and consistently can be substituted with punitive sanctions, not reparatory sanctions. The ECHR and EUCFR therefore also prefers the concepts of 'punishment' and 'penalty' as these will trigger the criminal-law guarantees to the extent discussed in Chapter 3.

Second, in the CJEU's case-law, where it nonetheless has not applied the Engel-test, the CJEU has also distinguished between punitive and reparatory sanctions in other areas of EU law, such as: (i) EU competition law and Regulation (EC) 1/2003;[1342] (ii) protection of the European Communities' financial interests and Regulation (EC) No 2988/95;[1343] and (iii) EU securities law and market abuse in MAD I and Article 50 EUCFR.[1344] Therefore, there seems to a rather strong tendency of consolidating the constitutional concept of a legal sanction defined in Chapter 3 across all areas of EU law within the entire EU legal order.

Third, the literature seems to acknowledge the previous views more generally.[1345]

D. The sanctioning authority

(I) The pillar

The fourth pillar is the 'sanctioning authority'. As already argued, the concept of sanction regimes is by its third definition a flexible concept that offers utility and functionality rather than strictness in its application. To the extent that all the five pillars can be identified within one single EU legislative or legal act, the particular legislative or legal act may also provide for its own sanction regime. At the same time, some of the legislative and legal acts are addressed to

[1342] Frese MJ, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing 2014), pp. 107-113.
[1343] Joined Cases C-260 and 261/14 – Județul Neamț and Județul Bacău, ECLI:EU:C:2016:360, paras. 47-51. The binary distinction between reparatory and punitive sanctions seems also more generally to govern the distinction between Article 4 and 5 of Regulation (EC) No 2988/95, and the concepts of 'administrative measures' and 'administrative penalties'. According to Case C-52/17 – VTB Bank v Finanzmarktaufsichtsbehörde, ECLI:EU:C:2018:648, paras. 39-40, what is considered an 'administrative measure' under Article 4 of Regulation (EC) No 2988/95 "must be classified as an administrative measure within the meaning of Article 65(1) [CRD]," cf. para. 42. According to the same principle, the same should also apply in respect of Article 5 of Regulation (EC) No 2988/95. These two conceptual principles and observation extends beyond the CRD and to the concept of 'administrative measures' and 'administrative penalties' more generally. Finally, pursuant to Joined Cases C-260 and 261/14 – Județul Neamț and Județul Bacău, paras. 50-51, and Case C-52/17 – VTB Bank v Finanzmarktaufsichtsbehörde, ECLI:EU:C:2018:648, paras. 30-48, 'administrative measures' pursuant to Article 4 Regulation (EC) No 2988/95 are referred to as 'financial correction measures' and covers so-called 'absorption interests'.
[1344] Chapter 3, Section III(2)(B).
[1345] See, for instance, D'Ambrosio R, 'Due Process and Safeguards of the Persons Subject to SSM Supervisory and Sanctioning Proceedings' (2013), p. 13; de Moor-van Vugt AJC, 'Administrative Sanctions in EU Law' (2012). Review of European Administrative Law, Volume 5, Issue 1, p. 12; D'Ambrosio R, 'The Legal Review of SSM Administrative Sanctions', para. 19.15, p. 320, Chapter 19 in Zilioli C and Wojcik (eds), 'Judical Review in the European Banking Union' (Edward Elgar Publishing 2021), and Frese, supra fn162.

and administered by an European sanctioning authority while others to a national sanctioning authority, whereby we will refer to 'European' ('ESR') and 'national sanction regimes' ('NSR'). These are also 'financial sanction regimes', when the applicable law belongs to EU or national financial law. The sanction regime may also be as an 'administrative sanction regime', when the nature of the sanctioning authority is an administrative body, and an 'criminal sanction regime', when the nature of the sanction authority is a criminal judicial authority / court at the head of the criminal justice system. In addition, there may be 'default sanction regimes', when only certain specific types of sanctioning powers are conferred on one sanctioning authority while another sanctioning authority may have complementary sanctioning powers in the areas not covered by the former sanctioning authority. The ne bis in idem principle in Article 4-P7 to the ECHR and Article 50 EUCFR provides the fundamental rules to be observed in the structural enforcement relationship between sanctioning authorities.

(II) Its application

On this basis we can identify the following sanction regimes within EU financial law. The SSMR, SSMFR, ECBSR I, CRD and CRR provides for a 'European sanction regime' in the form of a 'ECB sanction regime'. The SRMR and BRRD also provides for a European sanction regime in the form of the 'SRB sanction regime'. Similarly, CRAR and EMIR provides for a European sanction regime in the form of 'ESMA sanction regime'. Because these EU legislative or legal act either refers or depends upon the involvement of more than one sanctioning authority, and/or the ECB, SRB, and ESMA only have limited sanctioning powers in respect of the legal entities and natural persons that are subject to their supervision, the combination of these acts also provide for more than one administrative sanction regime in their relationships with the default national administrative sanction regime where either a national competent or resolution authority ('NCA' or 'NRA') are vested with complementary administrative sanctioning powers. The European sanction regimes also depends upon the default national criminal sanction regimes because these administrative European sanctioning authorities are not vested with any criminal sanctioning powers and they are all subject to a duty of referral and thereby to refer criminal matters for national enforcement and prosecution. The national sanction regimes thus have the exclusive competence to impose criminal sanctions.

Otherwise, violations of EU financial law are sanctioned mainly by the national sanction regimes. The national administrative sanctioning authorities are under the NFSRs charged

with the task to impose sanctions on natural or legal persons for all the other areas not covered by the EFSRs, that is, accordingly, and at least, on the basis of the violation-regimes covered by the: CRD, BRRD, AMLD IV, MAR, BR, MiFID II and MiFIR, PR, IFD and IFR, UCITS, and AIFMD. The national courts or other judicial authorities may as the national criminal sanctioning authorities impose criminal sanctions on the basis of the CFD, ALMD-CRIM and MAD-CRIM, [1346] but also on the basis of other EU administrative legislative acts to the extent that national law provides for criminal sanctions for the administrative infringements governed by the violation-regimes of those EU administrative legislative acts.

E. The enforcement of sanctions

(I) The pillar

The fifth and last pillar is the 'enforcement of sanctions'. The first and the second definition both refer to the "actual enforcement of sanctions," but neither the EUCSR nor the accompanying IASR defines the content of the two terms, 'actual' and 'enforcement of sanctions'.[1347] The most informative report reviewing the pre-crisis NFSR was the CEBS report. However, except from certain aspects of the procedural guarantees and the more general rules on the procedure for imposing sanctions, the terminology used in this report is too vague on this topic to have any use for a terminological clarification and definition of the concepts. In particular, the term 'actual' had a focus on the actual application of the national rules implementing the EU legal framework on financial sanctions, and thereby relating to how that legal framework was operating and applied in practice.[1348] The EUCSR also reflected on the necessity of whistleblower programs, leniency programs, and on rules on collective redress from authors of a violation when victims suffered harm.[1349] Therefore, this very muddy picture provides for no strict conceptual boundaries to build a strict concept for the enforcement of sanctions.

Then what is the enforcement of sanctions supposed to mean? The concept is not defined in any of provision of the post-crisis EU financial law. However, a closer look into the provisions of EU financial law seems to allow for some suggestions that characterises the

[1346] However, for the CFD and the freezing and confiscation of property, the EU Member States are free to bring confiscation proceedings, which are linked to a criminal case, before any competent court, cf. CFD, Recital 10.
[1347] However, the EUCSR did specify with respect to the three main requirements to sanctions, i.e. effectiveness, proportionality, and dissuasiveness, that these three requirements cannot be viewed in isolation from the other pillars, because whether sanctions meet the requirements "depends on a number of factors, such as the nature and level of the sanctions provided for by law, the institutional and procedural settings governing their application, the effective detection of infringements and the actual application of the sanctions provided for by law. These factors are part of sanctioning regimes [...]," cf. p. 4-5.
[1348] See CEBS/2009/47, Section III on the "Actual use of sanctioning powers," pp. 50-61, and the elements discussed therein.
[1349] EUCSR, cf. pp. 4 and 15.

constitutive elements for a conception of 'enforcement of sanctions' as opposed to the more general notion of 'enforcement of laws'. The concept of 'enforcement of sanctions' seems to deal with rules and issues relating to at least: (i) the effectiveness requirement to sanctions, including whether sanctions must be enforceable and how they should be executed;[1350] (ii) the publication of sanctions, if it is not viewed as an integrated element of sanctions' deterrent and stigmatising effects, thereby an inherent element to the very conceptualisation of sanctions; and (iii) the procedural rules and safeguards in proceedings that involves the imposition of sanctions, that is, 'sanctioning proceedings', which includes the human and fundamental rights as guaranteed by the TEU, EUCFR, and ECHR in their criminal and civil limbs, and the more specific legislation thereof under EU secondary law,[1351] including EU financial law.

On the other hand, the concept of 'enforcement of laws' seems more generally to concern rules and issues that relates to: (iv) the implementation of laws, monitoring of compliance with laws, and the supervisory task to ensure compliance with EU financial law, whereby the supervisory authorities in their supervisory functions acts as enforcement authorities; (v) the exercise of investigatory powers by the authorities involved in the investigation of financial violations;[1352] (vi) whistleblower programs or other enforcement mechanisms that enables reporting of violations;[1353] and (vi) national as well as cross-border cooperation between the different national and European authorities involved in the investigation, prosecution and

[1350] For instance, with respect to pecuniary sanctions, the duty to cooperate with other NCAs from EU Member States includes facilitating the recovery of pecuniary sanctions, cf. MAR, Article 25(6). With respect to enforcement of sanctions under the EFSRs, certain rules that applies to the ECB sanction regime and concern the ECB's power to enforce the sanctions imposed but as restricted by certain limitation periods, cf. Articles 130-131 SSMFR and Article 4c(1)-(3) ECBSR I. Article 137 SSMFR also prescribes that the proceeds from administrative penalties imposed by the ECB under Article 18(1) and (7) is the property of the ECB. See further Gortsos C, 'The Power of the ECB to Impose Administrative Penalties as a Supervisory Authority: An Analysis of Article 18 of the SSM Regulation' (2015). European Center of Economic and Financial Law. Working Paper Series No. 2015/11.

[1351] All proceedings relating to the imposition of sanctions must respect the human rights obligations under international law, including the ECHR, EUCFR and ICCPR, and observe the principles recognised in the ECHR and EUCFR as recognised in the TEU. See further the CFD, Article 8 and Recitals 33 and 58; MAD-CRIM, Recital 27-28; ALMD-CRIM, Recital 21. The EU has also adopted rules specifying certain procedural rights in criminal proceedings: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1-7.); Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1-10); Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1-12.). See further Klip A, 'European Criminal Law: An Integrative Approach' (4th Edition, Intersentia 2021), pp. 299-411.

[1352] For instance, for the purpose of law enforcement, the EU Member States must ensure that the national authorities responsible for investigating or prosecuting of market abuse and money laundering offences have the ability to use effective investigatory tools. See for instance AMLD-CRIM, Article 11 and Recitals 9 and 19.

[1353] For instance, AMLD IV, Article 61; MAR, Article 32 and Recital 74.

sanctioning of financial violations.[1354] In this view, the notion of 'enforcement' seems closer related to the notion of 'ensuring compliance' and 'supervision' in comparison to sanctions.

Therefore, this distinction must be left here as it stretches beyond the purposes of this Thesis and its research questions.[1355]

(II) Its application

Because the concept of enforcement is rather broad and therefore more difficult to determine, the enforcement issues relating to sanctions will not form part any further part of this Thesis and the discussions in Chapters 6 and 7. However, certain elements which may be considered as constitutive to the concept of 'enforcement of sanctions' is discussed in Chapter 6, Section III(1), considering the general requirement of 'effectiveness' of sanctions, and in Chapter 6, Section IV, the rules on the publication of sanctions.

3. ECB sanction regimes and the international standards and principles

On the basis of the discussions in Section III(1)-(2) and Chapter 4 we are now able to discuss the FSSA-review on the ECB sanction regime once we have discussed the ECB sanction regime in a bit more detail. This is the purpose on Section III(3)(A). In Section III(3)(B) we will then reflect on Country Report No. 18/233 from July 19 2018 on "Detailed Assessment of Observance of Basel Core Principles for Effective Banking Supervision,"[1356] referred to as 'IMF-CRN-18/233', as it is the only FSSA-report which directly relates to sanctions in the assessment of Basel Core Principle ('BCP') 1 and 11. Finally, as Chapter 7 will discuss the content and question the qualification and classification of the ECB sanctioning powers on the basis of the Engel-test, this assessment will not be carried out here. Just like international standards and principles on sanctioning do not really question the substantive elements of sanctions, but rather focus on their availability and whether they are effective applied in practice and the structural and elements of the sanction regimes, the discussion of the FSSA-review will also be restricted thereto. Accordingly, the suggested improvements from the EU sanctions law-

[1354] The obligation is regulated very broadly. For instance, the NCAs have an obligation to cooperate with other national authorities, other authorities from other Member States and third country states as well as with ESMA. There is also prescribed a duty in the AML-regime to avoid parallel (double) prosecution by centralising it. See for instance MAD-CRIM, Article 10 and Recitals 17 and 26; MAR, Articles 24-25; and AMLD IV, Articles 49-57b.
[1355] See nevertheless: Micklitz HW and Wechsler A (eds*),* 'The Transformation of Enforcement: European Economic Law in a Global Perspective' (Hart Publishing 2018).
[1356] See the following link: https://www.imf.org/en/Publications/CR/Issues/2018/07/19/Euro-Area-Policies-Financial-Sector-Assessment-Program-Technical-Note-Detailed-Assessment-of-46107.

perspective to the international standards and principles on sanctioning discussed in Section II will also not be part of the discussion except from a few fundamental observations.

A. ECB sanction regime

The administrative sanction regimes operating under EU banking law are built into the structures of the supervisory or resolution regimes of the ECB and SRB in accordance with their task to supervise and resolve those entities that qualifies as significant.[1357] With respect to the ECB's sanction regime, then it falls the within scope and is built on top of the supervisory structures of the ECB supervisory regime.[1358] Hence, the scope of the ECB's sanction regime and the complementary default national financial sanction regimes is determined primarily on the basis of Article 18 SSMR. Pursuant to Article 18(1) SSMR, the scope of the ECB' sanctioning power must satisfy the following requirements: (i) the offender is a legal person that qualifies as significant supervised entity that are directly supervised by the ECB ('SSE'); (ii) the SSE breaches a prudential requirement under directly applicable acts of EU law, i.e. EU regulations; (iii) the SSE has committed the breach either intentionally or negligently; and (iv) in relation to breaches the national financial sanctioning authorities (NCAs) must have made administrative pecuniary penalties available to them under relevant EU law.

This entails in respect of (i) that the scope of the ECB's sanctioning powers is aligned with the supervisory task conferred on the ECB by the SSMR, including the SSMFR and ECBSR I, wherefore the ECB can only impose and distribute sanctions to the SSEs.[1359] Hence, it follows that the ECB does not have any direct power to impose sanctions on natural persons. In respect of (ii), the SSE can only be subject to ECB sanctions, if the SEE has breached a prudential provision provided in a EU regulation, primarily the CRR.[1360] In respect of (iii), the SSE can only be sanctioned for breaches of which the SSE is responsible in terms of culpa. Thus, the SSE must have committed the infringements by acts of intent or negligence.[1361]

[1357] SSMR, Article 6(4); SSMFR, Articles 39-72; and SRMR, Articles 1-2.
[1358] On the ECB sanction regime, see: Gortsos C, 'The Power of the ECB to Impose Administrative Penalties as a Supervisory Authority: An Analysis of Article 18 of the SSM Regulation' (2015); Lackhoff K, *'Single Supervisory Mechanism: European Banking Supervision by the SSM: A Practitioner's Guide'* (CH Beck; Hart; Nomos 2017); and D'Ambrosio R, 'The Legal Review of SSM Administrative Sanctions', Chapter 19 in Zilioli C and Wojcik (eds), 'Judical Review in the European Banking Union' (Edward Elgar Publishing 2021).
[1359] SSMFR, Articles 120-137, in particular Article 122.
[1360] Gortsos C, 'The Power of the ECB to Impose Administrative Penalties as a Supervisory Authority: An Analysis of Article 18 of the SSM Regulation' (2015), p. 19. Gortsos points out that this includes the technical standards of the European Banking Authority adopted in the form of EU Regulations.
[1361] Klaus Lackhoff, *Single Supervisory Mechanism: European Banking Supervision by the SSM: A Practitioner's Guide* (CH Beck; Hart; Nomos 2017) 215. Lackhoff notes that "[as] all significant supervised entities are obliged to comply with the

In respect of (iv), Articles 66-67 of the CRD determines the scope of which administrative pecuniary penalties are made available to the NCAs, but only Article 67 CRD refers to the infringements of provisions contained in directly applicable EU law, the CRR. Only where the violation-regime in Article 67(1) CRD refers to CRR-infringements, the ECB will have the power to impose administrative pecuniary penalties pursuant to Article 18(1) SSMR. The ECB will nevertheless also have the power to impose administrative pecuniary penalties against SSEs to the extent that the EU Member States in the transposition of the CRD into national law goes beyond the CRD and provides administrative pecuniary penalties to the NCAs for CRR-infringements that are additional to those covered by the CRD's violation-regime in Article 67(1).[1362] Hence, the scope of the ECB's power to impose administrative pecuniary penalties is duplicated and runs parallel with the scope of the NCAs' power to impose administrative pecuniary penalties for CRR-infringements primarily.[1363] In this particular aspect, the scope of the ECB' sanctioning powers is thus determined by each of the individual default NFSRs and the extent to which they make administrative pecuniary penalties available for additional CRR-infringements. This may allow for a number divergences going across the NFSRs and an asymmetrical distribution of administrative pecuniary penalties between the SSEs from different EU Member States. Another asymmetrical implication and source of divergence follows from the legal construction of these provisions, because the ECB cannot impose administrative pecuniary penalties for CRR-infringements of which the NFSRs only have made criminal sanctions or non-pecuniary penalties available to the national sanctioning authorities.

Further restrictions to the scope of the ECB's sanctioning powers provided in Article 18(1) SSMR are given by Article 18(5) SSMR, whereby the ECB may require the NCAs to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with EU law and any other relevant national laws, which confers specific powers that are not currently required by EU law in respect to the SSEs and the members of their management board. More precisely, and in light of Article 18(1) SSMR, the ECB may pursuant to Article 134 SSMFR open such sanctioning proceedings in cases that includes the application of: (i) non-pecuniary penalties for breaches of directly applicable EU law (CRR-infringements) by the SSEs or natural persons (including members of the management board);

directly applicable provisions of Union law (CRR) and are further obliged to implement processes and arrangements to ensure such compliance in case of a breach circumstantial evidence exist that such breach occurred negligently, cf. paragraph 912.

[1362] ibid 214–215. Lackhoff writes that as "the ECB has been entrusted with the task to ensure compliance with (all) prudential requirements laid down in CRR (Article 4(1)(d) SSMR) one can argue that the power to sanction breaches to those requirements falls within the scope of the ECB's supervisory tasks. [...] Therefore, the ECB may in respect of significant supervised entities also make use of administrative pecuniary penalties provided in autonomous national law," cf. paragraph 911.

[1363] Gortsos (n 180), p. 19.

(ii) pecuniary penalties on natural persons for breaches of directly applicable Union law (CRR-infringements); (iii) any pecuniary or non-pecuniary penalties for breaches by the SSEs or natural persons of any national law transposing relevant EU directives (CRD-infringements); and (iv) any pecuniary or non-pecuniary penalties to be imposed in accordance with relevant national law, which confers specific powers on the NCAs, and which are currently not required by the relevant EU law (primarily determined by the CRD).[1364] Accordingly, the power to impose sanctions in these situations are powers of the NFSRs conferred on the NCAs. The ECB are not able to determine the outcome of such cases, which is a discretion entirely conferred on the NCAs subject to judicial review by the national courts.

In addition to the power to impose administrative pecuniary penalties pursuant to Article 18(1) SSMR, the ECB also has the power to impose sanctions pursuant to 18(7) SSMR in accordance with the ECBSR I. More precisely, the ECB power to impose sanctions contains the power to impose fines and periodic penalty payments,[1365] which the SSMFR nevertheless also considers as 'administrative penalties'.[1366] However, in its exercise of supervisory tasks, the ECB may apply the power to impose sanctions, when there is a failure to comply with obligations arising under an: (i) ECB decision; or (ii) ECB regulation.[1367] The sanctions may be imposed on (a) the SSEs, but also on (b) less significant supervised entities ('LSSE'), where the ECB decisions or regulations impose obligations on the LSSEs vis-à-vis the ECB.[1368] In this particular aspect, the personal scope of the ECB's direct sanctioning powers are therefore broadened in comparison with the scope of Article 18(1) SSMR. In respect of (i), the breach relates primarily to ECB decisions that are having a specific addressee and the scope of the sanctioning powers are restricted to whom "the ECB may address a decision in the first place,"[1369] primarily the SSEs. In respect of (ii), the breach of ECB regulations concern provisions which the ECB in the first place has the power to adopt in such an ECB legal act. Thus, the ECB may impose sanctions on the SSEs and LSSEs to the extent that the breach is of a material provision in the ECB regulations that imposes obligations vis-à-vis the ECB.[1370]

[1364] ibid 21.
[1365] ECBSR, Article 1(7) in conjunction with Articles 1(5)-(6) and 1a-7.
[1366] SSMFR, Article 120(b).
[1367] SSMR, Article 122 and ECBSR I, Article 1a(1).
[1368] SSMFR, Article 122(b).
[1369] Lackhoff (n 181) 219. Fn1051. In respect of the less significant supervised entities, the ECB may impose sanctions, for instance, for breaches of investigatory decisions and decisions on supervisory fees, cf. paragraph 938.
[1370] ibid. Lackhoff rightly points out that what applies in respect of breaches of ECB regulations should also be applicable in respect of breaches of ECB decisions without any specific addressees, cf. fn1052. Lackhoff also points that the ECB thereby has the right to impose sanctions on the less significant supervised entities without having the competence to supervise them. See further his discussion pp. 219-220, paragraphs 939-940.

B. The FSSA-review of the ECB sanction regime

In the FSSA-review, the FSAP-assessors concluded in respect of BCP 1 on "Responsibilities, objectives, and powers" that EU banking law was "Largely Compliant."[1371] In respect of BCP 11 on "Corrective and sanctioning powers of supervisors," the FSAP-assessors concluded that EU banking law was "Materially Non-Compliant."[1372] Accordingly, most attention is given to BCP 11 as it builds on and complements the framework given in BCP 1 by providing for the substantial standards and principles that relates to the concept of 'legal powers', and because the FSSA-review in this aspect revealed that EU banking law and the ECB sanction regime was materially non-compliant. A few observations on BCP 1 should nevertheless be given:

First, the FSAP-assessors acknowledged that the SSM by the SSMR establishes a clear allocation of supervisory tasks under the EU between the ECB and NCAs. However, they also pointed out that: (i) the legal underpinning of the SSM are complex; (ii) the supervisory functions has been force-fitted over a complicated interplay between EU and national laws, which do not envisaged a unified approach; and (iii) under these conditions the challenge consists of having a consistent and coherent application of prudential rules for establishing a EU level playing field.[1373] These three related issues do not only make the EU financial supervisory system very complex but even more so the relationship between the ECB sanction regime and NFSRs and the distribution of sanctioning powers between the ECB and NCAs, because the structures of the ECB' sanction regime is built on top of the supervisory system but with even more restricted sanctioning powers to the ECB while at the same time having much more diversified default sanction regimes operating at the national level. This aspect will be amplified in the assessment of BCP 11, but it calls more generally for a stronger and coherent integration between the supervisory system and the sanction regimes, including the judicial system.

Second, the FSAP-assessors considers the ECB to have a broad range of powers based within the CRR and SSMR and notes that the ECB also can apply the powers set out in the CRD as transposed into national law. Because EU law makes a large number of considerable options and discretions available to the EU Member States and NCAs, the ECB is also competent to exercise any national clusters when these powers are used for prudential and non-

[1371] IMF-CRN-18/233, p. 38.
[1372] IMF-CRN-18/233, p. 144.
[1373] Ibid.

punitive purposes.[1374] However, the ECB does not in a similar mirror-image fashion have any parallel cluster-powers in respect of administrative sanctions provided under the national sanction regimes because these remain within the exclusive competence of the national sanctioning authorities. Therefore, it is not obvious why the structures ECB sanction regime compared with the structures of the ECB supervisory system (should) contain such restrictions.

These two arguments already brings about a clear indication of the limitations of the ECB's sanctioning powers. As argued, the issues gets further amplified in the assessment of BCP 11. A third issue raised by the FSAP-assessors at the same time mitigates and amplifies the second point. Albeit the ECB's sanctioning powers are limited, the ECB can nevertheless require that the NCAs to open national enforcement proceedings with a view towards imposing administrative sanctions for breaches of national law transposing the CRD pursuant to Article 18(5) SSMR. The ECB also remains competent to impose punitive administrative pecuniary sanctions for breaches against the CRR to the extent that sanctions are available to the NCAs under the provisions of relevant EU banking law, i.e. Article 67 CRD.[1375] Furthermore, for breaches of purely national law, the ECB may be way of instruction request the NCAs to make use of their related national sanctioning powers.[1376] On this background, the FSAP-assessors thus considered: (i) the enforcement and sanctioning framework is very complex with substantive and procedural gaps which should be addressed in order to comply with BCP 11; (ii) the enforcement to be operationally difficult and time consuming due to the complex legal framework;[1377] and (iii) the CRD-sanctioning powers do not cover all breaches of the CRR, for instance, misreporting of financial statements, thereby also restricting the ECB's direct sanctioning powers under Article 18(1) SSMR, but nevertheless not under Article 18(5) SSMR.[1378] Therefore, the third issue and points made by the FSAP-reviewers more generally pointed to restrictions of the ECB' sanctioning powers on the basis of which particular EU and national law provisions that have been breached by the entities supervised by the ECB.

A fourth issue also relates to substantive scope of the ECB's sanctioning powers and concerns the addressees that can be subject to the ECB sanctions and the nature and types of the ECB's sanctioning powers.[1379] The ECB cannot directly: (i) impose sanctions against

[1374] SSMR, Article 9(1); and IMF-CRN-18/233, pp. 38-39 and 136.
[1375] Gortsos (n 184) 18–19.
[1376] IMF-CRN-18/233, p. 145.
[1377] The FSAP-assessors expressed that "the formal imposition of sanctions is not expeditious due to the complex legal framework, cf. IMF-CRN-18/233, p. 137.
[1378] IMF-CRN-18/233, p. 137.
[1379] For differences at the national level, see IMF-CRN-18/233, pp. 139-140.

LSSEs, only SSEs, although this is a minor issue because the scope of the ECB's supervision mainly covers the SSEs wherefore there is a close alignment in this regard; (ii) impose pecuniary and non-pecuniary sanctions on natural persons, including members of the management bodies of the SSEs;[1380] and (iii) impose non-pecuniary sanctions on SSEs, because the ECB only have two pecuniary powers, the power to impose fines and day-fines.[1381] In particular, all these asymmetries and restrictions on the appropriateness of the ECB sanctioning powers did not make the ECB sanction regime satisfying EC6 to BCP 11 as it explicitly requires the available of sanctions against natural and legal persons, including managers. We may add that the ECB' sanction regimes also not fully satisfies EC4 as it provides basis for the non-pecuniary sanctions against natural persons of barring individuals from the banking sector.

Therefore, the FSAP-assessors concluded more generally that: "[the] ECB's sanction and enforcement powers contain gaps and are fragmented. They do not act as a deterrence and do not ensure a level playing field because of gaps in Union law and national law implementing EU directives."[1382] In order to ensure full deterrence and a level playing field, the FSAP-assessors therefore recommended that the four issues related to the ECB's enforcement and sanctioning powers should be resolved so that they were more closely aligned with its supervisory responsibilities.[1383] In addition, the FSAP-assessors also recommended for "enforceable cease and desists orders with affirmative covenants,"[1384] although there is no express basis within the 2012 BCP, and Principle 1 and 11, for such a recommendation.[1385]

4. Conclusions

Section III not only argued that the two definitions of the concept of 'sanction regimes' provided in the EUCSR and IASR were inconsistent, it also argued that the concept was incomplete as the definitions did not provide for any sanctioning authority charged with the responsibility and task to sanction for the violations committed. Section III(1)(A) therefore provided a new general definition of the concept of a sanction regime:

[1380] The FSAP-assessors under the assessment of sanctioning powers notes that the ECB under Article 16(2)(m) SSMR has power to remove individual management body members, cf. IMF-CRN-18/233, pp. 142.
[1381] Chapter 7, Section III(1)(A)(II)(4); SSMFR, Article 134; and IMF-CRN-18/233, pp. 138-141 and 145.
[1382] IMF-CRN-18/233, p. 324.
[1383] IMF-CRN-18/233, p. 145. Generally, the ECB shared IMF's opinion, including that: "the current legal framework does not ensure a level playing field regarding enforcement and sanctioning measures, and that therefore further harmonization is necessary," cf. IMF-CRN-18/233, p. 338. See further p. 338.
[1384] IMF-CRN-18/233, p. 145.
[1385] Nonetheless, a standard that would guide the function and application of such an enforcement power would be recommendable as an amendment to the 2012 BCP, as well for amendments to the 2017 IOSCO Objectives and Principles.

> "The legal framework covering sanctions for the violations of laws under which one or more sanctioning authorities are responsible for the imposition and enforcement of sanctions."

It follows therefrom that the concept of sanction regimes is a structural and flexible concept that consists of five constitutive pillars which any given legislative act either individually or jointly with other acts must satisfy before a sanction regime can be identified. These have been determined as: (A) the legal framework; (B) the violations; (C) the sanctions; (D) the sanctioning authority; and (E) the enforcement of sanctions. Accordingly, when the legislation ((A)) provides for sanctioning powers ((C) for law violations ((B)) to be sanctioned by one or more sanctioning authorities ((D)) who also has the ability to enforce the sanctions ((E)), the five pillars are satisfied and at least one sanction regime can be identified.

When such a sanction regime deals with legislation that belongs to the legal area of financial law as narrowed down in this Thesis to the most important legislative and legal acts governing EU banking and securities laws, the sanction regime identify as a 'financial sanction regime', which becomes a 'national sanction regime' when the sanctioning authority is a national authority operating under a EU Member State and a 'European sanction regime' when the sanctioning authority is an European sanctioning authority. Three administrative financial European sanction regimes have been identified: the (i) ECB sanction regime; (ii) SRB sanction regime; and (iii) ESMA sanction regime, which are complemented by the 'default administrative national financial sanction regimes' where the NCAs or NRAs are vested with complementary sanctioning powers. Outside the complementary scope with the administrative financial European sanction regimes, the NCAs and NRAs are also the relevant sanctioning authorities of the 'administrative financial national sanction regimes', which are complemented by the 'criminal national sanction regimes' where the national judicial authorities and courts are charged with the task and monopoly to impose criminal sanctions. EU financial law is overwhelmingly characterised by enforcement through national sanction regimes because most of the EU legislative acts requires that the sanctions are imposed by either administrative national sanctioning authorities or national judicial authorities in form of national courts.

The concept of sanction regimes is important for a number of reasons. First, it is an analytical tool to examine whether the legislation provides for a sanction regime; the legal structures of any given sanction regime; and therefore also necessary for the assessment of whether the sanction regime in question is sufficiently deterrent and capable of ensuring compliance with laws. Second, the different sanction regimes can thereby be compared in order to ensure convergence between the sanction regimes and close any missing gaps that allow for sanction- and forum-shopping or regulatory arbitrage. Third, where the sanctioning tasks are

distributed among multiple sanctioning authorities each with their own scope of sanctioning competences, the scope of the sanction regimes will determine the scope of their sanctioning tasks and powers thereby providing the grounds for any further coordination and cooperation between the different sanctioning authorities. Fourth, and as aligned with the third point, the concept and scope of the sanction regimes are particularly important for the observance of sanctioning tasks and competences distributed between the administrative sanctioning authorities and the criminal sanctioning authorities, including, most importantly, the observation of the scope of the double jeopardy clause (ne bis in idem principle) provided in Article 4 to Protocol No 7 to the ECHR and Article 50 of the EUCFR. Because the administrative sanctioning authorities generally and formally do not have any criminal sanctions available they are also charged with a duty to refer criminal matters to the relevant national criminal sanctioning authorities, where the facts will give rise to the prosecution of such issues.

The post-crisis EU legal framework of financial law has thoroughly developed the substantive legislative content of most of the five pillars of the concept of sanction regimes with the only reservation that there is no strict conceptualisation of the concept of 'enforcement of sanctions', being the fifth pillar of sanction regimes. By the third pillar, what Section II has argued to be the conceptual minimum requirements for effective, proportionate, and dissuasive financial sanctions, may be viewed as an integrated part under the third pillar of the concept of sanction regime, particularly financial sanction regimes, as they provides the constitutive elements in the form of standards and principles that governs and should materialise into legislative provisions. In this regard, it should also be be noted that, just as the ECB sanction regime in the FFSA-review did not satisfy the 2012 BCP framework because of asymmetries in the scope of the ECB's sanctioning powers, the ECB sanction regime would also not fully satisfy the standards and principles derived from the EU Commission's policy and legislative actions proposed for the reinforcement of the pre-crisis NFSRs. The ECB does not have a full arsenal of punitive non-pecuniary sanctions available and they cannot impose any sanctions on natural persons, including members of the management board. Otherwise, whether the concept of a sanction regimes is *fully* developed will remain an ongoing question to be decided at any point of time, but the criminal classification factors for a regime of punishment, as discussed in Chapter 3, are helpful to built up and / or identify a criminal sanction regime.

Finally, it was observed in respect of the third pillar that there is a tendency to consider the definition of the constitutional concept of a legal sanction as defined in Chapter 3 as governing the conceptualisation of sanctions under EU law more generally, because there is a

strong tendency under the case-law of the CJEU to distinguish between reparatory sanctions and punitive sanctions. This will be further evidence in Chapter 6 and 7.

IV. CONCLUSION

Chapter 2 argued in accordance with Immanuel Kant that the right to exercise private vengeance was a right that according to the social contract between the individual and the State was waived by the individual and transferred to the State in return for protection against violence from other individuals. Once this transfer was executed the individual willingly became a citizen of the State and accepted that the State thus would have monopoly in punishing the individuals that as civilians would be subject to the will and power of the State. In light thereof, it is not surprising that the concept of a sanction *regime* is a nation-building and institutional concept that more or less directly are promoted by the international standards and principles on sanctioning and the IMF and World Bank under the FSAP. For that reason there is also confluence between the concept of a sanction regime discussed here in Chapter 5 and the ideas of what Chapter 2 considered as the institutional concept of punishment, and what the ECtHR in Chapter 3 considered and adhered to by the notion of a regime of punishment.

Chapter 5 have argued and promoted the idea that any sanction regime or institutional concept of punishment must respond to justice, in particular criminal justice, and therefore be subject to the rule of law. By the five constitutive elements for the concept of sanction regimes, the first pillar is therefore also promoting the rule of law so that the law must prescribe the sanctions that needs to be available in the particular areas of law, where one or more sanction regimes shall be operating. When this area of law is financial law, the concept of a sanction regime partakes in the task of building the stability of the financial system of a country as the financial system must be established within the national legal system of justice. Hence, the concept of sanction regimes is a concept that integrates the financial system within the legal system and the financial sanction regimes within the legal structures of the national sanction regimes. The financial sanction regimes may therefore often be complemented by the national criminal sanction regimes and the authorities involved in criminal proceedings.

In principle there is nothing binding in the concepts and structures discussed and promoted by Chapter 5 as they are founded in and governed by certain standards and principles, which should rather materialise into the implementation of specific law provisions of the State's own legal design than to provide any legal basis for inferring a specific form of sanction

regime and toolbox of appropriate sanctions. However, where a State agrees to the universal standards promoted by the international standard and principles on sanctioning that sanctions must be effective, proportionate and dissuasive and that sanction regimes must be sufficiently deterrent, which at least the EU Member States do and have agreed to since the EU Communication on Sanction Regimes, a certain set of standards and principles is presumed and implied in the thinking and conceptualisation of these ideas, just as they are rooted within the constitutions of the EU Member States and constitutionalised within the EU legal order by the TEU. These standards and principles therefore brings with them a certain set of ideas and notions that provides for its own "logical and legal system" that are governing the standards and principles and therefore also the conceptualisation of sanctions, including the financial sanctions. Accordingly, when Chapter 3 provides the evidence for and a definition of a constitutional concept of a legal sanction, it should be considered rather logical and reasonable that the appropriateness standard for a toolbox of appropriate and available sanctions as a minimum must cover and provide for a sufficient set of both reparatory and punitive sanctions, whereby the former powers aims at ensuring compliance through legal restoration and prevention and the latter powers aims at imposing punishment and creating deterrence. Similarly, when both natural and legal persons are subject to the specific law requirements under a specific area of law as is the case of banking and securities laws, is it also not rather logical and reasonable that the appropriateness standard also requires that appropriate sanctions are available to be imposed against both natural or legal persons? – Because appropriate punitive sanctions must be available, is it also not quite logical and reasonable that the most serious and reckless of violations should be targeted with criminal sanctions, and when fines is among the most common, agreeable and conventional of appropriate punitive pecuniary sanctions that these also should be a deterrent against very large cross-border financial institutions? – Therefore, should also not a number of appropriate sanctioning factors be made available when it has been accepted that the sanctions in order to be appropriate also must satisfy the requirements of effectiveness, proportionality and dissuasiveness? – Finally, when sanctions must be dissuasive and aim at deterrence and future compliance, can any non-disclosed sanction to the public in any way claim to be dissuasive and to have any deterrent effect on the specific offender and the other natural and legal persons at large? – Moreover, the conceptual minimum requirements for effective, proportionate and dissuasive for sanctions, including financial sanctions, seems to be of a rather basic nature that any state abiding to the rule of law and to the appropriateness-standard for sanctions should find it difficult to reject the legitimacy of these principles. The concept of a legal sanction and sanction regime thus serves as a blueprint for assessing as well

as building the sanction regimes to be operating within the criminal justice system of a state. However, with a view towards an universal application, it is seems likely that the future will call for stronger procedural protection of defendants that are subject to punitive sanctions.

> "But punishment is from God, and is just. And justice is a certain equality between the wrong and the punishment. Therefore, punishment needs to reduce the inequality of moral fault to equality. But this could only be so if the punishment were to bring about equality in the same person in whom moral fault previously brought about inequality, that is, that one who by sinning of his or her own will acted contrary to the will of God suffer something contrary to his or her will by the will of God. Therefore, punishment needs to be transmitted to the same person to whom moral fault is transmitted."
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> Saint Thomas Aquinas, Brian Davies and Richard Regan, *On Evil* Question IV, Eight Article, Point 8, p. 226.

§ 6. EU FINANCIAL SANCTION REGIMES II – GENERAL REQUIREMENTS FOR THE IMPOSITION OF SANCTIONS – ASSESSMENT II

I. INTRODUCTION

Chapter 6 follows two main tracks and purposes. The first track of Chapter 6 consists in a discussion of the general requirements for sanctions on the basis of legislative and legal acts of EU financial law as restricted in accordance with the first pillar of the concept of EU financial sanction regimes in Chapter 5. The general requirements concern the rules on criminal and administrative liability for imposing criminal or administrative sanctions on the offenders as discussed in Section II; the three main general requirements to sanctions of effectiveness, proportionality, and dissuasiveness and the sanctioning factors for the imposition of sanctions in Section III; and the rules on the publication of sanctions in Section IV. The requirements are 'general' because they applies as a main rule to all types of sanctions irrespective of whether they classify as administrative sanctions or measures, or criminal sanctions. Because there are no general and consistent definitions of the three general requirements to sanctions of effectiveness, proportionality and dissuasiveness, Section III(1) aim to provide the legal definitions, and for the purpose of establishing the legal definitions the discussion in Section III(1) we will utilise the discussions and conclusions made in Part I, Chapters 2-4. Finally, the discussion of the rules on the publication of sanctions in Section IV will be restricted to a discussion and assessment of how these rules and purposes will be assessed under the Engel-test.

The second track of Chapter 6 is referred to in the title by "Assessment II." Section II initiates the application of the Engel-test for the purpose of classifying EU financial law in accordance with the first Engel-criterion and the first Öztürk-criterion of the second Engel-criterion. Accordingly, we will need to determine whether the provisions of EU financial law and the violations and violation-regimes provided, they are governed by general or specific

norms. Violations of law provisions that are governed by specific norms points to the commission of a disciplinary offence; conversely, violations of law provisions that are governed by general norms points to the commission of a criminal offence. As the Öztürk-criteria are cumulative, it is nevertheless also required that the second Öztürk-criterion must be satisfied. That discussion is reserved entirely for Chapter 7. Hence, Chapter 6 only initiates the Engel-test with respect to the first and second Engel-criteria including the first Öztürk-criterion in Section II. Therefore, we will first read and interpretate the black letters of the provisions of EU financial law according to the labels designated by the EU legislators. Hence, Section II is also headed and titled true to their black letters and classification of EU financial law. Afterwards, in Section II(3), "Assessment II and conclusions," we will apply the second Engel-criterion and first Öztürk-criterion and conduct and assessment of Sections II(1)-(2).

II. CLASSIFICATION OF OFFENCES AND LIABILITY

In accordance with the first pillar of the concept of sanction regimes, it follows that the legislative acts of MAD-CRIM, AMLD-CRIM, and the CFD belongs to EU criminal law as MAD-CRIM is adopted on the basis of Article 83(2) TFEU; AMLD-CRIM on the basis of Article 83(1) TFEU; and the CFD on the basis of Articles 82(2) and 83(1) TFEU.[1386] On the other hand, the SSMR; ECBSR I; SSMFR; CRD; CRR; SRMR; BRRD; and AMLD-IV under EU banking law, and MAR; BR; MiFID II; MiFIR; PR; IFD; IFR; UCITS; AIFMD; CRAR; and EMIR under EU securities law belongs to administrative law because none of these EU legislative and legal acts are adopted on basis of Articles 82-83 TFEU. Instead, their adoption are mainly based on Articles 53, 114, 127, 132 of the TFEU. Hence, most of the legislative and legal acts of EU financial law classifies as administrative law. The key initial distinction and categorisation determines the starting point for the classification of the violations, liability and sanctions from a stricto sensu view point of the EU legislators. Accordingly, a violation covered by the MAD-CRIM, AMLD-CRIM and CFD will make the offender charged with a criminal offence and subject to criminal liability and criminal sanctions, while a violation covered by any of the other acts will make the offender charged for an administrative infringement and therefore subject to administrative liability and administrative sanctions or measures.

[1386] Andre Klip, *European Criminal Law: An Integrative Approach* (4th edition, Intersentia Ltd 2021) 228. Klip argues, generally, for the implementing of EU law, that EU law does not require the EU Member States to alter the fundamental characteristics of their criminal law. Rather, national criminal law influences EU law. However, "[an] exception to this general rule are the express changes that result from EU Directives adopted on the basis of Article 83 TFEU."

1. The criminal offences and criminal liability

As just argued, the CFD is adopted on the basis of TFEU, Articles 82(2) and 83(1); the AMLD-CRIM on Article 83(1); and MAD-CRIM on Article 83(2).[1387] In accordance with the objectives of these provisions, the CFD aims to approximate the EU Member States' freezing and confiscation regime and to combat crime, particularly cross-border organised crime, through the freezing and confiscation of the instrumentalities and proceeds of crime.[1388] Therefore, the CFD establishes the minimum rules on the freezing of property with the view to possible subsequent confiscation and on the confiscation of property in criminal matters.[1389] The AMLD-CRIM aims to secure the integrity, stability and reputation of the financial sector as well as the internal market and the internal security of the European Union, and it therefore establishes the minimum rules concerning the definition of criminal offences and sanctions in the area of money laundering.[1390] The MAD-CRIM aims to ensure the integrity of the financial markets in the European Union and to enhance investor protection and confidence in those markets, and therefore establishes the minimum rules for the criminal sanctions imposed for the criminal offences of insider dealing, unlawful disclosure of inside information and market manipulation.[1391]

A. Criminal offences

The integrity of the financial markets is ensured by the complementary legal framework of MAD-CRIM and MAR, the so-called 'market abuse regime.' While the MAD-CRIM establishes the minimum rules for criminal sanctions for market abuse, then MAR establishes a common regulatory framework and provides the preventive measures against market abuse.[1392] The complementarity between MAD-CRIM and MAR is first of all ensured by the main obligation to determine the scope of MAD-CRIM as well as to interpret and apply its provisions by taking into account the common legal framework established by MAR in order to

[1387] ibid 229. Klip argues that Article 83(2) TFEU is an ancillary competence which can be regarded as the codification of the CJEU's case law, and further that it is logical to understand the items of Article 83(1) cannot be covered by Article 83(2), vice versa, wherefor the two paragraphs relate to different types of offences.
[1388] CFD, Recitals 1-5.
[1389] CFD, Article 1(1) and Recital 5, 13 and 22-23.
[1390] AMLD-CRIM, Article 1(1) and Recital 1.
[1391] MAD-CRIM, Article 1(1) and Recital 1.
[1392] MAD-CRIM, Article 1(1); MAR, Article 1 and Recital 7. Since MAD-CRIM "provides for minimum rules, Member States are free to adopt or maintain more stringent criminal law rules for market abuse," cf. MAD-CRIM, Recital 20.

complement and ensure the effective implementation of MAR.[1393] Second, the coherency between the MAD-CRIM and MAR is also expressed in a variety of ways.[1394] The most important one is that the MAD-CRIM provides for the repressive and criminal law measures in order to combat market abuse offences, while MAR rather provides for the preventive and administrative law measures in order to prevent to market abuse offences.[1395] The prohibition against market abuse therefore establishes a subject matter common to both the MAD-CRIM and MAR. Together, they prohibits four types of behaviours considered as 'market abuse': (i) insider dealing, including recommending or inducing another person to engage in insider dealing;[1396] (ii) unlawful disclosure of inside information;[1397] (iii) market manipulation;[1398] and, but only subject to MAD-CRIM, (iv) inciting, aiding, abetting and attempting to commit market abuse.[1399] In this way, the market abuse regime establishes concurrent criminal (MAD-CRIM) and administrative liability (MAR) for the commission of market abuse violations. However, the difference in their scope is determined on the basis of the gravity of the particular market abuse violations committed and the natural or legal persons' level of liability and involvement in the commission of market abuse. More precisely, market abuse should be punished by criminal sanctions, when the behaviour qualifies as a 'criminal offence', which is the case, when market abuse has been committed intentionally and/or, at least, in serious cases. On the other hand, the imposition of administrative sanctions and measures as provided in MAR "do not require that intent is proven or that [the market abuse violation] are qualified as serious."[1400] The provisions of Articles 3-6 MAD-CRIM in conjunction with Articles 7-8, 10, 12 and 14-15 MAR lay down the more specific rules that governs the general prohibitions against market abuse.[1401]

[1393] MAD-CRIM, Recital 17 and 23.
[1394] The coherency is ensured, inter alia, by their subject matter as they both concern rules that governs and prohibits market abuse from a criminal and administrative law perspective, but also by their scope of application as they both applies to certain listed financial instruments as well as trading activities and other market behaviour in those listed financial instruments. Certain kinds of behaviour are also considered legitimate for economic reasons and therefore excluded from the scope of the market abuse regime. In this regard, the coherency is ensured in such a way that to the extent that MAR exempts from the prohibitions against insider dealing, public disclosure of inside information and market manipulation, the same prohibitions governed by MAD-CRIM do also not apply, cf. MAD-CRIM, Article 1(3)(a)-(c) and Recital 9. Generally, the types of behaviours that are considered legitimate are: trading in own shares in buy-back programmes (MAR, Article 5(1)-(3) and Recital 12); trading in securities or associated instruments for the stabilisation of securities (MAR, Article 5(4) and Recital 11); or transactions carried out in pursuit of monetary, exchange rate or public debt management policy, climate policy activities, or the EU's common agricultural or fisheries policy (MAR, Article 6(1)-(4) and Recitals 13 and 21-22). Other types of behaviour are also considered legitimate or otherwise accepted, for instance certain approved market practices, cf. MAR, Articles 9 and 13.
[1395] MAD-CRIM, Article 1(1) and Recitals 7-8; and MAR, Article 1.
[1396] MAD-CRIM, Article 3; MAR, Articles 8 and 14(a)-(b), and Recital 23.
[1397] MAD-CRIM, Article 4; MAR, Articles 10 and 14(c), and Recital 35.
[1398] MAD-CRIM, Article 5; MAR, Article 12 and 15, and Recitals 38-47.
[1399] MAD-CRIM, Article 6(1)-(2) and Recitals 13 and 15.
[1400] MAD-CRIM, Recital 23.
[1401] These are also the provisions that are governed by criminal norms, while the rest of the provisions as found in MAR mainly concerns the preventive measures governed by disciplinary norms.

The same principles applies to the AML-regime and the freezing and confiscation regime, but with certain modifications based on a more clear division of which subject matters that are considered belonging to criminal law and administrative law. Although the AML-regime, by AMLD-CRIM and AMLD IV, aims to ensure the integrity, stability and reputation of the EU financial sectors, then the AMLD-CRIM, in particular, aims to complement and reinforce the AMLD IV and to combat money laundering by means of criminal law.[1402] In this way, the division between the AMLD-CRIM and AMLD IV resembles the division between the MAD-CRIM and MAR. However, in comparison to the market abuse regime, the AML-regime does not provide for any concurrent criminal and administrative liability for the violation of the general prohibition against money laundering, because the commission of money laundering is primarily considered a criminal offence, and thus do not provide for administrative liability. Although both Article 3(1) AMLD-CRIM and Article 1(3) AMLD IV provides two definitions of the conduct of 'money laundering',[1403] and that the AMLD-CRIM and AMLD IV both prohibits money laundering,[1404] then Article 59 AMLD IV do not provide any administrative sanctions and measures for any administrative infringements of the prohibition against money laundering. This element of no concurrent criminal and administrative liability represents a key difference between the market abuse regime and the AML-regime.

The minimum rules for the approximation of the EU Member States' "freezing and confiscation regime"[1405] is provided by the CFD. The CFD considers among the most effective means to combat crime is to provide for severe legal consequences for the offenders committing such crime, including "the effective detection and the freezing and confiscation of the instrumentalities and proceeds of crime."[1406] The AMLD-CRIM also complements this view by recognising that the freezing and confiscation of the instrumentalities and proceeds of crime removes the financial incentives that motivates and drive such crime.[1407] For these reasons, the CFD establishes minimum rules on the freezing of property with a view to possible subsequent

[1402] ALMD-CRIM, Recital 1. The AMLD-CRIM also reflects and is aligned with the recommendations and instruments adopted by the FATF and the 1990 Convention, cf. ALMD-CRIM, Recitals 2-3.
[1403] The two definitions are not entirely identical even though much in the scope of Article 1(3)(d) AMLD IV is covered by Article 4 AMLD-CRIM, but the text of Article 1(3)(d) is wider by including, in particular, "participation in, association to commit, [...] facilitating and counselling the commission" of money laundering."
[1404] AMLD-CRIM, Articles 3-8; and AMLD IV, Article 1(2).
[1405] CFD, Recital 5. The CFD recognises that one of the main motivations for cross-border organised crime, including mafia-type criminal organisation, is financial gains (CFD, Recital 1; Council Framework Decision 2005/212/JHA, Recital 1). Organised criminal groups operate without borders and increasingly acquires property in other EU Member States and third countries than those in which they are based (CFD, Recital 2). Therefore, there exists an increasing need for effective international cooperation on asset recovery and mutual legal assistance, and the adoption of minimum rules, as provided by the CFD, will approximate the EU Member States' freezing and confiscations regimes and thereby facilitate mutual trust and effective cross-border cooperation, cf. CFD, Recitals 2 and 5.
[1406] CFD, Recital 3.
[1407] AMLD-CRIM, Recital 16.

confiscation and on the confiscation of property in criminal matters.[1408] In addition, the CFD's freezing and confiscation regime is further built upon by Regulation (EU) 2018/1805 providing the rules for the mutual recognition of freezing orders and confiscation orders in order "to put in place a comprehensive a comprehensive system for the freezing and confiscation of the instrumentalities and proceeds of crime in the Union."[1409] The scope of the CFD, and the legal powers it provides for, applies to a number of criminal offences covered by the instruments listed in Article 3 CFD, many of which is also expressed in the list provided in Articles 3 of Regulation (EU) 2018/1805. However, in addition, the CFD also applies to other legal instruments, if those instruments provide express legal basis for the CFD to be applicable to the criminal offences harmonised in these legal instruments.[1410] Accordingly, Article 9 AMLD-CRIM prescribes that the EU Member States must ensure that their national authorities have the powers to freeze and confiscate the proceeds derived from an instrumentalities used or intended to be used in the commission, or contribution to the commission, of the money laundering offences laid down in Article 3 of the AMLD-CRIM.[1411] A similar legal basis is not found within MAD-CRIM and MAR.[1412] Therefore, the powers to freeze and confiscate property derived through the commission of one of the market abuse offences are not made available by the CFD,[1413] only if they also constitute a money laundering offence.

B. Criminal liability

[1408] CFD, Article 1(1). The CFD applies without prejudice to the procedures that the EU Member States may use to confiscate the property in question, cf. CFD, Article 1(2). The procedural rules for the freezing and confiscation of property is thus entirely a subject matter that belongs national procedural law, but subject, however, to the supervision by the ECtHR and CJEU with respect to the human and fundamental rights as provided in the ECHR and EUCFR, in particular with respect to the procedural guarantees in criminal proceedings. For the purposes of the AMLD-CRIM, the EU Member States "should, as a minimum, ensure the freezing and confiscation of the instrumentalities and proceeds of crime in all cases provided for in [the CFD as well as] strongly consider enabling confiscation in all cases where it is not possible to initiate and or conclude criminal proceedings, including in cases where the offender has died," cf. AMLD-CRIM, Recital 16.

[1409] Recital 8 of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. OJ L 303, 28.11.2018, p. 1–38.

[1410] CFD, Article 2(6) and Article 3.

[1411] AMLD-CRIM, Article 9.

[1412] The MAD-CRIM and MAR do not refer to the CFD. The CFD's powers to freeze and confiscate proceeds from crime, including from market abuse offences, are only required to be available to the NCAs to the extent that the proceeds from the market abuse offences have been laundered, thus also resulting in a money laundering offence cf. AMLD-CRIM, Article 2(1)(u). On the other hand, the CFD does not preclude the EU Member States to opt in the powers to freeze and confiscate the proceeds directly obtained from the commission of one of the market abuse offences, cf. CFD, Article 3.

[1413] However, the sanctioning power to confiscate, but not to freeze, property must nevertheless be made available under the NFSR in order to target the market abuse offences covered by market abuse regime according to Article 2 of Framework Decision 2005/212/JHA as the EU Member States are obliged under Article 2 to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds. As market abuse offences are punishable by deprivation of liberty by a minimum term of imprisonment of at least two years (MAD-CRIM, Articles 3-5 and 7), Article 2 of the Framework Decision 2005/212/JHA also provides an obligation to confiscate the proceeds derived from market abuse offences. Pursuant to Article 14(1) CFD, Article 2 of the Framework Decision 2005/212/JHA is not replaced by the CFD.

(I) Natural persons

(1) Liability for market abuse offences

Liability for a violation of one the prohibitions against market abuse qualifies as criminal liability (MAD-CRIM), and thereby not administrative liability (MAR), to the extent that two cumulative conditions are satisfied: (1) the market abuse violation has been committed with 'intent'; and (2) the particular circumstances amounts to a 'serious case' of market abuse.[1414] The difference in the scope of application between MAD-CRIM and MAR is thus determined on the basis of the natural persons' level of liability and involvement in the commission of market abuse, and the gravity of the particular market abuse violation.

Starting with the first condition (1), the main rule is that the criminal liability of a natural person for market abuse requires intent.[1415] In the NFSR, the EU Member States are nevertheless also granted the option to qualify market manipulations as a criminal offence, when the conduct of market manipulation has been committed recklessly or by serious negligence.[1416] Although no similar provision is given in respect of insider dealing and unlawful disclosure of inside information, the EU Member States are also not precluded from establishing criminal liability for insider dealing and unlawful disclosure of inside information, when the violation of these prohibitions have been committed recklessly or by serious negligence. This is due to the principles that follows from the Greek Maize case and subsequent case-law.[1417]

With respect to the second condition (2), Recitals 11-12 of MAD-CRIM lays down the relevant criteria for determining whether the particular circumstances of the case qualifies as a serious case of market abuse, and thereby to a criminal offence. Recital 11 only relates to the prohibitions against insider dealing and unlawful disclosure of inside information. The violation of these two prohibitions amounts to a 'serious case', when the committed insider dealing and/or unlawful disclosure of inside information: (i) have a high impact on the integrity of the market; and/or (ii) the actual or potential profit derived or loss avoided is high; and/or (iii) the level of damage caused to the market is high; and/or (iv) the overall value of the financial instruments traded is high. Other circumstances may also amount to a serious case, as where:

[1414] MAD-CRIM, Articles 3(1), 4(1) and 5(1), and Recital 10 and 23. Contrary to the criminal sanctions provided under MAD-CRIM, the sanctions for the administrative infringements provided under MAR do not require that intent is proven or that the violations are qualified as serious, cf. MAD-CRIM, Recital 23.
[1415] MAD-CRIM, Articles 3(1), 4(1), 5(1), and Recital 10.
[1416] MAD-CRIM, Recital 21.
[1417] See Chapter 3, Section III(2)(B)(II).

(v) the offence has been committed within the framework of a criminal organisation; and/or (vi) the offender has committed the same offence before. Instead, Recital 12 relates to market manipulation. First of all, a violation of the prohibition against market manipulation also amounts to a 'serious case' under the same circumstances as referred to in (i)-(iii). In addition thereto, market manipulation is also considered a serious case, as where: (vii) the level of alteration of the value of the financial instrument or spot commodity contract is high; and/or (viii) the amount of funds originally used also is high; and/or (ix) the market manipulation has been committed by a person employed or working in the financial sector or in a supervisory or regulatory authority. The criteria laid down in Recital 11-12 are thereby considered as aggravating or mitigating circumstances applicable to the national sanctioning authorities in order to determine whether the offender is subject to administrative or criminal liability.[1418]

Behaviour and conducts such as inciting, aiding, abetting, and attempting to commit market abuse may also result in criminal liability.[1419] However, it is not entirely clear from Article 6 MAD-CRIM to which extent the two cumulative conditions (1)-(2) applies for such situations. On the other hand, it seems logical only to establish criminal liability when the offender had intent (1) to incite, aid, abet or attempt to commit a violation of one the prohibitions against market abuse and such violation amounts to a serious case (2). The aggravating and mitigating circumstances (i)-(ix) provided in Recitals 11-12 are thereby also applicable in order to determine whether the circumstances amount to a serious market abuse case.

(2) Liability for money laundering offences

A comparison between the market abuse regime and AML-regime first of all reveals that criminal liability of a natural person for a money laundering offence does not require that any of the conducts that pursuant to Article 3 AMLD-CRIM and Article 1(3) AMLD IV qualify as money laundering amounts to serious case of money laundering. However, it is still required as one of two cumulative conditions for establishing criminal liability that the natural person who has committed money laundering, the 'money launderer': (1) has done so with intent; and (2) with the knowledge that the property laundered was derived from criminal activity.[1420] As an alternative to the second condition, Article 3(2) AMLD-CRIM nevertheless also provides an option for the EU Member States to make the offender punishable for a money laundering

[1418] Chapter 3, Section II(2)(B).
[1419] MAD-CRIM, Article 6(1)-(2).
[1420] AMLD-CRIM, Article 3(1) and AMLD IV, Article 1(3).

offence when the money launderer 'suspected or ought to have known' that the property was derived from criminal activity. Nonetheless, the EU Member States should also be able "to provide that money laundering committed recklessly and by serious negligence constitutes a criminal offence."[1421] An example on a reckless case of money laundering is "self-laundering," whereby the person who has committed, or been involved in, the criminal activities (the offender of the predicate offence) from which the property was generated, afterwards laundered the property (also the offender of the money laundering offence).[1422] Article 3(5) AMLD-CRIM criminalises self-laundering. Inciting, aiding, abetting, and attempting to commit money laundering, including self-laundering, also constitutes criminal liability.[1423] As of market abuse, the requirement also seems to be that the offender had intent to either incite, aid, abet or attempt to commit money laundering and knew that the property was derived from criminal activity.

The definitions on money laundering provided by AMLD-CRIM and AMLD IV are not fully identical. In particular, with respect to the second condition, Article 1(3) AMLD IV seems to provide a wider definition of money laundering by including knowledge of property that was derived "from an act of participation in [criminal] activity."[1424] The importance of the additional element in Article 1(3) AMLD IV is nevertheless questionable as the conducts that amounts to money laundering pursuant to Article 1(3) ALMD IV already seems to be covered by Article 3(1) AMLD IV in conjunction with Article 4. Although the latter provisions do not provide for "participation in, association to commit, [...] facilitating and counselling," then such wording seems only to specify the term "aid," because aid may translate into a conduct that qualify as participation, association, facilitation and counselling.[1425] Similarly, to know that the property is derived from a criminal activity seems also to cover the knowledge that the property is derived from an act of participation in criminal activity.[1426]

[1421] AMLD-CRIM, Recital 13.
[1422] AMLD-CRIM, Article 3(5) and Recital 11. Hence, there is full identity between the person committing the underlying criminal activity (offender) and the person conducting the money laundering activities (money launderer). Self-laundering therefore consists of two criminal offences, that is in the underlying criminal activity, which is the first criminal offence punishable on its own merits, and which is referred to as a 'predicate offence' for the money laundering offence, cf. Recital 5, because the property is derived from that offence. The second criminal offence is the conduct that amount to money laundering and which are committed by the same natural or legal person having committed the first offence. In this respect, Recital 11 specifies Article 3(5) AMLD-CRIM: "In such cases, where, the money laundering activity does not simply amount to the mere possession or use of property, but also involves the transfer, conversion, concealment or disguise of property and results in further damage than that already caused by the criminal activity, for instance by putting the property derived from criminal activity into circulation and, by doing so, concealing its unlawful origin, that money laundering activity should be punishable."
[1423] AMLD-CRIM, Article 4.
[1424] Article 1(3) AMLD IV.
[1425] Compare AMLD-CRIM, Article 3, and AMLD IV, Article 1(3)(d).
[1426] Compare AMLD-CRIM, Article 3(1)(a)-(c), and AMLD IV, Article 1(3)(a)-(c).

Recital 13 AMLD-CRIM further stipulates that the required conditions of 'intent' and 'knowledge' may "be inferred from objective, factual circumstance."[1427] To determine whether the person knew that the property was derived from criminal activity, the specific objective and factual circumstances of the case should therefore be taking into account, including, for instance, whether the value of the property was disproportionate to the lawful income of the accused person, and whether the criminal activity and acquisition of property occurred within the same time frame.[1428] In this context, Recital 13 also stipulates that the AMLD-CRIM does not distinguish between property derived directly from criminal activity, and situations where the property has been derived indirectly from criminal activity as in line with the broad definition of 'proceeds' in the CFD.[1429] The determination of knowledge is thereby only concerned with the fact that the property was derived from criminal activity, not how it was derived, nor how the property was subsequently treated. Therefore, a conviction for having committed money laundering may therefore be based on circumstantial evidence.

This definition of the concept of 'criminal activities' contained in Article 2(1) AMLD-CRIM constitutes the 'predicate offences' for money laundering.[1430] Of the criminal activities listed in Article 2(1)*(a)-(v)*, it is also worth noticing that the criminal offences governed by MAD-CRIM are listed as a criminal activity and therefore constitutes a predicate offence for the purpose of the AMLD-CRIM.[1431] The same conclusion may also be inferred from Recital 5 AMLD-CRIM, which specifies that "[any] kind of punishable involvement in the commission of a predicate offence as criminalised in accordance with national law should also be considered as criminal activity for the purposes of [AMLD-CRIM]."[1432] Hence, Recital 5 does not distinguish between whether the offence is criminalised entirely on the basis of the national law or whether it is a result of the implementation of EU law. However, Recital 5 does clarify that in cases where EU law allows the EU Member States to provide for sanctions other than criminal sanctions, the AMLD-CRIM does not require that the EU Member States to classify

[1427] AMLD-CRIM, Recital 13. AMLD IV, Article 1(6) also prescribes that knowledge, intent or purpose required as an element of the activities referred to in Articles 1(3) and 1(5) of the AMLD IV may be inferred from objective factual circumstances.
[1428] Ibid.
[1429] CFD, Article 2(1) defines 'proceeds' to mean "any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits."
[1430] AMLD-CRIM, Recital 5. The concept of 'criminal activity' is defined both in Article 2(1) AMLD-CRIM and in Article 3(4) AMLD IV. Despite, the list of criminal activities in Article 2(1) AMLD-CRIM seems longer, and therefore to cover a wider scope of criminal activities, then it may be an error of inference because Article 3(4)(f) AMLD IV covers all criminal offences, which are punishable by deprivation of liberty for a maximum of more than one year. See further that provision.
[1431] AMLD-CRIM, Article 2(1)(u). This further entails, for instance, that to the extent a credit institution or financial institution has committed a serious form of market abuse and afterwards laundered the proceeds, i.e. self-laundering, for instance by putting the property into circulation, then the criminal liability of the credit or financial institution can be established pursuant to both the MAD-CRIM and AMLD-CRIM.
[1432] AMLD-CRIM, Recital 5.

the offences as predicate offences for the purposes of the AMLD-CRIM. Moreover, the AMLD-CRIM will not convert the administrative infringements into criminal offences and treat them as predicate offences, where EU law provides for administrative sanctions and measures, irrespective of whether the EU Member States are allowed to provide for criminal sanctions for the administrative infringements, as is the typical case in EU financial law. Therefore, only violations classified as criminal offences in national law, irrespective of whether there is an underlying EU law duty to do so, are treated as predicate offences.

Article 6 AMLD-CRIM considers certain types of criminal activities as 'aggravating circumstances.' Although the AMLD-CRIM does not contain any obligation to increase sentences, then the EU Member States must ensure that the judge or court is able to take the aggravating circumstances into account when sentencing the offenders.[1433] Therefore, the EU Member States have an obligation to ensure that in relation to the money laundering offences governed by the AMLD-CRIM, the following circumstances are to be regarded as 'aggravating circumstances': (a) the offence was committed within a criminal organisation within the meaning of the Council Framework Decision 2008/841/JHA;[1434] or (b) the offender is one of the 'obliged entities' listed in Article 2 AMLD IV and have committed the offence in the exercise of their professional activities.[1435] In addition to those circumstances, the EU Member States may also regard the following two circumstances as aggravating: (a) the laundered property is of considerable value; or (b) the laundered property derives from one the criminal activities and predicate offences referred to in Article 2(1)(a)-(e) and (h) of the AMLD-CRIM. In this context, it is should be noted that the market abuse offences contained in MAD-CRIM are not considered one of the aggravating circumstances, but that self-laundering is.

In order to combat money laundering and as well as for criminal law measures to be effective, "a conviction for the commission of money laundering should be possible without it being necessary to establish precisely which criminal activity generated the property."[1436] Therefore, the EU Member States have an obligation to ensure that a prior or simultaneous conviction for the criminal activity from which the property was derived is not a prerequisite

[1433] AMLD-CRIM, Recital 15.
[1434] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime. OJ L 300, 11.11.2008, p. 42–45.
[1435] AMLD-CRIM, Article 6(1)(a)-(b). Pursuant to Recital 15 AMLD-CRIM it nonetheless "remains within the discretion of the judge or the court to determine whether to increase the sentence due to the specific aggravating circumstances, taking into all the facts of the particular case."
[1436] AMLD-CRIM, Recital 12. Pursuant to Recital 12, it should be possible for the EU Member States, "in line with their national legal systems, to ensure this by means other than legislation."

for the conviction of money laundering.[1437] A conviction of money laundering must also be possible where it is established that the property was derived from a criminal activity but without it being necessary to establish all of the circumstances or factual elements relating to the underlying criminal activity, including, inter alia, the identity of the offender.[1438]

(II) Legal persons

The liability of legal persons for market abuse and money laundering offences have express legal bases in two almost identical provisions of Articles 8 MAD-CRIM and 7 AMLD-CRIM.[1439] In accordance with Articles 8(1) MAD-CRIM and 7(1) ALMD-CRIM, the EU Member States have an obligation to ensure that legal persons can be held liable for the same criminal offences as natural persons, including market abuse offences and money laundering offences;[1440] self-laundering with respect to money laundering;[1441] and inciting, aiding, abetting and attempting to commit market abuse, money laundering, and self-laundering.[1442] For liability of a legal person to be established, it is required that the criminal offences are committed by a person acting for the benefit of the legal person concerned, either by acting individually or as part of an organ of the legal person, and that person are having a leading position within the legal person on the basis of any of the following three criteria: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person.[1443] A legal person must also be able to be held liable where the lack of supervision or control by a person, having a power of representation or authority as described in (a)-(c), has made the commission of one of market abuse offences[1444] or money laundering offences[1445] possible for the benefit of the legal person by a person under its authority.[1446] This latter provision, if interpreted as: 'the occurrence of a criminal offence to be proof of the lack of supervision or control', will amount to a strict liability,

[1437] AMLD-CRIM, Article 3(3)(a).
[1438] AMLD-CRIM, Article 3(3)(b). Pursuant to AMLD-CRIM, Article 3(3)(c) and AMLD IV, Article 1(4) money laundering, also as a criminal offence, extends to property derived from conduct that occurred on the territory of another EU Member State, or of a third country, where the particular conduct(s) would constitute a criminal activity, if it had occurred domestically.
[1439] MAD-CRIM, Recital 18, provides more specifically that the EU Member States should extend liability for the offences provided for in [MAD-CRIM] to legal persons through the imposition of criminal or non-criminal sanctions or other measures which are effective, proportionate and dissuasive, for example those provided in [MAR]."
[1440] MAD-CRIM, Article 3-5; AMLD-CRIM, Article 3(1).
[1441] AMLD-CRIM, Article 3(5).
[1442] MAD-CRIM, Article 6; ALMD-CRIM, Article 4.
[1443] MAD-CRIM, Article 8(1)(a)-(c); AMLD-CRIM, Article 7(1)(a)-(c).
[1444] i.e. insider dealing; unlawful disclosure of inside information; market manipulation; inciting, aiding and abetting, and attempt to commit market abuse, cf. Articles 3-6 of the MAD-CRIM.
[1445] i.e. money laundering activities; self-laundering; or aiding, abetting, inciting or attempting to commit money laundering activities, cf. Articles 3(1), 3(5) and 4 of the AMLD-CRIM.
[1446] MAD-CRIM, Article 8(2); and AMLD-CRIM, Article 7(2).

if it is to be understood and interpreted as a factual issue. However, Klip has argued that, "it is more likely that it was intended to criminalise negligent lack of control or supervision."[1447]

These provisions do not provide any strict or direct obligation to provide for corporate criminal liability. On the other hand, these provisions are not intended to exclude it.[1448] It may nevertheless be viewed as a quite paradoxical legal position that a legal person, just like a natural person, can be held liable to a criminal offence without it necessarily following that corporate criminal liability has been established. This remains the situation. Referring to ALMD-CRIM and MAD-CRIM, amongst others legislative acts, Klip has argued that: "What the instruments that stipulate corporate criminal liability for such entities have in common is the provision that the criminal liability for such entities is not exclusive, but is additional to the individual criminal liability of natural persons."[1449] In fact, liability of legal persons shall not exclude criminal liability and proceedings against those natural persons who were involved as offenders, inciters or accessories with respect to the any of the market abuse or money laundering offences just referred to.[1450] Thus, the latter provisions do also not exclude the possibility for establishing concurrent (joint) criminal liability of both a natural person and legal person, at the same time, for the commission of any of the criminal offences. Together, the rules on liability of natural persons and legal persons for criminal offences is ensuring that personal liability for the commission of the criminal offences can be established, whereby they are functioning as the main retributive requirement for the imposition of sanctions. The rules thus deals with the notion of what Hart has referred to as: "retribution in distribution of punishment."[1451]

2. Administrative infringements and liability

As the European Parliament and Council can only adopt legislative acts that classify as criminal law acts to the extend they have legal basis within Articles 82-84 TFEU, the SSMR; CRD; CRR; SSMFR; ECBSR I; SRMR; BRRD; AMLD IV; MAR; BR; MiFID II; MiFIR; PR; IFD; IFR; UCITS; AIFMD; CRAR; and EMIR cannot classify as criminal acts. The legislative acts are adopted on the basis of the TFEU, Articles 53; 114; and 127(6) and 132. Therefore, they

[1447] Klip (n 1) 279.
[1448] ibid 278–280.
[1449] ibid 279.
[1450] MAD-CRIM, Article 8(3); and AMLD-CRIM, Article 7(3).
[1451] Hart HLA, 'Prolegomenon to the Principles of Punishment' (1960). Proceedings of the Aristotelian Society, New Series, Vol. 60, 1959-1960, p. 12. See Chapter 2 more generally on the discussion of retribution.

classify as administrative law acts.[1452] They provides for administrative infringements and liability, and makes the offender subject to administrative sanctions and measures.[1453]

A. Administrative infringements

The EU Member States must ensure that their national laws provide administrative sanctions and measures for at least a vast number of enumerated infringements listed in or otherwise expressly covered by the violation-regimes of the administrative legislative and legal acts of EU financial law.[1454] Generally, the reference to the term 'at least' entails that the administrative sanctions and measures also may be applicable and imposed for infringements other than those particular infringements that are expressly covered by the lists of infringements. As a main rule, this is for each of the EU Member States to decide.[1455] Otherwise, the following overview is mainly restricted to the listed infringements provided in the violation-regimes.

EU banking law provides violation-regimes for both the NFSR,[1456] and the EFSR.[1457] In respect of the NFSR, the legal frameworks of the CRD, BRRD, and AMLD IV provides infringements of primarily the following types of rules:

(i) prohibitions against carrying out business and activities without necessary authorisations;[1458]
(ii) the regime on withdrawals of authorisations;[1459]
(iii) notification requirements;[1460]
(iv) applications for approvals from the supervisor;[1461]
(v) appropriate governance arrangement and recovery and resolution plans;[1462]
(vi) information and disclosure requirements, including complete information;[1463]
(vii) prudential requirements and related supervisory powers;[1464] and
(viii) preventive rules on anti-money laundering, the AMDL IV.[1465]

[1452] Although it does not expressly follow from any of these Treaty provisions that they only allow for the adoption of legal instruments that classify as administrative measures, the text of Articles 53 and 114 TFEU by the reference to "administrative action" at least indicate that the envisaged measures are administrative.
[1453] These EU legislative or legal acts also provides for: 'administrative infringements', 'administrative sanctions' or 'other administrative measures', or otherwise indicate their 'administrative' classification.
[1454] Chapter 5, Section III(2)(B). EU banking law: CRD, Articles 66(1) and 67(1).
[1455] Except with respect to the implementation of MiFID II, because it prescribes that the sanctions and measures provided "shall apply to infringements even where they are not specifically referred to in [Article 70(3)-(5)]."
[1456] Articles 66(1) and 67(1) CRD; 111(1) BRRD; and 59(1) AMLD IV.
[1457] Articles 18 SSMR; 120-137 SSMFR; and 1a(1)-(2) ECBSR.
[1458] Articles 9 and 66(1)(a)-(b) CRD.
[1459] See Chapter 7, Section III(2)(A)(I)(1) and just below.
[1460] Articles 22, 25, 26, 66(1)(c)-(d) and 67(1)(b)-(c) CRD; and 25 and 111(1)(b) BRRD.
[1461] Articles 21a and 66(1)(e) CRD.
[1462] Articles 67(1)(d) and 74 CRD; and 5, 7, and 111(1)(a) BRRD.
[1463] Articles 67(1)(e)-(i) and (m) CRD; 92, 99, 101, 394, 415, 430, 431 and 451 CRR; and 11, 81 and 111(1)(c)-(d) BRRD.
[1464] Articles 67(1)(j)-(k), (n) and (p)-(q), 91, 104, 105 and 141 CRD; and, specifically, 28, 52, 63, 395, 405, 412 of the CRR, and generally, the Articles laid down in the CRR, Part Three, Four, Six, or Seven.
[1465] More precisely, the CRD, Article 67(1)(o) refers to Directive 2005/60/EC, which is repealed and replaced by AMLD IV, cf. Article 66 AMLD IV. Pursuant to Article 59(2), the AMLD IV's violation-regime covers only breaches that are considered serious, repeated, systematic, or a combination thereof, of the national rules implementing the AMLD IV, including at least the requirements provided in: (a) Articles 10-24 (customer due diligence); (b) Articles 33-35 (suspicious transaction reporting); (c) Articles 40 (record-keeping); and (d) Articles 45-46 (internal controls).

In addition to these rules, the violation-regimes provided under EU banking law for the EFSR and the ECB sanction regime includes infringements of the rules found in: (ix) the SSMR/SSMFR framework;[1466] and (x) the ECB regulations and ECB decisions;[1467] but excluded from the ECB' sanction regime is infringements of the AMLD IV ((viii)).[1468]

In respect of the SRB' sanction regime, it concern infringements that relates to: (i) failures to comply with the exercise of investigatory powers;[1469] and (ii) non-compliance with an SRB decision addressed to the entities under resolution.[1470]

EU securities law also provides for violation-regimes for both the NFSR,[1471] and the EFSR.[1472] In respect of the NFSR, the legal frameworks of MAR, BR, MiFID II, PR, UCITS, and IFD provides infringements of the following types of rules:

(i) prohibitions against market abuse;[1473]
(ii) preventive rules on market abuse;[1474]
(iii) the regime on withdrawals of authorisations;[1475]
(iv) the use of benchmarks and their integrity and reliability;[1476]
(v) the use of prospectus and their drawing up, approval and distribution;[1477]
(vi) authorisations and operating conditions for MiFID II-firms;[1478]
(vi) prudential rules for investment firms;[1479]
(vii) authorisations and operating conditions for UCITS;[1480]
(viii) non-compliance with the exercise of investigatory and supervisory powers.[1481]

The violation-regimes provided under EU securities law for the EFSR and ESMA includes infringements of the following types of rules: (i) authorisation and operating conditions

[1466] Article 18(1)-(6) SSMR.
[1467] Articles 18(7) SSMR and 1a(1)-(2) ECBSR I.
[1468] Article 18(1)-(6) SSMR.
[1469] Articles 38(2) and 39(1) SRMR refers to Articles 34-36 SRMR.
[1470] Article 38(2)(c) SRMR refers to the decisions adopted pursuant to Article 29(2) SRMR that primarily relates to the exercise of resolution actions. For the cases not covered by (i)-(ii), the SRB may instead recommend the NRAs to take action in order to ensure that appropriate penalties are imposed in accordance with the Articles 110-114 BRRD and with any relevant national legislation, cf. SRMR, Article 38(8).
[1471] Articles 30(1) MAR; 42(1) BR; 70(3)-(5) MiFID II; 38(1) PR; 99a UCITS; and 18(1) IFD. The AIFMD does not provide any violation-regime, and seems to be rather in need of an update.
[1472] Articles 20(1), 24(1), 36a(1), and 36b(1) CRAR; and 20(1), 25j(1), 25k(1), 25p(1), 25q(1), 65(1), 66(1), 71(1), and 73(1) EMIR.
[1473] Articles 14-15 and 30(1)(a) MAR.
[1474] Articles 16-20 and 30(1)(a) MAR.
[1475] See Chapter 7, Section III(2)(A)(I)(1) and just below.
[1476] Articles 4-16, 19a-c, 21, 23-29, 31(1)(a) and 34 BR.
[1477] Articles 3, 5-7(1)-(11), 8-11(1)-(3), 14(1)-(2), 15(1), 16(1)-(3), 17-19(1)-(3), 20(1), 21(1)-(4) and (7)-(11), 22(2)-(5), 23(1)-(3) and (5), and 27 and 38(1)(a) PR.
[1478] Article 70(3)(a)-(b) MiFID II refers to the relevant provisions of MiFID II and MiFIR, including Articles 8-9, 11, 16-21, 23-37, 44-54, 57, 58, and 63-66 MiFID II and Articles 3-4, 6-8, 10-15, 17-18, 20-23, 25-31, 35-37, 40-42 and MiFIR.
[1479] Article 18(1)(a)-(i) IFD refers to Articles 26 IFD; 37, 43, 46-53, 54(1)(b) and (e) IFR; and 28, 52, and 63 CRR; serious breaches of the national provisions transposing the AMLD IV; and Article 91 CRD.
[1480] Articles 5-7, 11-14, 22(3)-(7), 27, 30-31, 49-57, 68-82, 93, and 99a(a)-(s) UCITS.
[1481] Articles 30(1)(b) MAR; 30(1)(b) BR; 70(5) MiFID II; and 38(2) PR refers to the failure to cooperate and comply with an investigation, inspection or a request covered by Articles 23(2) MAR; 41 BR; 69 MiFID II; 32 PR. No such provisions are found under the UCITS, IFD and AIFMD. See also the Case C-481/19 – DB v CONSOB, ECLI:EU:C:2021:84, concerning the right to silence and Articles 47-48 EUCFR.

for CRAs, and the use of credit ratings;[1482] (ii) authorisation and operating conditions for CCPs and trade repositories;[1483] (iii) the regime on withdrawals of authorisations;[1484] and (iv) the non-compliance with ESMA's decisions addressed to the entities subject to its supervision and the exercise of certain investigatory and supervisory measures.[1485]

Across EU financial law, the 'withdrawals of authorisations', and sometimes including the suspension of authorisations, referred to as 'the regime on withdrawals of authorisations' above, are attached to its own particular violation-regime.[1486] Because the application of the withdrawal-power is closed tied in with a particular violation-regime, the violations are discussed together with the withdrawal-power in Chapter 7.[1487]

Therefore, across these overviews of the violation-regimes under EU financial law, it follows more generally that the infringements covered by the NFSR's and EFSR's violation-regimes mainly relates to the violation of rules on the: (1) authorisation of the entities supervised, including the withdrawal and suspensions of their authorisations; (2) operating conditions for the entities, including rules on the prudential supervision and supervision of conduct of business rules; and (3) decisions addressed to the entities, including the exercise of investigatory and supervisory powers or measures. Because the ECB, by virtue of Article 127(6) TFEU, only may be conferred specific tasks relating to the 'prudential supervision' of (significant) credit institutions and other institutions, the nature of the rules provided under EU banking law may also be considered as 'prudential'. Although there is no definition of the concept of 'prudential', the content of which may therefore be discussed,[1488] the supervisory task conferred on the ECB by the virtue of Article 4(1) SSMR provides an indication of the nature of the prudential rules that are subject to the ECB's supervision.[1489] However, as some of the rules

[1482] Articles 23e(1), 24(1), and 36a(1) CRAR, which all refer to the list of infringements provided in Annex III.
[1483] Articles 25i(1) and 25j(1) EMIR, which for the rules relating to the CCPs refers to the infringements provided in Annex III, and Articles 64(1) and 65(1) EMIR, which for the rules relating to trade repositories refers to the infringements provided in Annex I.
[1484] See Chapter 7, Section III(2)(A)(I)(1) and just below.
[1485] CRAR, Annex III, Section II, points. 7-8, and Article 36b(1); and EMIR, Annex I, Section IV, points (a)-(c); Annex III, Section V, points (a)-(e), and Articles 25k(1) and 66(1).
[1486] Articles 14(5) SSMR; 18 and 67(2)(c) CRD; 35 and 42(2)(d) BR; 8, 43, and 62 MiFID II; 7(5) and 29(4) UCITS; 11 AIFMD; 20 CRAR; and 20, 25p, 25q(1)(d), 71, and 73(1)(d) EMIR.
[1487] See Chapter 7, Section III(2)(A)(I)(1).
[1488] Klaus Lackhoff, *Single Supervisory Mechanism: European Banking Supervision by the SSM: A Practitioner's Guide* (CH Beck; Hart; Nomos 2017) 27–40. In particular, in paras. 106-11, Lackhoff points out the criteria defining 'prudential supervision' in legal terms. He concludes that "[rules] of prudential supervision should encompass there at least those legal provisions addressed (be it directly or indirectly) to credit institutions or financial institutions which are pursuing the objective to foster financial stability by establishing requirements that shall ensure the functioning of the credit institutions on a micro or macro level," cf. para. 112.
[1489] ibid 196–205. Therefore, pursuant to Article 4(1) SSMR, the concept of 'prudential' relates to task of ensuring compliance with the rules and requirements in relation to the tasks, *primarily*, referred to in Article 4(1)(d), including: (i) own funds requirement (CRR, Part Two to Part Three, Articles 25-386); (ii) securitisation (former CRR, Part Five, Articles 404-410, see amendment 5, 'M5', to the CRR); (iii) large exposure (CRR, Part Four, Articles 387-403); (iv) liquidity (CRR, Part Six,

under EU banking law are very similar in nature to those applicable under EU securities law, or even directly applicable to certain entities covered by the legal provisions of EU securities law,[1490] a wide number of rules under EU securities law may also be characterised as prudential. In the literature, it has also been argued that EU securities law to a large extent is 'supervisory law'.[1491] In the context of EU securities law it has also been argued that "[prudential] supervision covers the control of the financial institutions' solvency whereas conduct of business supervision monitors the financial institutions' compliance with rules of conduct and organisational requirements. Such a structure is referred to as a twin peaks scheme."[1492] Because EU financial law only are applicable to a closed and specified group of natural and legal persons, we can already now establish the starting point of the Engel-test that the first Öztürk-criterion will consider EU financial law to be governed by disciplinary norms. Accordingly, irrespective of whether the rules under EU banking and securities law may be referred to as prudential or supervisory law and provide for rules on prudential supervision and the conduct of business, the rules are generally to be characterised as disciplinary law and violations thereof to qualify as disciplinary offences. Therefore, EU financial law also generally provides for 'disciplinary sanction regimes'. The discussion will continue in Section II(3).

B. Administrative liability

At the level of the EFSR and the sanctioning powers conferred on the European sanctioning authorities, it is a general rule that the natural and legal person's liability to sanctions for the commission of infringements requires that the infringements have been committed with intent or negligence.[1493] In this respect, intent may be established, "if there are objective factors which demonstrate that the entity or its management body or senior management acted deliberately

Articles 411-428); (v) leverage (CRR, Part Seven and Seven A, Articles 429-430); and (vi) public disclosure requirements (CRR, Part Eight, Articles 431-455). Lackhoff considers these rules and requirements to "stem from the *substantive supervisory law* which consists particular of the CRR," cf. p. 198, paragraph 848. Italics added. The concept of 'prudential' also relates to the tasks referred to in Article 4(1)(e) in relation to *governance and risk management*, including: (i) fit and proper requirements for the managers of the credit institutions (CRD, Article 91); (ii) the risk management processes (CRD, Articles 74, 76, and 86-87); (iii) internal control mechanisms (CRD Articles 4(5) and 123); (iv) the renumeration policies and practices (CRD, Articles 74(1), 75, and 92-96); and (v) effective internal capital adequacy assessment processes (CRD, Article 108). The current supervisory framework are generally considered to consist of three pillars, whereby 'pillar 1' relates to rules on capital requirements requiring own funds to have a loss absorbing ability; 'pillar 2' relates to rules on governance and risk management; and 'pillar 3' relates to rules on the public disclosure requirements.

[1490] Between the CRD, CRR, MiFID II, MiFIR, IFD, and IFR, there are often cross-references therein.

[1491] Rüdiger Veil, *European Capital Markets Law* (Second edition, Hart Publishing 2017) 135.

[1492] ibid 142.

[1493] Articles 18(1) SSMR; 38(1) SRMR; 36a(1) CRAR; and 25j(1) and 65(1) EMIR. In Case T-576/18 – Crédit Agricole SA v ECB, ECLI:EU:T:2020:304, the CJEU laid down the concept of 'negligence': "the concept of negligence refers to an unintentional act or omission by which the person responsible breaches his or her duty of care [...]. Moreover, for the purposes of determining whether or not such negligence exists, account must be taken, in particular, of the complexity of the provisions at issue and the professional experience of and care taken by the undertaking concerned [...]," para. 80.

to commit the infringement."[1494] In particular, negligence or intent are conditions that must be established for the entities that are subject to the fines to be imposed by the ECB, the SRB or ESMA.[1495] However, the general rule is nevertheless restricted in a number of ways. First, the scope of the ECB's and SRB's sanctioning powers are asymmetrical, because the ECB and SRB do not have any sanctioning powers in respect of natural persons.[1496] They may nonetheless require or recommend to the national sanctioning authorities to open national sanctioning proceedings against natural persons.[1497] ESMA do also not have power to fine natural persons,[1498] except from imposing periodic penalty payments against certain natural persons.[1499] The general rule is also restricted by the rules on the periodic penalty payments, because they are not made conditional upon the establishment of negligence or intent but a 'continued breach' with the underlying obligations arising from the supervisory decisions addressed to the supervised entities, or, in case of the ECB, non-compliance with the ECB regulations.[1500] However, it does not exclude that negligence and intent may result in a continued breach.

At the level of the NFSR, none of the legislative acts provides any provisions that lays down express requirements on intent or negligence as conditions for the imposition of the administrative sanctions or measures.[1501] The rules on liability is therefore a subject matter to be decided at the national level. However, the level of responsibility of the natural or legal person for the commission of the infringements provided in the violation-regimes, including whether the particular infringement was committed with intent or negligence, are provided as some of the relevant sanctioning factors to be considered by the national, and European, sanctioning authorities in choosing the appropriate sanctions or measures to be applied, and in setting their appropriate level of severity.[1502] The sanctioning factors are discussed in Section III(2).

3. Assessment II and conclusions

[1494] Articles 38(1) SRMR; 36a(1) CRAR; and 25j(1) and 65(1) EMIR.
[1495] Articles 18(1) SSMR; 38(1) SRMR; 36a(1) CRAR; and 25j(1) and 65(1) EMIR.
[1496] Articles 18 SSMR; 122 SSMFR; 1a(1) ECBSR I, and 38-39 SRMR.
[1497] Articles 18(5) SSMR; and 38(8) SRMR.
[1498] Articles 36a(1) CRAR; and 25(j)(1) and 65(1) EMIR.
[1499] Articles 23(b)(1) in conjunction with 36b(1)(b)-(d) CRAR; and 25(k)(1)(b) in conjunction with 25f(1) and (4), and 66(1)(b) in conjunction with 61(1) and (4) EMIR.
[1500] Articles 18(7) SSMR in conjunction with 122 and 129(1) SSMFR; and 1(4), 1(6) and 1a(1) ECBSR I. However, the 'continued breach' is not made an express requirement in Articles 39(1) SRMR; 36b(1) CRAR; and 25k(1) and 66(1) EMIR, but these provisions much be read in light of Article 129(1) SSMFR.
[1501] Articles 66(2) and 67(2) CRD; 111(2) BRRD; 59(2) AMLD IV; 30(2) MAR; 42(2) BR; 70(6) MiFID II; 38(2) PR; 99(6) UCITS; and 18(2) IFD.
[1502] Articles 70(b) CRD; 114(b) BRRD; 60(4)(b) AMLD IV; 31(1)(b) MAR; 43(1)(c) BR; 72(2)(b) MiFID II; 39(1)(b) PR; 99c(1)(b) UCITS; and 18(3)(b) IFD.

In accordance with the Engel-test and the first Engel-criterion, the distinction made between the EU criminal and administrative laws serves as the starting point for the Engel-test and first Engel-criterion. The following tasks is therefore to conduct an assessment of the same law provisions in light of the second Engel-criterion and first Öztürk-criterion to determine the extent in which the rules under EU financial law are governed by criminal or disciplinary norms. In order to conduct that assessment, it is necessary to recall that the second Engel and first Öztürk-criterion goes beyond the black letters of the laws and their designated legal classification and a step deeper in seeking the essential nature of the governing norms. In accordance with the first Öztürk-criterion, rules are governed by criminal norms, when they are based upon '*general norms'* as found in laws and requirements that protects the general interests of the society and which by their scope are directed towards the general population or some broader capacity of specific groups. On the other hand, rules are governed by disciplinary norms, when they are based upon *'specific norms'* as found in laws and requirements that by their scope of application are directed towards a certain specific or closed group possessing a special status, typically certain professionals or business activities. Hence, the specific norms protects the public interests and confidence in the specific group and the reputation thereof.

The market abuse regime provides for a complementary legal framework, which protects the integrity of the EU financial markets and the public confidence in the financial markets.[1503] The violations comprising market abuse are therefore also considered to harm "the integrity of the financial markets and public confidence in securities and derivatives,"[1504] as it is a damaging behaviour that "prevents full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets."[1505] It follows that market integrity is fundamental to the objectives of integrated, efficient and transparent financial markets and strong investor confidence.[1506] In Grande Stevens and Others v. Italy, the applicants had violated the prohibitions against market manipulation transposed from MAD I and into Italian administrative law.[1507] The ECtHR observed that "the provisions of which the applicants were accused of breaching were intended to guarantee the integrity of the financial markets and to maintain public confidence in the security of transactions."[1508] The ECtHR

[1503] MAR, Recital 4.
[1504] MAR, Recital 2.
[1505] MAR, Recital 7.
[1506] MAD-CRIM, Recital 1; MAR, Recital 2.
[1507] Grande Stevens and Others v. Italy, paras. 34, 46, 91. See also Chapter 3, Section II(1)(B)(I).
[1508] Grande Stevens and Others v. Italy, para. 96. Both the MAD-CRIM but, more importantly in this aspect, also MAR still continue to aim at the same goals and protect the same interests, cf. MAD-CRIM, Article 1(1) and Recitals 1-3; and MAR, Article 1 and Recitals 1-3.

concluded that the rules violated by the applicants were governed by the "general interests of the society [and] usually protected by criminal law."[1509] The first Öztürk-criterion was satisfied. Therefore, the more general implication that follows from the Grande Stevens case is that the prohibition against market abuse are considered governed by criminal norms. The question then becomes how the result of the Grande Stevens case influences the interpretation of the market abuse regime as separated into legal instruments of criminal and administrative law? – Decisive to the second Engel and Öztürk-criterion is the scope of the governing norms.

The basis for the complementary legal framework of MAD-CRIM and MAR is their common prohibition against market abuse,[1510] comprising the individual prohibitions against insider dealing, unlawful disclosure of inside information and market manipulation. These prohibitions are also general prohibitions, because they applies to *any person*.[1511] Irrespective of their criminal or administrative designation, a violation of any of these prohibitions therefore qualifies as a violation of a rule that is governed by criminal norms for the purpose of the Engel-test. Their concurrent liability for a violation of one of the prohibitions against market abuse is also a criminal classification factor that is indicative of the underlying general norm and criminal offence.[1512] However, where the MAD-CRIM only lays down the minimum rules for criminal sanctions on market abuse, MAR also provides the measures to prevent market abuse.[1513] Articles 14-15 of MAR are therefore governed by criminal norms and in pursuit of a repressive purpose, while the other provisions are governed by disciplinary norms in pursuit of a preventive purpose. Moreover, the preventive provisions are governed by specific norms, because they only applies to certain specifically designated natural or legal persons ('SDP'), which according to their profession, business activities or other role in the infrastructure of the financial markets perform very specifically defined functions. The preventive provisions makes the SDPs subject to the very detailed requirements and obligations, which are closely tied in with the performance of their role and the exercise of their functions.[1514] Therefore, a violation of any of these disciplinary and preventive rules will amount to a disciplinary offence.

The rationale here laid out in the assessment of the market abuse regime has found an even more express application within the AML-regime. The AML-regime provides for a more clear-cut distinction between the criminal and disciplinary norms as the natural or legal persons

[1509] Grande Stevens and Others v. Italy, para. 96. See further Chapter 3, Section III(2) and Georgouleas and Nestoras v. Greece.
[1510] MAD-CRIM, Articles 3-6; and MAR, Chapter 2, Articles 8, 10, 12, 14, and 15.
[1511] Veil (n 106) 194.
[1512] Chapter 3, Section II(3)(A)(I)(2).
[1513] MAD-CRIM, Article 1(1); and MAR, Article 1.
[1514] See Articles 16-20 MAR.

are not held as subjects to a concurrent liability framework for the commission of money laundering. As a key difference to the market abuse regime, money laundering is entirely criminalised as a criminal offence, and where the MAR-sanctions can be imposed for a violation of the general prohibitions against market abuse, the AMLD IV-sanctions are not prescribed to be imposed for violations of the general prohibition against money laundering.[1515] Therefore, the AML-regime provides for a clear separation of the general norms and criminal offences into the AMLD-CRIM and the specific norms and disciplinary offences into the AMLD IV. Thus, repressive rules are found in the AMLD-CRIM and the preventive rules in AMLD IV. This distinction is more true to the principles of the Engel-test. It also seems more true to the FATF Recommendations and their criminalisation of money laundering.[1516] Because the money laundering offences also requires intent, then it is an additional criminal classification factor that such a violation only may result in being charged with a criminal offence.[1517]

The observations made so far should also make the main rule clear that EU financial law is overwhelmingly governed by disciplinary norms. The main rule is justified by the fact that the provisions of EU financial law mainly applies to certain more specifically designated natural or legal persons, the SDPs, which together forms a closed group of natural persons and specific legal entities that performs certain very specific types of business activities and restricted functions and roles. It is only those particularly designated SDPs, which are subject to the provisions of EU financial law.[1518] In order to perform the busines activities and related infrastructural roles and functions in the EU financial markets, the SDPs or the business activities or functions they perform or intent to pursue are often subject to authorisations.[1519] The functioning of the authorisation is that the SDPs, by satisfying the formal and legal requirements for obtaining authorisation, also legally are deemed suitable to exercise the activities

[1515] Compare AMLD-CRIM, Articles 3-4, with AMLD IV, Article 59, and its reference to Articles 10-24; 33-35; 40, and 45-46. Furthermore, in comparison, MAR, Article 30(1)(a), also provides administrative sanctions and measures for the violations of the prohibitions against market abuse (Articles 14-15).
[1516] FATF Recommendation 3.
[1517] AMLD-CRIM, Article 3(1); and AMLD IV, Article 1(3). Chapter 3, Section II(1)(3)(A)(I)(4), also considers the requirement of 'intent' as one of the subjective elements, which may be indicative of a criminal offence.
[1518] The SDPs that are subject to the provisions of EU banking law are primarily credit institutions, financial institutions, financial holding companies and mixed financial holding companies. See further: CRR, Article 1; CRD, Article 2(1); SSMR, Article 1 and Article 2(3)-(6); ECBSR I, Article 1(3); BRRD, Article 1; SRMR, Article 2; and AMLD IV, Article 2. Pursuant to Article 2 AMLD IV, the natural and legal persons designated as 'obliged entities' covers very different types of busines activities and professions by which the AMLD IV reaches further than the general personal scope of EU banking law. However, all of the obliged entities share the risk of being vulnerable to money laundering activities, and are therefore made subject to the specific provisions of the AMLD IV that aims to prevent money laundering. The SDPs that are subject to the provisions of EU securities laws are primarily investment firms, market operators, data reporting service providers, issuers of financial instruments, administers of benchmarks, undertakings for collective investment in transferable securities ('UCITS'), credit rating agencies, central counterparties ('CCPs') and trade repositories. See further: MiFID II, Article 1(1); IFD, Article 2(1); PR, Article 1; BR, Articles 2 and 4-10; UCITS, Article 1(1); CRAR, Article 2(1); and EMIR, Article 1(2).
[1519] SRMR, Article 14; CRD, Article 8; BR, Article 34; MiFID II, Articles 5, 44, 59; UCITS, Articles 7 and 29; AIFMD, Article 6; CRAR, Article 15; EMIR, Articles 14 and 55.

associated with the authorisation they applied for. Having obtained their authorisation, the SDPs are then subject to a regime of civil rights and disciplinary rules that more specifically governs their conduct of business activities and functions they perform. This point to another exception to the main rule that EU financial law is disciplinary law:

Article 9 CRD lays down a general prohibition against "persons or undertaking that are not credit institutions from carrying out the business of taking deposits or other repayable funds from the public."[1520] Article 9 CRD must be read in conjunction with Article 4(1)(1) CRR, which defines a 'credit institution' as "an undertaking the busines of which is to take deposits or other repayable funds form the public and *to grant credits from its own account*."[1521] Hence, the latter *phrase* of Article 4(1)(1) expands the scope of the prohibition. However, and irrespective thereof, the decisive element is in accordance with the first Öztürk-criterion that it contains a general prohibition, because it applies to *any* natural or legal person, which carries out the business of taking deposits and repayable funds from the public without authorisation (narrow interpretation). Article 9 CRD is therefore governed by general and criminal norms. Any violation of the prohibition as transposed into national law will therefore make the offender charged with a criminal offence to the extent that the offender also risks to be imposed of punitive and deterrent sanctions in accordance with the second Engel-criterion and second Öztürk-criterion, which will be the case in respect of the CRD-sanctions available.[1522]

In accordance with the Steininger principle, a violation of a rule that provides for a general and foreseeable negative obligation (a foreseeable prohibition) also satisfies the first Öztürk-criterion, for instance, where a SDP conducts economic activities outside a licensed (approved) area.[1523] Accordingly, the rules on the authorisation and registration of SDPs and their related activities may be interpreted in light of the Steininger principle. For instance, CRD, Annex I provides a "List of activities subject to mutual recognition," which in point 1 also includes taking deposit and other repayable funds from the public.[1524] Any additional economic activity, which is covered by the CRD-list of activities, will also be considered part of the scope of rights carried by the authorisation. However, if a credit institution pursued any economic activities outside the scope of CRD annexed-activities, the credit institution might be in breach of a general and foreseeable negative obligation of not to conduct any of such

[1520] CRD, Article 9(1).
[1521] CRR, Article 4(1)(1). Italics added.
[1522] CRD, Article 66(2). This is discussed in detail in Chapter 7, Section III.
[1523] Chapter 3, Section II(B)(I).
[1524] CRD, Annex I, point 1. Annex I provides a "List of activities subject to mutual recognition," which in point 1 includes taking deposit and other repayable funds. Fourteen additional points and items are also included.

activities, which therefore will result in a violation of a rule that is governed by criminal and general norms pursuant to the Steininger principle. A large number of similar legal provisions prescribing authorisations and approval requirements to which there also are rights closely tied in with the authorisation may also be viewed in light of the Steininger principle.[1525]

In addition, it can also be observed that the criminal classification factor of the involvement of the criminal courts mostly are envisaged to be relevant for the implementation of the CFD, the AMLD-CRIM and MAD-CRIM at the national level.[1526] However, with respect to the EFSR and the SSMR, SSMFR, ECBSR I, SRMR, CRAR, and EMIR, the administrative nature of these legislative and legal acts all imply that the ECB, SRB and ESMA also are of an administrative nature. For that reason, they are also under an obligation to refer criminal matters for further investigation and prosecution to the NFSR at the national.[1527] Except from placing the sole power to initiate criminal proceedings and impose criminal sanctions within the NFSR, the enforcement models applied under the NFSR, including the level of involvement of the administrative or criminal authorities, may otherwise diverge largely across the EU Member States. However, the EU administrative legislation does envisage, imply or require that the designated national authorities involved in the supervision, resolution and sanctioning also classify as administrative authorities.[1528] Therefore, one of the supervisory powers conferred to the NCAs is also the power to refer criminal matters to the relevant investigating and prosecuting authorities for the further criminal investigation or prosecution.[1529] And, as discussed in Chapter 7, the NCAs are also vested with the power to impose administrative sanctions, unless the EU Member States have exercised on their choice to provide for criminal sanctions.

[1525] Articles 8 CRD; 34 BR; 5, 44, 59 MiFID II; 20 PR; 7 and 29 UCITS; 6 AIFMD; 15 CRAR; and 14 and 55 EMIR.
[1526] Chapter 3, Section II(2)(C). The CFD, Article 2(4), defines 'confiscation' as to mean "a final deprivation of property ordered by a court in relation to a criminal offence." Recital 10 also provides that the EU Member States are free to bring confiscation proceedings, which are linked to a criminal case before any competent court. See further, the CFD, Recitals 14, 16, 19, 21, 31, and Articles 5 and 8. However, the freezing order seems to be envisaged as a decision, which could be taken by "a competent authority other than a judicial authority," cf. CFD, Article 8(4). The AMLD-CRIM provides that there is no obligation to increase sentences, but the EU Member States "should ensure that the judge or the court is able to take the aggravating circumstances set out in [the AMLD-CRIM] into account when sentencing offenders," cf. Recital 15. The discretion of "the judge or the court" with respect to the choice of the appropriate sanctions and sentencing is further considered in the AMLD-CRIM, Recitals 14-15, and Articles 5-8. The MAD-CRIM is more open-textured compared to the CFD and AMLD-CRIM, but the MAD-CRIM does envisage that the criminal courts are involved in the law enforcement. See, in particular, Recital 19 and Article 11 MAD-CRIM.
[1527] SSMFR, Article 136; SRMR Articles15(1)(e); CRAR, Article 23e(8); and EMIR Article 64(8). These provisions provides a firm recognition of the ECB, SRB and ESMA not having criminal sanctioning powers, and that criminal prosecution entirely is a matter of national enforcement by the relevant authorities under the NFSR.
[1528] Articles 4(1)(40) CRR; 65 CRD; 3, 18 and 110 BRRD; 58 AMLD IV; 3(1)(12), 22 and 30(1) MAR; 40-42 BR; 4(1)(26), 67 and 70 MiFID II; 2(1)(18) MiFIR; 2(o), 31 and 38 PR; 3(1)(5), 4 and 18 IFD; 4(1)(7) IFR; 2(1)(h), 97 and 99 UCITS; and 4(1)(f), 44 and 48 AIFMD.
[1529] Articles 23(2)(f) MAR; 69(2)(h) MiFID II; 98(2)(l) UCITS; and 46(2)(l) AIFMD.

Therefore, it can be more generally concluded that EU financial law is overwhelmingly governed by disciplinary norms and therefore classifies as disciplinary law. Violations of EU financial law will therefore also in most situations classify as disciplinary offences under the second Engel-criterion and first Öztürk-criterion the purposes of the Engel-test with the key exceptions of violations of the prohibitions against market abuse and Article 9 CRD as these are governed by general and criminal norms. However, violations thereof will trigger the criminal guarantees if the second Engel-criterion by the second Öztürk-criterion and/or the third Engel-criterion also will be satisfied. This mainly requires that the nature and purpose of the MAR- and CRD-sanctions are punitive and deterrent. Although, the market abuse regime provides a formal distinction between administrative and criminal liability on the basis of the criteria such as 'seriousness' and 'intent', this formal distinction will prove to be illusory and redundant under the Engel-test, if the MAR-sanctions qualifies punitive and deterrent.[1530] The fact that the underlying and governing norm violated is regulated not only by instruments of administrative law, but also of criminal law, exactly points out that the underlying and governing norm violated essentially qualify and classify as a general and criminal norm. Therefore, as an overwhelming main rule, the sanction regimes found under EU financial law primarily classifies as European or national *disciplinary* sanction regimes.

III. THE IMPOSITION OF SANCTIONS

1. Effectiveness, proportionality and dissuasiveness

It is general rule under EU (financial) law that all sanctions, irrespective of whether the sanctions classify as administrative or criminal sanctions, that they are required to be effective, proportionate and dissuasive,[1531] although there appears to be certain exceptions.[1532] The main

[1530] See the conclusions in Chapters 3 and 7.

[1531] EU banking law: SSMR, Recital 36 and Article 18(3) and 18(5), first subparagraph; CRD, Recital 35 and Article 65(1), third sentence; BRRD, Recital 126 and Article 110(1), third sentence; AMLD IV, Recital 59 and Article 58(1); AMLD-CRIM, Article 5(1) and Article 8. EU securities law: BR, Recital 56 and Article 42(1), second subparagraph; MiFID II, Recital 141 and Article 70(1), first subparagraph; PR, Recital 74 and Article 38(1), first subparagraph; UCITS, Article 99(1), third subparagraph and Article 99c(1); IFD, Recital 18 and Article 18(1), third subparagraph; CRAR, Recital 66 and Article 36, first subparagraph; EMIR, Recital 46 and Article 12, 22(3), second subparagraph; MAD-CRIM, Recital 18 and Article 7(1) and Article 9.

[1532] First, periodic penalty payments shall generally be effective and proportionate, but not dissuasive, cf. SSMFR, Article 129(2); SRMR, Recital 95 and Article 39(2); CRAR, Article 36(b)(2); and EMIR, Articles 25k(2) and 66(2). Second, the fines provided for in the SRMR are not explicitly required to be effective, cf. SRMR, Article 38 and Recital 95. Third, there is no explicit legal basis under MAR that requires that the sanctions must be effective, proportionate and dissuasive. However, Recital 18 of MAD-CRIM expresses: "In order to ensure effective implementation of the European policy for ensuring the integrity of the financial markets set out in [MAR], Member States should extend liability for the offences provided for in [MAD-CRIM] to legal persons through the imposition of criminal or non-criminal sanctions or other measures which are effective, proportionate and dissuasive, for example those provided for in [MAR]. [...]."

problem is nevertheless that there are no legal provisions or recitals under EU financial law that defines the three concepts. This has already been recognised by the EU Commission and the CJEU.[1533] Therefore, at one hand, to require that sanctions are effective, proportionate and dissuasive without providing the necessary definitions of these concepts at the other, makes it very difficult to determine whether the sanctions may satisfy these requirements. Hence, the purpose of Section III(1) is to explore the possible definitions of the three concepts by taking a deeper look into the sources already discussed in the various Chapters of this dissertation, including: *(i)* the EU Communication on Sanction Regimes and its accompanying Impact Assessment; *(ii)* the theories on the justification of punishment; *(iii)* the international standards and principles on sanctioning. A decisive view may or should nevertheless be given to other relevant sources, including: *(iv)* EU law in general, and particularly the CJEU's case law on the enforcement of EU competition law as it seems to be the most developed area of EU law with respect to the enforcement and sanctioning for violations;[1534] and *(v)* the ECtHR's case law applying the Engel-test, which also attach a certain specific meaning to these concepts, particular 'dissuasiveness'. In addition, *(vi)* certain recitals from the legislative and legal acts of EU financial law also sheds some light on these three concepts.[1535] The items referred to in the brackets, ((i)-(v)), comprise the methodological approach for the analysis and discussion of each of the concepts in order to determine the content of the three requirements.

A. The three concepts and requirements

(I) Sanctions must be effective

The EU Communication on Sanction Regimes and its accompanying Impact Assessment *(i)* do generally not have an identical terminology and definitions of the three requirements. With regard to the concept of 'effectiveness', sanctions may be considered (I) 'effective':

[1533] In the EU Communication on Sanction Regimes and its accompanying Impact Assessment it is held: "it is hardly possible to formulate generally applicable criteria for judging the requirements of effectiveness, proportionality and dissuasiveness. This has to be assessed in the light of the nature of different infringements and the specifics of the sectors concerned," cf. IASR, p. 11. In the Case C-45/08 – Spector Photo Group, ECLI:EU:C:2009:806, the CJEU also stated that the relevant EU Directive, MAD I, "does not establish any criteria for assessing how effective, proportionate and dissuasive a sanction is. It is for national legislation to define those criteria," cf. para. 71. The CJEU nevertheless also noted "that the 38th recital in the preamble to Directive 2003/6 states that sanctions should be sufficiently dissuasive and proportionate to the gravity of the infringement and to the gains realised and should be consistently applied," cf. para. 72.

[1534] Veil (n 106) 176–177; Marco Ventoruzzo and Sebastian Mock, *Market Abuse Regulation: Commentary and Annotated Guide* (1st edition., Oxford University Press 2017) 494–497. These sources also makes comparisons with EU competition law and the enforcement and sanctions for the violations thereof. For instances, Veil also argues that certain "regulatory concepts stems from European competition law," cf. p. 176, para. 20.

[1535] Recitals 36 and 38 CRD; 71 and 73 MAR; 56-71 and 61 BR; 142 and 146 MiFID II; 74-75 PR; and 16 MAD-CRIM. To be discussed in the following.

(I)(1) "when they are capable of ensuring compliance with EU law."[1536]

(I)(2) "to be effective, sanctions must achieve the aim of the legislative act."[1537]

(I)(3) "when they are capable of ensuring compliance and consequently effective application of EU law."[1538]

The similarity between the first and third definition is obvious, but their inconsistency with the second definition nevertheless stands out. The third definition is similar to the first definition because they both considers sanctions to be effective, when they are capable of ensuring compliance with laws. Therefore, the purpose of ensuring compliance with laws seems to be the main purpose of the effectiveness requirement, because the third definition specifies the subsequent consequence of compliance: that EU (financial) law will be applied effectively. This leaves out the second definition as quite different, and it gives rise to at least two questions. What is meant by the aim of the legislative act? And are sanctions as a legal tool suitable or even capable to achieve or pursue the aims given by a particular legislative act?

An initial attempt to provide for a consistent and coherent interpretation might suggest that to "achieve the aim of the legislative act" is a consequence of the "effective application of EU law," because only where the law is applied effectively, the aim of the law can be achieved. This interpretation suggests that the second definition is a definition of laws' effectiveness rather than sanctions' effectiveness, and it has some merit, because it would make the second definition consistent with the two others: *when sanctions are capable of ensuring compliance, the laws will be applied effectively, and the laws can achieve their aims*. This would reserve the concept of 'effectiveness' to mean, as well to require, that the sanctions must be capable of ensuring compliance. However, how do sanctions ensure compliance with laws?

Of the theories on punishment *(ii)*, the retribution and deterrence theories are the two main theories, which comes closest to explain what it means for sanctions to ensure compliance. As argued in Chapter 2, Aquinas generally considers legal coercion necessary to install virtue and for punishment to partake therein by maintaining good and orderly justice, and thereby upholding the common good of justice and peace. In this respect, it is worth quoting Aquinas again on the relationship between human laws and punishment:

> "But since some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by *force* and *fear*, in order that, at least, they might *desist* from evil-doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and

[1536] EUCSR, p. 4.
[1537] IASR p. 4.
[1538] IASR, p. 11.

> thus become virtuous. *Now this kind of training, which compels through fear of punishment, is the discipline of laws*."[1539]

Aquinas main idea is that by 'force' and 'fear of punishment' we compel offenders to change their behaviour into virtues conduct, and this is necessary, as well as natural to human beings, because, as he argues, whatever rises up against the common good and orderly justice is put down by that order or by principle of that order, and such "repression is punishment."[1540] Although these words are old, the underlying ideas and principles on which they are based seems to provide some fresh light on the function of sanctions, including their function to ensure compliance. While the concept of 'law' generally is related to sources of 'force' (legal coercion and repression) as reflected in the binding nature of laws, the concept of 'punishment' is related to sources of both 'force' and 'fear'. Although Aquinas nowhere clarifies this interpretation, his punishment philosophy implies such a view that the training and disciplining happens through legal means that provides for force and fear. This is, perhaps, for some very logical and obvious (psychological) reasons, which might explain the close relationship between force and fear. If punishment only is considered a 'threat' without never actually being realised, as applied and imposed, and thereby en*forced*, the fear of punishment would disappear as an empty threat not worthy for any offender to consider and fear. Hence, to consider punishment as to consist of both elements, of force and fear, seems to be a reasonable view, which the deterrence theory also would agree with, particularly in its distinction between specific and general deterrence. This view is also implied by the EU Commission:

> Sanctions are an important part of any regulatory system. They provide a deterrent and act as a catalyst to ensure that EU legislation is complied with. In the financial sector, efficient sanctioning regimes are a key element of a supervisory regime which should ensure sound and stable financial markets and ultimately, the protection of consumers and investors."[1541]

Hence, the importance of sanctions is not only due to the fact that they provide a deterrent and thereby act as catalyst (fear of punishment), but also because they are applied and imposed:[1542] how else would the sanctioning (supervisory) authorities ensure sound and stable financial markets as well as protect consumers and investors? – Any fear of punishment therefore depends upon punishment actually being imposed and enforced.

[1539] ST, Vol. II, Pt. I-II, Q95, a1. Italics added.
[1540] ST, Vol. II, Pt. I-II, Q87, a1.
[1541] EUCSR, p. 4.
[1542] In Case C-45/08 – Spector Photo Group (ECLI:EU:C:2009:806), the CJEU referred to point 55 of the Opinion by the Advocate General (ECLI:EU:C:2009:534), of which the first two sentences provide: "Only a prohibition on insider dealing which *is effectively enforceable in practice* can guarantee the functioning of the financial markets in the best way possible. Only if the prohibition on insider dealing allows infringements to be *effectively sanctioned does it prove to be powerful and encourage compliance with the rules by all market actors on a lasting basis*," cf. para. 37. Italics added.

This suggests that the first and third definition of effectiveness, which requires that sanctions are capable to ensure compliance, may be read as to include a requirement for sanctions to be capable of actually *compelling* compliance. If this view is correct, and the sanctions proves capable of compelling compliance with EU financial law, the sanctions may thereby also be considered as an even more fundamental source of coercion capable to attain the aim of the particular legislative act, for instance, that the financial markets are sound and stable and that the consumers and investors are protected. However, the latter is rather a function of the prescriptions of the particular legislative act than a function of sanctions' effectiveness. If the financial markets still turns out to be unsound and unstable after sanctions have compelled compliance, then the failure is not due to the force of sanctions. As they have just ensured compliance, the failure must instead be considered due to the prescribed requirements of the legislative acts, because by complying with these acts, the acts have proved insufficient to attain the aims of the legislative acts. Such an interpretation, which split the tasks of punishment to ensure and compel compliance, and of laws to pursue and achieve their ends,[1543] seems not only to be more intuitive, but is also implicit to most theories on punishment. Again, it would also provide consistency and coherency between the three definitions on effectiveness, because the second definition becomes an aim for laws rather than for sanctions.

Similarly to the close connection between 'force' and 'fear', there is also a close connection between the concepts of 'effectiveness' and 'dissuasiveness'. Of the international standards and principles of sanctioning *(iii)*, only the FATF Recommendations, by Paragraph 26 of the FATF Methodology, reflects on 'effectiveness':

> "In the effectiveness assessment, assessors should consider whether the sanctions applied in practice are effective at ensuring future compliance by the sanctioned institution; and dissuasive of non-compliance by others."[1544]

This part of Paragraph 26 employs a terminology that is aligned with the deterrence theory and the concept of dissuasiveness, because the criminal and administrative sanctions' capability to ensure "future compliance by the sanctioned institution" is an expression of the concept of specific deterrence, and "non-compliance by others" is an expression of general deterrence. The aim for future compliance by the sanctioned institution and compliance by others are also an expression of fear of punishment and an expression of force, because, what determines whether the sanctions are effective at ensuring future compliance by the sanctioned

[1543] Aquinas also writes, for instance, that: "Whatever is for an end should be proportionate to that end. Now the end of law is the common good [...]. Hence, human laws should be proportionate to the common good. Now the common good comprises many things. Wherefore law should take account of many things, [...]." Cf. ST, Vol. II, Pt. I-II, Q96, a1.
[1544] FATF Methodology, para. 26, p. 10.

institution is a function of how sanctions are applied in practice. Hence, Paragraph 26 also relies upon the idea that sanctions are sources of force, thereby having a compelling nature, which makes them capable of ensuring future compliance by a specific offender. As a function thereof, sanctions also becomes a source of fear, which makes not only the specific offender fear fresh (additional) sanctions, if the behaviour is not changed, but also for others to fear similar consequences, as the sanctions have exemplified in the sanctioning of the specific offender what punishment they will suffer, if they were to engage in a similar behaviour. In this way, sanctions will be capable of ensuring compliance by others. Thus, Paragraph 26, in light of the retribution and deterrence theories, also consider sanctions as effective when they are capable of *compelling* compliance, whereby they also *ensure* compliance.

However, other sources may still disprove this interpretation. The hope is nevertheless that EU law in general *(iv)* will provide a more definite answer. Regarding 'effectiveness', as a sanctioning principle under EU competition law, Frese makes it clear that different obligations follows from the principle, including, first of all, that the EU Member States are required to terminate and penalise infringements of Articles 101-102 TFEU effectively, meaning both that the national legislators must provide for effective sanctioning powers and that the national competent authorities must use these powers effectively. Then, he argues:

> "What constitutes an effective sanction for the purposes of Article 4(3) TEU depends on the type of anti-competitive behaviour and the circumstances of the case. It is suggested that persisting infringements, whether as a consequence of the undertaking's behaviour or its very structure, *require a remedy that effectively terminates the infringement*. How this is achieved seems less important. A cease-and-desist order together with a sufficiently severe penalty payment and attached to a well-reasoned decision establishing the infringements may be as effective as an order stating positively what commercial changes are to be made."[1545]

Abstracting away from the particularities of EU competition law, the principle referred to by Frese considers effectiveness as a source of force by compelling compliance until the particular infringement has terminated. Hence, only a sanction that effectively terminates the particular infringement(s) can be considered effective, and thereby capable of ensuring compliance. According to Frese, it matters less for the effectiveness requirement how compliance is achieved,[1546] a discretion granted to the relevant sanctioning authority, which might also suggest that there can be an obligation for the relevant sanctioning authority to apply more than one sanction. In this way, the 'effectiveness requirement' is result-oriented as the sanctions must be applied and imposed in order to terminate the infringements.

[1545] Michael J Frese, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing 2014) 102. Italics added.
[1546] However, this is a crucial matter for the proportionality requirement.

As neither the ECtHR under the Engel-test *(v)*,[1547] nor any recitals of the from the legislative and legal acts of EU financial law *(vi),*[1548] really reflects upon the effectiveness concept, we may more generally conclude that the concept of 'effectiveness' requires that sanctions are capable to compel compliance and thereby being able to terminate the infringements. In this way, sanctions can be considered capable to ensure compliance, and for the laws to achieve their ends. Thus, certain provisions also requires that sanctions must be *enforceable*.[1549]

(II) Sanctions must be dissuasive

Regarding the concept of dissuasiveness, *(i)* the EU Communication on Sanctioning Regimes and its accompanying Impact Assessment do also not have fully identical definitions of 'dissuasiveness'. The documents consider sanctions to be (II) 'dissuasive':

> (II)(1) - "when they are sufficiently serious to deter the authors of violations from repeating the same offence, and other potential offenders from committing such violations."[1550]
>
> (II)(2) - "to be dissuasive, sanctions must deter future infringements."[1551]
>
> (II)(3) - "when they prevent authors of potential violations from committing or from repeating those violations."[1552]

A first observation that needs to be made is that the term 'deter' (deterrence) is used synonymously with the term 'dissuasive' (dissuasiveness), which in light of the third definition also includes the term 'prevent' (prevention). This terminology is in line with the deterrence theory, which also is referred to as the negative prevention theory in Chapter 2.[1553] In light of the deterrence theory *(ii)*, the first (II)(1) and third II)(3) definitions consider sanctions to be dissuasive when they satisfies the requirements of both specific and general deterrence. Although, the second definition (II)(2) seems mostly to focus at general deterrence, as there is no direct link to any specific offender, the open-endedness of (II)(2) does not preclude a reading, which includes specific deterrence. Therefore, in light of the deterrence theory, sanctions are considered dissuasive, when the sanctions aim to prevent the specific offender from repeating

[1547] The effectiveness requirement has never been questioned by the ECtHR under the Engel-test.
[1548] The recitals from the legislative and legal acts of EU financial law do not shed any light on the concept of effectiveness, because the terms 'effective' or 'effectiveness' are often used in so many different ways and contexts that from their connections and associations it is hardly possible, even less meaningful, to derive any fixed and definite conclusion on the concept. Its content clearly depends on the context in which it is used, and it very often focus on laws' effectiveness, the effects or efficiencies of laws. Recital 5 of ECBSR I seems nevertheless to point in the same direction as the conclusion.
[1549] Articles 41(3) SRMR; 36d(3) CRAR; and 25m(4) and 68(4) EMIR.
[1550] EUCSR, p. 4.
[1551] IASR, p. 4.
[1552] IASR, p. 11.
[1553] Chapter 2, Section II(1)(B)(I).

the violation and other potential offenders from committing any fresh violations. In their complementary relationship to the concept of effectiveness, specific deterrence not only requires that sanctions compel the specific offender to compliance (force), it also aims at installing fear in the specific offender in order to deter and prevent the offender from repeating the violation (fear). And, through exemplified sanctioning of the specific offender (force), fear is installed in any other potential offender in order to deter them from committing similar and fresh violations (fear). Therefore, only through means that applies force and fear may sanctions fulfil their requirements of being effective and dissuasive. In the light thereof, the concept of effectiveness is closer related to means of force that compels compliance, while dissuasiveness is closer related to means that (also) instal fear and deter. Hence, the relationship between the two concepts and requirements is strongly interdependent.

The question then is how far that conclusion holds in view of the other sources? With respect to the international standards and principles on sanctioning *(iii)*, then what has already been argued with respect to the concept of effectiveness (I) in its relationship to the concept of dissuasiveness equally applies here (II). Nevertheless, a few additional observations must be made. The FATF Recommendations first of all requires that all sanctions, irrespective of whether they classify as disciplinary, civil, administrative or criminal sanctions, must be effective, proportionate and dissuasive. Second, with respect to 'dissuasiveness', Paragraph 26 of the FATF Methodology only adheres to general deterrence by requiring that the sanctions are "dissuasive of non-compliance by others."[1554] Although Paragraph 26 only focus on general deterrence, it has just been argued ((ii)) that general deterrence is often a function of specific deterrence through exemplified sentencing and the severity of sanctions, and as the effectiveness assessment must consider whether the sanctions on the books as well as applied in practice are effective, there seems to be no intention in Paragraph 26 to preclude specific deterrence from the concept and requirement of dissuasiveness. Instead, the converse applies.

That dissuasive sanctions must be understood as a requirement that refers to both specific and general deterrence seems also to be recognised under EU law in general *(iv)*. In the area of EU competition law, the CJEU has expressly stated, in the Case C-289/04 P – Showa Denko v. Commission, that "[it] its settled case law [...] that the fines imposed for infringements of Article 81 EC and laid down in Article 15(2) of Regulation No 17 *are designed to deter both the undertakings in question and other operators from infringing the rules of*

[1554] Chapter 4, Section III(3)(B).

Community competition law in the future."[1555] In the light thereof, Frese has also argued more generally for EU competition law that the dissuasiveness or deterrence principle contains a requirement for both specific and general deterrence.[1556] The ECB has also recognised in its "Guide to the method of setting administrative pecuniary penalties pursuant to Article 18(1) and (7) of Council Regulation (EU) No 1024/2013,"[1557] referred to as the 'ECB Fine Guide', that the administrative penalties imposed by the ECB must comply with both specific and general deterrence.[1558] Therefore, all uncertainties seems to be removed with respect to whether dissuasiveness contain requirements for both specific and general deterrence. Furthermore, the sanctioning factors, as discussed in Section III(2), does not only provide for aggravating and mitigating factors for satisfying the proportionality requirement, but does also contain factors that are relevant for satisfying the requirement for deterrence. Furthermore, the rules on the publication of sanctions is, primarily, in line with general deterrence.

The concept of dissuasiveness and deterrence pursuant to the ECtHR's case law and the Engel-test *(v)* is primarily an inference from an assessment that considers the sanction in question as punitive, and therefore to qualify as punishment. The ECtHR has in a number of occasions expressed that punishment and deterrence are the twin-objectives that customarily characterises criminal sanctions.[1559] Others have acknowledged and applied that view.[1560] The problem with that view is nevertheless the logical inference whereby sanctions that qualifies as being punitive also qualifies as being dissuasive, and therefore results in a conclusion that classifies the sanctions as criminal sanctions. In fact, there seems to be no case before the

[1555] Case C-289/04 P – Showa Denko v. EC Commission (ECLI:EU:C:2006:431), para. 16. Italics added. Article 81 EC is now Article 101 TFEU and Article 15(2) of Regulation No 17 (Council Regulation (EEC) No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 204-211) is now Article 23(2) of Council Regulation (EC) No 1/2003 of December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25, referred to as 'Regulation (EC) No 1/2003'.

[1556] Frese (n 161) 105. Frese argues: "This requirement, which could be referred to either as the principle of dissuasiveness or the principle of deterrence, also applies to infringements of EU competition law. Member States should ensure that undertakings are dissuaded from committing infringements of Articles 101 and 102 TFEU. *Sanctions that are not able to change the undertakings' intent or to induce them to take the requisite precautionary measures do not dissuade. Logically, the requirement to provide for dissuasive sanctions applies solely to infringements committed intentionally or negligently*. Undertakings acting contrary to EU competition law in good faith may be corrected by means of a sanction, but simply cannot be dissuaded. The Court of Justice has insisted that infringements that are harmful both to competition and to the attainment of the EU's greater internal market objectives ([e.g.] market-sharing and boycotts) especially require a dissuasive sanction." Italics added. Although the enforcement of EU competition law is different from the enforcement of EU financial law, there seems to be no obvious issues relating to inferences from EU competition law to EU financial law, so long as the considerations relates to the general aspect of the concepts. At p. 106, Frese also argues that the "General Court also seems to take account of the issue of 'marginal deterrence'." The extent to which considerations relating to marginal deterrence will apply under EU financial law nevertheless remains an open question, except from those inferences which can be made from a comparison of the legal provisions with respect to the severity of the sanctions.

[1557] Link: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.guidetothemethodofsettingadministrativepecuniarypenalties_202103~400cbafa55.en.pdf.

[1558] ECB Fine Guide, point. 7.

[1559] Chapter 3, Section II(2)(B)(II)(2).

[1560] Andre Klip, *European Criminal Law* (3 edition, Intersentia 2016) 2.

ECtHR where the ECtHR first has determined that the sanctions are dissuasive without also considering the sanctions punitive.[1561] As it is a general requirement under EU financial law that the administrative EU financial sanctions must be dissuasive, then a strict application of such rule of inference would entail that the administrative sanctions and measures also must be considered to classify as criminal sanctions. However, as argued in Chapter 3, as well in Section II above, the Engel-test separates between sanctions imposed on the basis of violations of provisions that are governed by criminal and disciplinary norms. Where sanctions have been imposed on the basis of a violation of provisions governed by disciplinary norms, the ECtHR has recognised that the fines in question were punitive, but the ECtHR remains reluctant to qualify the fines as dissuasive, so-called: "disciplinary fines."[1562] Therefore, within the Engel-test, this is less of a problem, because the second Engel-criterion will by the first Öztürk-criterion overrule the legal requirement for sanctions to be dissuasive, if the sanctions are not so severe that the third Engel-criterion will be satisfied. This will be discussed in more detail in Chapter 7.

Finally, considering the recitals from the legislative and legal acts of EU financial law *(vi)* and their views and objectives, a first observation notes that number of recitals refer to notions such as: 'deterrent effect',[1563] 'deterrent sanction regimes',[1564] 'dissuasive effect',[1565] and 'dissuasiveness'.[1566] The first two concepts relating to 'deterrence' provides for a broader orientation towards policy objectives that promotes "equal, strong and deterrent sanctioning regimes,"[1567] by seeking to establishes a common and converging approach to sanctions in the NFSR, to preserve market integrity and to enhance sanctions' "deterrent effect".[1568] The third concept of 'dissuasive effect' relates to recitals that are more concerned with rules on the publication of sanctions and therefore discussed in more detail in Section IV.[1569] Hence, these recitals do not exactly concern the meaning of the concept of dissuasiveness (deterrence). However, the fourth group of recitals relates to the concept of 'dissuasiveness'. In this regard, Recitals 36 CRD and 142 MiFID II provides two sanctioning principles for the imposition of

[1561] The ECtHR has nevertheless considered certain preventive measures to be dissuasive, but without qualifying them as punitive. See further Chapter 3, Section III(1)(C)(II).
[1562] Chapter 3, Section III(1)(A)(II)(1)(a)(2)).
[1563] Recitals 71 MAR; 56 BR; and 74 PR.
[1564] Recitals 70 MAR and 3 MAD-CRIM.
[1565] Recitals 38 CRD; 146 MiFID II; and 73 MAR.
[1566] Recitals 36 CRD; 142 MiFID II; and Recital 16 MAD-CRIM.
[1567] Recitals 70 MAR and 3 MAD-CRIM
[1568] Recitals 71 MAR; 56 BR; and 74 PR.
[1569] Recitals 38 CRD; 73 MAR; and 146 MiFID II.

pecuniary sanctions, referred to as 'administrative pecuniary sanctions' in the CRD and 'administrative fines' in MiFID II.[1570] CRD, Recital 36, here exemplifies:

> "(36) In particular, competent authorities should be empowered to impose administrative pecuniary penalties which are sufficiently high to offset the benefits that can be expected *and* to be dissuasive even to larger institutions and their managers."[1571]

Concurrently, Recital 36 CRD and 142 MiFID II provides for two sanctioning principles that, at least, are applicable to pecuniary sanctions. The first principle is the *'offsetting principle'*, which contains an obligation to set the amount of the fine so high that it offsets the expected benefits, determined as the pecuniary profits obtained or losses avoided due to the commission of the violation(s). Therefore, the offsetting principle pursues the purpose of restoration by seeking to re-establish the status quo of the legal situation before the commission of the violation(s).[1572] The idea is in line with Aquinas' principle of restitution by which compensatory and restorative measures are considered fundamental and basic to the establishment of commutative justice.[1573] This idea is also in line with the notion of reparation and compensation of the damages caused by the violation(s) as well as the very common expression in criminal law whereby sanctions have to ensure that crimes do not pay (-off). Therefore, the offsetting principle also fully accords with the hybrid conception of a criminal sanction, as criminal sanctions may pursue the complementary objectives of reparation and prevention on the one side, together with punishment and deterrence on the other side. Hence, the offsetting-principle accords in full with the governing objectives of the first of two essential and constitutive building-blocks for the hybrid concept of criminal sanctions, whereby pecuniary sanctions may pursue the purposes of reparation and compensation.[1574] Hence, the offsetting principle requires that the pecuniary amount of the fine must annul the (expected) benefits.

Recitals 36 and 142 *also* makes it clear that the amount of the fine should be higher than the amount equal to the mere restoration in order for the fine to be dissuasive. Therefore, in addition to the offsetting principle, there is an obligation to impose administrative pecuniary penalties and fines that are dissuasive, as well as for larger institutions and their managers. Hence, a fine would not be dissuasive, neither would such a fine satisfy the obligation from Recitals 36 and 142, if the amount imposed was equal to the benefit derived from the violations committed, thereby only satisfying the offsetting principle. In fact, such a pecuniary amount

[1570] The nature of these sanctions is discussed more thoroughly in Chapter 7.
[1571] Recitals 36 CRD. Italics added. See also MiFID II, Recital 142.
[1572] Chapter 3, Section II(2)(B)(II)(2)(a)(3)).
[1573] Chapter 2, Sections II(1)(A)(I) and III.
[1574] Chapter 3, Section II(2)(B)(II)(2)(a)(3)).

would not even comply with the definition of a 'fine', because the offsetting principle is equal to no more than a reparatory or compensatory repayment obligation. Therefore, Recitals 36 and 142 implies that administrative pecuniary sanctions and fines must consists of a surcharge element above the level of restoration.[1575] Hence, the dissuasiveness requirement contained in Recitals 36 and 142 is a call for the *'punitive principle'*. In light of the Engel-test and the constitutional concept of sanctions, this cannot be surprising, because a fine would not qualify as a fine, if the pecuniary sanction only amounted to compensation and reparation. It is only by the virtue of punitive element that a pecuniary sanctions will result in a deprivation of the offender's property, because the mere return of any benefits obtained from the violation is a return of benefits, which the offender never was legally entitled to. What the offender (or any other person) is not entitled to or does not own as property, the offender cannot be deprived. Only when the offender will be subject to a deprivation, the offender will be subject to a punitive and deterrent sanction. In this way, the punitive principle also fully accords with the governing objectives of the second of two essential and constitutive building-blocks for the hybrid concept of criminal sanctions, whereby pecuniary sanctions may pursue the purposes of punishment and deterrence.[1576] Therefore, it follows more generally that the offsetting and punitive principles are compatible with the hybrid conception of criminal sanctions.[1577]

From a stricto sensu perspective it must be noted that the offsetting and punitive principles only are prescribed for the administrative pecuniary penalties and administrative fines contained in the CRD and MiFID II.[1578] However, the offsetting and punitive principles are so essential and basic, and as they are in accordance with the general theory on fines, a restriction in their application to the CRD and MiFID II is not valid and cannot be accepted as all fines, to qualify as a fine, must comply with the offsetting and punitive principle. Accordingly, the scope of the offsetting and punitive principles reaches beyond the administrative pecuniary penalties and fines contained in the CRD and MiFID II and is therefore one of the general

[1575] Recital 71 MAR and Recital 57 BR also refer to 'the need for the fines [or administrative pecuniary sanctions] to have deterrent effect', which also is in line with this principle.
[1576] Chapter 3, Section II(2)(B)(II)(2)(a)(3)).
[1577] Recalling from Chapter 3, Section II(2)(B)(II)(2)(a)(3)) and Section II(4), that criminal pecuniary sanctions consists of an element of compensation and/or reparation as the first constitutive building block, compatible with the offsetting and restitution principle, and an element of punishment and deterrence as the second constitutive building block.
[1578] The offsetting and punitive principle seems also to underlie the distinction between the sanctions and measures provided by Articles 4-5 of Council Regulation (EC, Euratom) No 2988/95 of December 1995 on the protection of the European Communities financial interests. OJ L 312, 23.12.1995, p. 1-4. In addition, it follows from the case law of the CJEU that, "in the area of checks and penalties for irregularities committed under Community law, the Community legislature has, by adopting Regulation No 2988/95, *laid down a series of general principles and has required that, as a general rule, all sectoral regulations comply with those principles*," cf. Case C-295/02 – Gerken, ECLI:EU:C:2004:400, para. 56, italics added. See also Case C-94/05 – Emsland-Stärke v Landwirtschaftskammer Hannover, ECLI:EU:C:2006:185, para. 50. This all suggests that the offsetting and punitive principle applies to administrative pecuniary sanctions and fines in EU law in general.

requirements to pecuniary sanctions under EU financial law. Thereby, it should also be noted that the offsetting and punitive principle under the dissuasiveness requirement further implies that the purposes of punishment and dissuasiveness hardly can be separated into two distinct purposes and requirements,[1579] which gives all of the administrative fines / pecuniary penalties / sanctions provided for in EU financial law a criminal character. Finally, the offsetting and punitive principles do not seem to be suitable principles for the application of non-pecuniary sanctions, because it is not equally evident what non-pecuniary sanctions seek to offset.[1580]

(III) Sanctions must be proportionate

The EU Communication on Sanctioning Regimes and its accompanying Impact Assessment *(i)* do also not have an identical definition of the concept of 'proportionality'. The sanctions can be considered (III) 'proportionate':

> (III)(1) "when they adequately reflect the gravity of the violation and do not go beyond what is necessary for the objectives pursued."[1581]
>
> (III)(2) "to be proportionate, they must adequately reflect the gravity, nature and extent of the loss and/or harm and must not go beyond what is necessary for the objectives pursued."[1582]
>
> (III)(3) "when they do not go beyond what is necessary for the objectives pursued and adequately reflect the gravity of the infringement."[1583]

Although different formulations, all three definitions on proportionality contains two elements that provides for a two-step proportionality test. Accordingly, the first element (1) requires that the sanctions must adequately reflect the gravity of the violation ('1EP'), including the nature and extent of the loss and/or harm caused by the violation; and the second element (2) requires that the imposed sanctions do not go beyond what is necessary for the objectives pursued ('2EP'). While the first element of the proportionality test concern issues that have a long tradition as part of the theoretical discussions of the justification for punishment, the second element has been developed in German law and is now well established as a general principle of EU law.[1584] The EU Communication on Sanction Regimes and its accompanying Impact Assessment seems to have derived the two elements of 1EP and 2EP of the

[1579] It is therefore questionable under the Engel-test, whether the ECtHR validly can uphold that disciplinary fines, which the ECtHR qualify as punitive, also not are dissuasive, despite their reluctance to do so. See Chapter 3, Section III(1)(A)(II)(2).
[1580] Compare, for instance, to Recital 16 of MAD-CRIM, which reflects upon imprisonment.
[1581] EUCSR, p. 4.
[1582] IASR p. 4.
[1583] IASR p. 11.
[1584] Paul Craig, *EU Administrative Law* (3 edition, Oxford University Press 2018) 643.

proportionality test from two CJEU-cases, Case C-356/97 – Molkereigenossenschaft Wiedergeltingen, and C-430/05 – Ntionik and Pikoulas.[1585] The problems with these definitions are nevertheless that they are not consistent with the proportionality concept provided in CJEU-cases, where the ECB has been one of the parties to the case. Neither do these definitions seems to be consistent with the developments in EU competition law. Thus, we need to consult and compare with the CJEU's case law in EU law more generally to define the proportionality concept.

First, to be consistent in our approach and methodology, we need to consult the other sources and bring them into the discussion to set the legal background. In respect of *(ii)*, it is noticeable that the first element of the proportionality test (1EP) is aligned with the retribution theory and therefore invokes that the severity of the punishment should be proportional to the gravity of the offence, thereby following the law of retribution and lex talionis principle in the way that the offender should be punished by the degree ("poetic justice") and not by the same kind of suffering, which the offender inflicted upon others, including the society more broadly ("poetic exactness").[1586] Hence, the first element of the proportionality test (1EP) provides for a standard that is in alliance with the lex talionis principle in the way that sanctions must be proportionate to the the gravity of the offence rather than the strict lex talionis principle of retaliation in kind. In respect of *(iii)*, the FATF Recommendations considers sanctions to "be applied proportionately to greater or lesser breaches of the [law] requirements."[1587], and the FATF Recommendations confirms 1EP and the view of poetic justice under (ii). Third, the ECtHR do not conduct any review on whether the sanctions imposed are proportional under Engel-test *(v)*. As for the effectiveness requirement, the reason is that the appropriateness assessment of sanctioning decisions largely falls outside the scope of Articles 6-7 and P7-4, and therefore also falls outside the scope of the Engel-test in accordance with the doctrine of margin of appreciation, unless the punishment is arbitrary.[1588] Fourth, there are no recitals under EU financial law *(vi)* that sheds any light on the concept of proportionality. Accordingly, from these sources it follows that 'proportionality in degree', for which the severity of the sanctions must adequately reflect the gravity of the violations, is the most important element (1EP) that governs the proportionality standard. Let us carry this observation with us.

[1585] Case C-356/97 – Molkereigenossenschaft Wiedergeltingen, ECLI:EU:C:2000:364, and C-430/05 – Ntionik and Pikoulas, ECLI:EU:C:2007:410, where the former case did not relate to the area of EU financial law, but to EU agricultural law, cf. EUCSR, p. 4. IASR, p. 11, fn18.
[1586] Chapter 2, Sections II(1)(A)(III) and II(1)(C)(I).
[1587] FATF Methodology, Paragraph 26. No similar definitions are provided in the 2012 BCP or 2017 IOSCO Principles.
[1588] Chapter 3, Section II.

This view seems to contrast very significantly with the case-law of the CJEU, where the ECB has been one of the parties to the case, and where the ECB has exercised its: (i) supervisory powers;[1589] (ii) power to withdraw the authorisation of a credit institution;[1590] and (iii) power to impose administrative pecuniary penalties.[1591] In all three instances, the CJEU has provided for the same identical proportionality concept without providing any explicit basis for the first element of the proportionality test (1EP). In Case T-52/16 – Crédit Mutual Arkéa v ECB, the ECB applied its supervisory powers (i), and the CJEU stated:

> "It is settled case-law that, in accordance with the principle of proportionality, which is one of the general principles of EU law, the acts adopted by EU institutions must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued [...]."[1592]

Accordingly, de lege late is and should be considered as settled, irrespective of the legal categorisation and application of the powers referred to (i)-(iii). The proportionality concept only provides for the second element of the proportionality test (2EP) but with the additional element and obligation that: *"where there is a choice between several appropriate measures, recourse must be had to the least onerous."* This proportionality concept seems also to be rather consistent with the CJEU's case-law under EU law more generally at least as it is indicated in the literature;[1593] in the context of criminal sanctions and fundamental rights, where Article 49(3) EUCFR just provides that "[the] severity of the penalties must not be disproportionate to the criminal offence,"[1594] perhaps also in respect of Article 50 EUCFR;[1595] as well in the context of administrative sanctions.[1596] The concept seems to have been derived and

[1589] See Chapter 7, Section II(2)(B)(I) and Case T-52/16 – Crédit Mutual Arkéa v ECB, ECLI:EU:2017:902; Case T-712/15 – Crédit Mutuel Arkéa v ECB, EU:T:2017:900; Case T-122/15 – Landeskreditbank Baden-Württemberg - Förderbank v ECB, ECLI:EU:T:2017:337.
[1590] See Chapter 7, Section III(2)(A)(I)(1) and Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB, ECLI:EU:T:2021:669, paras. 297-346.
[1591] See Chapter 7, Section III(1)(A)(II)(1) and (4)(b) and Case T-203/18 – VQ v ECB, ECLI:EU:T:2020:313.
[1592] Case T-52/16 – Crédit Mutual Arkéa v ECB, para. 200. See also Case T-712/15 – Crédit Mutuel Arkéa v ECB, para. 201; Case T-122/15 – Landeskreditbank Baden-Württemberg - Förderbank v ECB, para. 67; and Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB, para. 307; and Case T-203/18 – VQ v ECB, para. 61.
[1593] Craig (n 199) 643–644; Steve Peers and others, *The EU Charter of Fundamental Rights: A Commentary* (1st edition, Hart/Beck 2014) 1365–1366; Lackhoff (n 103) 126.
[1594] EUCFR, Article 49(3), and the Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) (OJ C 303, 14.12.2007, p. 17-35), p. 31. See previous footnote in respect of Peers and others, where Mitsilegas also refers to the Joined Cases C-539/10 P and C-550/10 P – Al-Aqsa, ECLI:EU:C:2012:711, para. 122. Mitsilegas also points to the Opinion of Advocate General Sharpston in Case C-396/11 – Radu, ECLI:EU:C:2013:39, delivered on 18 October 2012, ECLI:EU:C:2012:648, point 103, that the CJEU has yet to rule on the interpretation of Article 49(3) EUCFR; and to several Opinions by Advocates-General. See further pp. 1365 and 1369.
[1595] C-537/16 – Garlsson Real Estate v CONSOB, EU:C:2018:193, para. 48.
[1596] Craig (n 199) 643. Craig considers the proportionality test to consists of two elements: (1) "whether the measure in question was suitable or appropriate to achieve the desired end;" and (2) "whether it was necessary to achieve that objective, or whether the objective could have been attained by a less onerous method."

originated from the Fedesa case,[1597] from which derives the so-called "Fedesa-test."[1598] According to the Fedesa-test, when there is a choice between several appropriate measures and recourse should be had to the least onerous, the proportionality standard it provides for is whether the chosen measure are 'manifestly inappropriate or disproportionate' by taken into account the objective which the competent institution or authority is seeking to pursue.[1599]

It is nevertheless also apparent from Craig's treatment of proportionality, as well as pointed out by Frese, that the proportionality requirement serves many different masters and therefore the concept has various identities depending on where its legal basis have been provided,[1600] including whether it is provided for in the context of criminal law;[1601] it is used for challenging the legality of EU action;[1602] and/or EU Member State actions.[1603] Within this legal context, Craig has first of all pointed out that "there are cases concerned with penalties where the ECJ has applied the manifestly disproportionate test derived from *Fedesa*."[1604] He has nevertheless also shown what seems to be the main rule under EU law in general that the CJEU's case-law promotes a general tendency towards considering the proportionality standard for sanctions to require that the sanctions are "*commensurate with the seriousness of the [...]*

[1597] Case C-331/88 – Fedesa, ECLI:EU:C:1990:391.
[1598] Craig (n 199) 665. The core idea governing the Fedesa-test is that "where the Treaties explicitly or implicitly accord a broad discretion to the legislative institutions or the administration, the Courts should be wary of substituting their judgement for that of the primary decision-maker under the guise of proportionality," cf. , p. 653. Accordingly, the EU institutions and authorities enjoy a wide discretion, but nonetheless restricted by the manifestly inappropriateness standard.
[1599] Case C-331/88 – Fedesa concerned a preliminary ruling, which challenged the validity of a Council Directive that prohibited the use in livestock farming of certain substances having a hormonal action by among reasons of its inconsistency with the principle of proportionality. The applicants claimed, inter alia, that the prohibition was not necessary because consumer anxieties could be allayed simply by the dissemination of information and advice, and that the prohibition entailed excessive disadvantages, particularly considerable financial losses on the traders concerned, in relation to the alleged benefits accrued to the general interests. The CJEU denied these arguments and concluded that the importance of the objectives pursued by Community law justified even substantial negative financial consequences for certain traders, and that the principle of proportionality had not been infringed, cf. paras. 15-18. The CJEU described the so-called 'Fedesa-test' in the following way: "The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; *when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued*," cf. para. 13. Italics added. The CJEU then provided the proportionality standard of the Fedesa-test: "However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if *the measure is manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue [...]," cf. para. 14. Italics added. See also Case C-94/05 – Emsland-Stärke v Landwirtschaftskammer Hannover, paras. 48-55; and Joined Cases C-37/06 and 58/06 – Viamex Agrar Handels and Zuchtvieh-Kontor v Hauptzollamt Hamburg-Jonas, ECLI:EU:C:2008:18, paras. 37-43.
[1600] Frese (n 161) 108. For instance, the proportionality principle has an explicit legal basis or has been applied by the CJEU to conduct a review of measures having a legal basis in the TEU, Articles 4(3), 5(1), 5(4); TFEU, Articles 82-83 and 101-102; EUCFR, Articles 49(3), 52(1); and not to forget Title V, TFEU, on the "Free movement of persons, services and capital." In a number of cases, the CJEU has also found it necessary to clarify that the principle of proportionality must be observed by the Community legislature, the national legislatures, and the nation courts and authorities, cf. Joined Cases C-37/06 and 58/06 – Viamex Agrar Handels and Zuchtvieh-Kontor v Hauptzollamt Hamburg-Jonas, para. 33.
[1601] Peers and others (n 208) 1365–1371.
[1602] Craig (n 199) 642–668.
[1603] ibid 669–693.
[1604] ibid 665. Italics maintained.

breach."[1605] At the same time, Craig also pointed out for the Fedesa-test and manifestly inappropriate standard that it seems to be more suitable for testing the proportionality of (the imposition of) financial burdens on economic operators,[1606] similarly to the ECB supervisory powers.[1607] Hence, the CJEU's case law favours the first element of the proportionality test (1EP), whereby the sanctions must be proportionate to the gravity of the violation.[1608] This will be even more evident once we compare to sanctions imposed under EU competition law (below).

Perhaps one single and general proportionality concept are serving *too many masters*?[1609] – This question has quite some merit:

First, and most importantly, the applicable proportionality concept that derives from the Fedesa case and Case T-52/16 – Crédit Mutual Arkéa v ECB is *not logically consistent* with the dissuasiveness requirement. The contradiction consists in requiring the impossible that the sanctions should be dissuasive in its functions of specific and general deterrence and, at the same time, to require where there is a choice between several appropriate measures, that *recourse must be had to the least onerous one*.[1610] The problem exists, when the CJEU find this proportionality standard applicable in cases, where the ECB pursuant to Article 18(1) SSMR has exercised its power to impose administrative pecuniary penalties.[1611]

[1605] ibid. See, for instance, the case of Man Sugar, Case 181/84 – The Queen, ex parte E. D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP), ECLI:EU:C:1985:359, paras. 29-30, where the penalty "should have been significantly less severe [and] more consonant with the practical effects of such a failure," cf. para. 30. In this regard, see also Case 122/78 – Buitoni, ECLI:EU:C:1979:43; Case C-104/94 – Cereol, ECLI:EU:C:1995:313. In the Case 240/78 – Atalanta Amsterdam, ECLI:EU:C:1979:160, the CJEU held in relation to Article 5(2) that penalty must to be made commensurate with the degree of failure to implement the contractual obligations or with the seriousness of the breach of those obligations," cf. para. 15. In Case 122/78 – Buitoni, the CJEU expressed: "The fixed penalty, [...], must therefore be held to be excessively severe in relation to the objectives of administrative efficiency in the context of the system of import and export licence," cf. para. 20. See also Case 21/85 – A. Maas & Co., ECLI:EU:C:1986:449, paras. 28-29; Case C-161/96 – Südzucker Mannheim, ECLI:EU:C:1998:30, paras. 31 and 43.

[1606] Case 114/76 – Bela-Mühle, ECLI:EU:C:1977:116 (compulsory purchase of skimmed-milk powder), para. 7; Case 265/87 – Schräder, ECLI:EU:C:1989:303 (co-responsibility levy), paras. 20-25; Case – C-8/89 – Zardi, ECLI:EU:C:1990:260 (co-responsibility levy); Joined cases C-133/93, C-300/93 and C-362/93 – Crispoltoni, ECLI:EU:C:1994:364 (reduction of premium paid to a tobacco producer), paras. 37-48. However, in a number of cases, the CJEU has not applied the principles of the Fedesa-test. See, inter alia: Case 116-76 – Granaria, ECLI:EU:C:1977:117; Joined Cases 119/76 and 120/76 – Ölmühle, ECLI:EU:C:1977:118; Case C-295/94 – Hüpeden & Co., ECLI:EU:C:1996:267; Case C-296/94 – Pietsch, ECLI:EU:C:1996:268; and Case C-365/99 – Portuguese, ECLI:EU:C:2001:410.

[1607] Case T-712/15 – Crédit Mutuel Arkéa v ECB, para. 211, referring to Case C-331/88 – Fedesa, para. 24.

[1608] Joined Cases C-95/07 and C-96/07 – Ecotrade, ECLI:EU:C:2008:267, paras. 65-67; Case C-284/11 – EMS-Bulgaria, ECLI:EU:C:2012:458, paras. 67-70; and Case C-263/11 – Ainārs Rēdlihs, ECLI:EU:C:2012:497, paras. 45-55; Case 203/80 – Casati, ECLI:EU:C:1981:261, para. 27; Case C-210/91 – Commission v Greece, ECLI:EU:C:1992:525, para. 20.

[1609] See also Chapters 3 to 5 of Tridimas T, *'The General Principles of EU Law'* (2nd Edition Oxford University Press 2006).

[1610] However, this was also indirectly implied by the CJEU in the Joined Cases T-351/18 and T-584/18 – Ukrselhosprom PCF LLC and Versobank AS v ECB, para. 323.

[1611] Case T-203/18 – VQ v ECB, ECLI:EU:T:2020:313, para. 61. See also Case C-547/14 – Philip Morris Brands and Others, ECLI:EU:C:2016:325, para. 165; C-537/16 – Garlsson Real Estate v CONSOB, EU:C:2018:193, para. 48; and Joined Cases C-596/16 and C-597/16 – Puma and Zecca v CONSOB, ECLI:EU:C:2018:192, para. 43.

Second, the CJEU has stated that the principles regarding the rights of defence under EU competition law enforcement proceedings in respect of Articles 101-102 TFEU "apply, by analogy, to observance of the rights of the defence in a procedure carried out by the ECB in respect of a requirement under relevant directly applicable acts of Union law, in terms of Article 18 SSMR."[1612] Much therefore indicates that the CJEU more generally in the future will adhere to the principles governing the sanctioning and enforcement proceedings under EU competition law.[1613] This may therefore also be relevant in respect of resolving any inconsistency issues with respect to the proportionality concept for sanctions.

Third, Frese has shown in the context of EU competition law that the proportionality standard varies depending on whether the sanctions qualify as:[1614] (i) punitive sanctions, (ii) reparatory sanctions', or (iii) whether the enforcement actions taking by the EU Commission have resulted in negotiated forms of reparation.[1615] The proportionality standard varies in such a way that for punitive sanctions (i), the sanctions must comply with a proportionality standard that is consistent with both the first and second elements of proportionality (1EP) and (2EP) above. Accordingly, "the sanction must not be disproportionate for the objectives pursued and the application of a sanction must be proportionate to the gravity of the infringement."[1616]

In respect of reparatory sanctions (ii), then Frese defines 'reparatory sanctions' as: "meant to remedy the illegality rather than to punish the offender. Reparatory sanctions in the area of EU competition law regularly take the form of orders prohibiting (the continuation of) certain action or requiring certain action."[1617] Thus, there is confluence between the essential nature and purpose of reparatory sanctions in EU competition law and most of the supervisory powers in EU banking law, and in EU financial law more generally,[1618] because 'supervisory powers', like reparatory sanctions, may impose (financial) burdens on the credit institutions to either ensure or restore compliance with laws, and contrary to the 'administrative pecuniary penalties' under Article 18 SSMR and the similar administrative pecuniary sanctions or fines

[1612] Case T-576/18 – Crédit Agricole SA v ECB, para. 109.
[1613] See also Chapter 7, Section III(1)(B).
[1614] Frese (n 161) 107–113. Frese makes his argument and exemplifies by the virtue of primarily three cases: (I) Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 – *Otis*, ECLI:EU:T:2011:363; (II) Joined Cases C-241/91 P and C-242/91 P – *Magill*, ECLI:EU:C:1995:98; and (III) Case C-441/07 P – *Alrosa*, ECLI:EU:C:2010:377.
[1615] For the purposes here we will set the third distinction (iii) aside, except from the following observation. Frese defines the enforcement actions that results in negotiated forms of reparation as "commitment decisions under Article 9 of Regulation 1/2003, with which the Commission terminates an investigation without a finding of infringement but after the undertaking has given commitment to make certain changes in its commercial activities," cf. p. 111. Although there is not full confluence, negotiated forms of reparations closely resembles the 'informal supervisory measures', referred to as "operational acts [presumed that they are] manifested in a letter," cf. Lackhoff (n 97), para. 458, p. 106. See also para. 228, p. 51.
[1616] Frese (n 161) 108. Frese further exemplifies by reference to Otis, para. 384.
[1617] ibid 110. Brackets maintained.
[1618] Chapter 7, Section II(2)(C), and compare to Frese pp. 110-111.

elsewhere provided under EU financial law, they do not aim to punish.[1619] Accordingly, the nature and purposes of the supervisory powers and administrative pecuniary penalties are not identical, and the two legal categories implies a distinction between reparatory and punitive sanctions. This distinction is in line with the three general requirements to sanctions as opposed to the legal category of 'supervisory powers and measures', where the latter only are required to be effective and proportionate, but *not* dissuasive.[1620] It is also in line with the constitutional concept of sanctions, because reparatory sanctions are not punitive, thus neither deterrent, and therefore hardly can be required to be dissuasive. Hence, as there is confluence between reparatory sanctions under EU competition and supervisory powers under EU financial law, and they do not have the same nature and purposes as punitive sanctions, the comparison to EU competition law makes the argument for also distinguishing between different proportionality standards on the merits of the distinction between reparatory and punitive sanctions.

However, there is not full confluence between the proportionality standard applicable under EU competition law for reparatory sanctions and the proportionality standard laid down in Case T-52/16 – Crédit Mutual Arkéa v ECB for the ECB supervisory powers:

> "[...] the principle of proportionality means that the burdens imposed on undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely reestablishment of compliance with the rules infringed."[1621]

The only difference seems nevertheless to be that the proportionality standard for supervisory powers is the requirement that "where there is a choice between several appropriate measures, recourse must be had to the least onerous."[1622] This do also not preclude that there can be full confluence between the proportionality standards for reparatory sanctions and supervisory powers, rather the contrary, because this requirement is reasonable.[1623] In their nature and purpose to ensure or restore compliance with laws, the supervisory powers also "intervene in the activity of institutions that are necessary for the exercise of their function."[1624] Accordingly, when the ECB (or NCA) intervenes into the private sphere of a credit institution for the

[1619] Case T-203/18 – VQ v ECB, para. 66: "Moreover, the ECB is right to observe in its written submissions that the alternatives to the imposition of an administrative pecuniary penalty highlighted by the applicant, such as the exercise of the powers it derives from Article 16(2) of Regulation No 1024/2013, are irrelevant to the present complaint, since they cannot constitute appropriate measures within the meaning of the case-law cited in paragraph 61 above. *Indeed, the purpose for which those powers were conferred on the ECB is to enable it to ensure compliance with prudential requirements by credit institutions and not to punish those institutions* (see, to that effect, [Crédit mutuel Arkéa v ECB,T-712/15, para. 212])." Italics added. See further Chapter 7, Section II(2)(B).
[1620] E.g. Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank AS v ECB, para. 320.
[1621] Frese at p. 110 here quotes Magill, para. 93.
[1622] Case T-52/16 – Crédit Mutual Arkéa v ECB, para. 200.
[1623] Lackhoff (n 103) 126 and 210. See paras. 547 and 894.
[1624] CRD, Article 64(1).

purpose to ensure and restore compliance with laws, the supervisory power chosen by the ECB should also be least burdensome of those deemed appropriate to restore compliance in order to protect the private autonomy of the credit institution. Therefore, the proportionality standard functions as a requirement for "minimum reparation," and do not bring a legitimate mandate for a "maximum reparation," whereby the ECB seeks to optimise the legal and financial position of the credit institution in question towards some gold-standard that fine-tunes its legal and financial position for what the ECB predicts to be the future. Such an intervention contravenes fundamentally with the private autonomy of the credit institution and the discretionary powers that belongs to the management board. The (maximum) reparation also lose it is character as a reparation and rather qualifies as an optimisation. Therefore, the application of supervisory powers for fine-tuning- and optimisation-purposes rather than reparatory purposes manifests as a misuse of supervisory powers and functions as a punishment.[1625]

Furthermore, when a supervisory power as a reparatory sanction has been used for purposes of punishment and deterrence, or when a penalty in the form of a fine has been used for the purpose of restoring compliance, it should be evident that both situations will be a disproportionate, arbitrary and rather manifestly inappropriate used of powers. For instance, where an infringement of the capital requirements under EU banking law is remedied with a liquidity measure rather than capital measure, without there being any meaningful prudential link between the two, such application of a liquidity measure for a non-compliance with the capital requirements would be a disproportionate and manifestly inappropriate use of a supervisory power.[1626] The appropriateness standard carries such a logic and principle, and it is governed by a view towards the *very nature of the infringements* and therefore proportionality *in kind*, because the nature of the violation, i.e. non-compliance with the capital requirements, calls first and foremost for a reparation by the use of capital measures rather than liquidity measures or

[1625] See Chapter 7, Section II(2)(B)(I), and Case T-52/16 – Crédit Mutual Arkéa v ECB, para. 210. In that case, the CJEU argued that when the applicant submits that the level of CET 1 capital imposed is in the nature of a covert penalty, the applicant was essentially claiming the application of the capital add-on power in Article 16(2)(a) SSMR result in a 'misuse of powers' understood in accordance with the settled case-law on this concept (see references in para. 210), where an administrative authority has used its powers for a purpose other than that for which were conferred on it. Accordingly, a "decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose" (para. 210). See also Case T-712/15 – Crédit Mutuel Arkéa v ECB, para. 213, where the CJEU stated that the applicant has not put forward "objective, relevant and consistent evidence, [...], to show that its level of capital was determined in such a way as to punish it." See also Case T-203/18 – VQ v ECB, para. 66; Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB, paras. 205-213 and 297-304; and Case C-52/17 – VTB Bank, ECLI:EU:C:2018:648.

[1626] For instance: (I) where a prudential assessment has determined that a credit institution does not hold sufficient capital in order to cover the risks it is subject to, the appropriate supervisory power (although depending on the particular case) would very likely be to require the credit institution to hold (additional) own funds pursuant to Articles 104(1)(a)/16(2)(a) CRD/SSMR. This is in accordance with the principle of proportionality in kind.

any other measure that is ineffective in terminating the particular kind of violation. In such situations, the chosen measures are manifestly inappropriate and functions as a punishment.

Therefore, and although the CJEU has settled which proportionality concept that are applicable under EU banking law for the application of supervisory powers, the withdrawal power, and the administrative pecuniary penalties, the inconsistency with the dissuasiveness requirements requires us to provide for a general distinction in the construction of the proportionality concept between reparatory and punitive sanctions, as governed by the two notions of proportionality in kind *(poetic exactness)* and in degree *(poetic justice)*, and in the conclusion below to suggest new definitions on the basis of the comparison with EU competition law. Nevertheless, irrespective of the logical inconsistency, there seems to be a common agreement in the literature, as evidenced in the case-law of the CJEU more generally, that the applicable proportionality concept provides for a strict (narrow) proportionality requirement to be satisfied.[1627] Finally, whether there in reality is any real and substantive differences between the different proportionality standards seems very questionable.[1628] At least for punitive sanctions, and fines in particular, the essential purpose and function of proportionality concept and requirement is to determine whether the sanctions provided or imposed are '*excessive*'.[1629] For that reason, the proportionality concept is often also used under EU competition law to challenge the severity of the fines imposed be way of seeking a reduction, in particular where the fines imposed have involved large sums of money.[1630]

B. Conclusive remarks and new definitions

[1627] Craig (n 199) 643–644; Peers and others (n 208) 1365–1366; Lackhoff (n 103) 126.
[1628] In particular, as the CJEU has found no problem in adhering to all three proportionality standards in the same case. See further: Case C-94/05 – Emsland-Stärke v Landwirtschaftskammer Hannover, paras. 48 and 56 (i), paras. 53 and 58 (ii), and paras 54 (iii); Case C-354/95 – National Farmers' Union, ECLI:EU:C:1997:379, paras. 49-55.
[1629] Craig (n 199) 665. Even in the Joined Cases C-37/06 and 58/06 – Viamex, where the CJEU applied the Fedesa-test, the CJEU has also stated that the judicial review aims to verify whether "the measure in question is not vitiated by any manifest error or misuse of powers and that the authority concerned *has not manifestly exceeded the limits of its discretionary power*," cf. para. 34. Italics added. See also Case C-189/01 – Jippes and Others, (ECLI:EU:C:2001:420), para. 80; and Case 122/78 – Buitoni, para. 20. See also Tridimas (note 218) pp. 169-173 and 234-238.
[1630] ibid 667. For instance, see also the following cases: Case T-59/99 – Ventouris Group, ECLI:EU:T:2003:334; Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P – Limburgse Vinyl, ECLI:EU:C:2002:582; Case T-224/00 – Archer Daniels, ECLI:EU:T:2003:195; Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P – Aalborg Portland, ECLI:EU:C:2004:6; Case C-359/01 P – British Sugar, ECLI:EU:C:2004:255; Joined cases T-101/05 and T-111/05 – BASF and UCB, ECLI:EU:T:2007:380; Case C-3/06 P – Group Danone, ECLI:EU:C:2007:88; Case T-18/05 – IMI, ECLI:EU:T:2010:202; Case C-411/15 P – Timab Industries, ECLI:EU:C:2017:11.

On the basis of the discussion above, the only legal definition provided by the CJEU was for the concept of proportionality, which requires that the (i) supervisory powers, (ii) the withdrawal-power, and (iii) the power to impose administrative pecuniary penalties:

> "must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

On the basis of the same discussion above, it is nevertheless possible to re-formulate three new definitions for the three concepts of effectiveness, proportionality, and dissuasiveness for sanctions. However, in respect of the dissuasiveness concept, the definition only applies for punitive sanctions, while for the effectiveness and proportionality concepts, the two definitions distinguishes between reparatory (a) and punitive sanctions (b):

> (I)(a) Reparatory sanctions are effective, when they are capable at compelling and restoring compliance with the laws including to terminate any violation thereof.
>
> (I)(b) Punitive sanctions are effective, when they are capable of being enforced by enforcement authorities in the legal justice system.
>
> (II) Sanctions are dissuasive, when they are punitive and capable to deter the offender(s) from repeating the violation(s) and any other potential offender from committing future violation(s). For administrative pecuniary sanctions and fines to be dissuasive it is also required that they offset any benefit derived from the violation as well as punish beyond the level of restoration.
>
> (III)(a) Reparatory sanctions are proportionate, when the burdens imposed do not go beyond the level of legal restoration, including the purposes (i) to ensure and restore compliance with the rules violations; (ii) the restoration of the damages caused by the violation; and (iii) to bring a violation to an end. Where there is a choice between several appropriate remedial measures, recourse must be had to the least onerous of the remedial measures.
>
> (III)(b) Punitive sanctions are proportionate, when they adequately reflect the gravity of the violation and do not go beyond what is necessary for the objectives pursued by taking into account the nature, purposes and severity of the sanction(s) and the purposes and importance of the rules violated.

Whether any of these definitions will prove valid is uncertain as it is for the CJEU to determine their validity. Most uncertainty seems to be attached to the definition of proportionality as the discussion revealed, wherefore any clarification from the CJEU is welcomed.

It should nevertheless be noted that there is confluence between the requirement of effectiveness (I)(a) and proportionality requirement for reparatory sanctions (III)(b), because a restoration of compliance with the rules violated or restoration of the damages caused by the violation will also require the termination of the violation. Accordingly, a reparatory sanction is also an effective and proportionate sanction when it terminates the violations; restores the

legal position into compliance and do not go beyond the level of restoration. For that reason, the supervisory powers under EU financial are also required to be effective and proportionate, but not dissuasive. Therefore, there is for punitive sanctions an internal battle governing their application between the dissuasiveness requirement (II) and the proportionality requirement (III)(b). The sanctioning factors discussed in the following will emphasise that this internal battle is rather one of poetic justice than poetic exactness, because while poetic exactness focuses at the nature and type of violation committed, and therefore requires the imposition of effective and reparatory sanctions of a similar kind as the violation, then poetic justice is not bound to the legal level of restoration, but goes beyond, and is in some sense beyond the level of law but still within the sphere of justice. Within the sphere of justice the sanctioning factors becomes very important, because they influence the final sentence or order, and without them the result may be very arbitrary and disproportional sanctions imposed on offenders.

It should also be noted for administrative pecuniary sanctions that they may result in offsetting the benefit derived from the violation without punishing beyond the level of restoration. This would make the administrative pecuniary sanction qualify as a reparatory sanction, wherefore it must satisfy the effectiveness (I)(a) and proportionality (III)(a) requirements. If it also punishes by including a surcharge, the administrative pecuniary sanction qualify as a punitive sanction and must satisfy the effectiveness (I)(b), dissuasiveness (II) and proportionality (III)(b) requirements. By these legal definitions it is also implied that an effective sanction as a main rule will be a reparatory sanction, because the effectiveness standard for the punitive sanctions does not prescribe a rule and objective for its application but rather an enforcement potential. On the other hand, the effectiveness requirement is prescribed for all punitive sanctions classified as either criminal and administrative sanctions, and because they deprives the offender of some right and needs to deter the specific offender and other potential offenders, then this will require that the punishment can be seen by the public and enforced effectively in the courts or other enforcement proceedings. Therefore, when all sanctions are required to be effective, proportionate, and dissuasive, then these three general requirements are implying that even for one particular violation more than one sanction may be required in order to terminate the violation and repair for the damages it has caused as well as to punish and deter the particular offender and install general deterrence in others. In the terminology applied under EU administrative financial law, it translates into an application of supervisory powers and administrative sanctions, at the same time, and calls for a specific interplay between them. There are no further rules on the interplay between the types of power and sanctions, and the

sanctioning authorities are as a main rule provided with wide discretionary powers to adopt appropriate sanction(s) with a sufficient level of severity for very specific types of violations that are bound-in with specific factual circumstances.[1631] Fundamentally, it is an exercise of poetic exactness and poetic justice and a prohibition against excessive and draconian sanctions.

Finally, according to the case-law of the CJEU, the proportionality concept is settled for the withdrawal-power as argued above. However, the discussion in Chapter 7 will assess the withdrawal-power under the Engel-test and its qualification and classification will also determine the applicable proportionality standard.[1632]

2. Sanctioning factors

The sanctions imposed for the violations of EU financial law must be effective, proportionate and dissuasive. In order to choose the appropriate type of sanction(s) to be imposed as well as to determine its level of severity, certain aggravating and mitigating circumstances must be taken into account by the relevant sanctioning authorities within the NFSR and EFSR. Because these circumstances are applicable for the imposition of administrative sanctions and administrative measures, they are referred to as 'sanctioning factors' in the following.[1633] Hence, the otherwise wide discretion granted to the sanctioning authorities in the application and imposition of sanctions are made subject to certain sanctioning factors to ensure that the sanctions are effective, proportionate and dissuasive. While the following Section III(2)(A) discusses the sanctioning factors having legal bases within EU financial law, Section III(2)(B) puts more emphasis on the national level and legislation on sanctioning factors. The order chosen for the discussion in Section III(2)(A) is to group the individual sanctioning factors found within the individual EU legislative and legal acts together according to their content in a decreasing order. The result is that the discussion will move from sanctioning factors that are common to all sanction regimes and towards sanctioning factors that are relevant only to some sanction regimes for sanctioning violations of certain specific legislative and legal acts. The reason for the order chosen is mainly that we are then able to see the commonality of sanctioning factors and that we are taking a consolidating and general view on EU financial law and sanctions. The more common and general the individual sanctioning factor is to all sanction regimes, the

[1631] However, the scope of the discretionary powers of the ECB, ESMA and SRB are restricted by the ECB's Fine Guide and the CRAR, EMIR and SRMR.
[1632] See Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB, paras. 31-40 and 310-346. In that case, the ECB applied the withdrawal power as a precautionary measure. See Chapter 7, Section III(2)(A)(I)(1).
[1633] A general description of the relevant sanctioning authorities are also found in Recitals 57 BR and 71 MAR.

more the sanctioning factors presents themselves as relevant standards and principles for the international framework of financial sanctions.[1634]

A. The sanctioning factors pursuant to EU financial law

The main rule under EU financial law applicable to the NFSR is that the relevant sanctioning authority must ensure when determining the type and level of administrative sanctions, that they take into account all relevant circumstances, including, where appropriate, a number of listed sanctioning factors.[1635] Hence, the sanctioning factors are not made directly applicable to the imposition criminal sanctions. Some of the headlines to certain specific provisions under EU securities law also indicates that the sanctioning factors are applicable for the application of supervisory powers.[1636] However, as supervisory powers are not required to be dissuasive, and the sanctioning factors all may be applied to reflect the factual circumstances by way of increasing the dissuasiveness of the sanctions, the sanctioning factors are mainly relevant and applicable to those administrative sanctions (and administrative measures) that qualifies as punitive sanctions. Therefore, many of the sanctioning factors are also applicable to the EFSRs, when the SRB and ESMA impose fines and the ECB impose sanctions pursuant to Article 18(7) SSMR.[1637] Some of the same sanctioning factors are also applicable to ESMA's sanctioning regime in ESMA's application of supervisory measures.[1638] Therefore, the following discussion will go across the NFSRs and EFSRs and their sanctioning factors are grouped according to how general and representative the specific factor is for all sanction regimes.

The rules providing the sanctioning factors also provides for another main rule, which is, the rules do not prescribe how the sanctioning factors should be applied, including how much weight that are attached to each of the factors. This main rule holds true for the NFSR and for ESMA's powers to apply its supervisory measures, but it is modified by the rules governing the SRB's and ESMA's power to impose fines as certain coefficients are attached to each of the individual factors to enable a calculation of an appropriately severe fine.[1639] The

[1634] Chapter 5, Section II(2)(F).
[1635] Articles 70 CRD; 114 BRRD; 60(4) AMLD IV; 31(1) MAR; 43(1) BR; 72(2) MiFID II; 39(1) PR; 18(3) IFD; and 99c(1) UCITS. The AIMFD does not provide any legal provisions on sanctioning factors, and is outdated.
[1636] Articles 31 MAR; 43 BR; 72 MiFID II; and 39 PR.
[1637] Articles 18(7) SSMR in conjunction with Article 2(3) ECBSR I; 38 SRMR; 36a CRAR; and 25j and 65 EMIR. A noticeable difference between these sanctioning regimes is that the sanctioning factors of the SRB and ESMA sanctioning regimes are only applicable to fines, while the sanctioning factors within the ECB sanctioning regime also applies to periodic penalty payments by the virtue of the definition of the concept of sanctions in Article 1(7) ECBSR I.
[1638] Articles 24(2) CRAR; and 25q(2) and 73(2) EMIR.
[1639] Articles 38 SRMR; 36a and Annex III CRAR: 25j and Annex IV, and 65 and Annex II EMIR.

main rule is also modified by the ECB's Fine Guide, which bears a close resemblance with the method provided in the SRMR, CRAR and EMIR for the imposition of SRB and ESMA fines.[1640] These rules do not eliminate the discretion granted to the ECB, SRB and ESMA in the imposition of fines, but the coefficients indicate a certain weight attached to each of the sanctioning factors, and therefore illustrates the EU legislators view on the severity of the sanctioning factors more generally. While Chapter 7 will discuss the nature of the ECB, SRB and ESMA fines and their application of sanctioning factors,[1641] the following discussion is mainly restricted to the other sanctioning factors and takes a general view on these factors.

(I) The general sanctioning factors

(1) The gravity of the infringements

At the very core of the definition of the proportionality concept is the main requirement that the severity of the sanctions imposed must adequately reflect the gravity of the violation (infringement). Hence, the proportionality requirement has also become a sanctioning factor, which is provided for all sanctioning regimes,[1642] including for ESMA's power to impose supervisory measures,[1643] and for the ECB, SRB and ESMA fines.[1644] Although, it is not exactly obvious what is meant by the 'gravity' of the infringement, the definition of the proportionality concept (III)(2) from the accompanying Impact Assessment to the EU Communication on Sanctioning Regimes connected the gravity of the violation with the nature and extent of the loss and/or harm caused by the violation. Thus, the gravity factor may more generally be determined as to adequately reflect the nature, seriousness and severity of the breach(-es) committed.[1645] Other factual circumstances may therefore also be considered to reflect the essence of the gravity factor like circumstances such as: "the seriousness of the effects of the infringements;" "the repetition, frequency or duration of the infringement by that undertaking;" and "the profits obtained by the undertaking by reason of the infringement."[1646] Conversely, it also

[1640] Whether the ECB adheres to the aggravating and mitigating factors provided in Article 70 CRD and Article 2(3) ECBSR I for the imposition of fines pursuant to Article 18(1) and 18(7) is not clear. See, the ECB Fine Guide, points 7 and 30. Articles 4a-c of the ECBSR I do not derogate from Articles 2(3) pursuant to Article 1a(2) ECBSR.
[1641] Chapter 7, Section III(1)(A)(II)(4).
[1642] Articles 18(3) SSMR; 70(a) CRD; 2(2) and 2(3)(b)-(d) ECBSR I in conjunction with 120(b) and 122 SSMFR; 114(a) BRRD; 60(4) AMLD IV; 31(1)(a) MAR; 43(1)(a) BR; 72(2)(a) MiFID II; 39(1)(a) PR; 18(3)(a) IFD; 99c(1)(a) UCITS; 36 and Recital 66 CRAR; and 12(1) and 22(3) and Recital 46 EMIR.
[1643] Articles 24(2)(a) CRAR; and 25q(2)(a) and 73(2)(a), and Recitals 84 and 88 EMIR.
[1644] ECB Fine Guide, Section 2.1.1; and Articles 38(3) SRMR; 36a(2) CRAR; and 25j(2)-(3) and 65(2) EMIR
[1645] IASR p. 4. See also the ECB Fine Guide, Section 2.1.1.
[1646] ECBSR I, Articles 2(3)(b)-(d).

seems reasonable to consider these more specific factors as implicit to the general requirement for sanctions to be proportionate, where such factors are not expressly provided.

(2) Degree of responsibility for the infringements

Albeit it may be in line with the logic and interests of dissuasiveness to punish the innocent, then it is generally argued as immoral and to contravene the principle of proportionality.[1647] Therefore, as a minimum requirement for imposing sanctions on anybody, the relevant sanctioning authorities must be able to establish liability and distribute some level of responsibility to a natural or legal person for the particular infringement(s) committed. In all sanction regimes, the severity of the sanctions to be imposed must therefore also be influenced by some version of "the degree of responsibility of the natural or legal person responsible for the infringement,"[1648] wherefore it must be taking into account "whether the infringement has been committed intentionally or negligently."[1649] The logic of this factor provides that the severity level of the sanctions to be imposed should increase with the level of responsibility (from negligence to intent) involved in the commission of the infringement(s). In setting the severity level of the SRB and ESMA fines, intent is therefore also an aggravating factor paired with an adjustment coefficient of 2 to be added to the basic amount of the fine.[1650] If 'intent' cannot be established,[1651] negligence may still have been involved in causing the infringement, for instance, as expressed in the underlying circumstances of the other sanctioning factors.

(3) Level of cooperation by the responsible person

The sanctioning authorities in the EU financial sectors must also take into account the level of cooperation of the natural or legal person responsible for the violation(s) with the relevant investigation, supervisory, and/or sanctioning authority, "without prejudice to the need to

[1647] Chapter 2, Section I(1)(C)(I).
[1648] Articles 18(3) SSMR; 70(b) CRD; 38(5)(a) SRMR; 114(b) BRRD; 60(4)(b) AMLD; 31(1)(b) MAR; 43(1)(c) BR; 72(2)(b) MiFID II; 39(1)(b) PR; 18(3)(b) IFD; 99c(1)(b) UCITS; 24(2)(d), 36a(1) and Annex IV(I)(5) CRAR; 25q(2)(d), 25j(1) and Annex IV(I)(e), and 65(1) and Annex II(I)(e), and 73(2)(d) EMIR. There is no explicit legal basis under the ECBSR I for taking into account the degree of responsibility of the undertaking having committed the infringements, but it is difficult not to interpret Article 2(3)(a) ECBSR I in the light thereof: "(a) on the one hand, the good faith and the degree of openness of the undertaking in the interpretation and fulfilment of the obligation arising from an ECB regulation or decision as well as the degree of diligence and cooperation shown by the undertaking or, on the other, any evidence of wilful deceit on the part of officials of the undertaking."
[1649] Articles 24(2)(d) CRAR; and 25q(2)(d) and 73(2)(d) EMIR.
[1650] Articles 38(9)(d) SRMR, first subparagraph; 36a(1) and Annex IV(I)(5) CRAR; and 25j(1) and Annex IV(I)(e), and 65(1) and Annex II(I)(e) EMIR.
[1651] Articles 38(1) SRMR; 36a(1) CRAR; and 25j and 65(1) EMIR.

ensure disgorgement of profits gained or losses avoided by that person."[1652] The latter element is only applicable under EU securities law when the relevant legislative act also provides legal basis for the sanction of disgorgement. Because disgorgement is not a sanctioning power provided under EU banking law, neither in the UCITS or IFD,[1653] this element of the sanctioning factor is also not provided in any of these legislative and legal acts. The sanctioning factor is not applicable, when ESMA exercises its supervisory measures.[1654] Cooperation with the relevant authorities is typically required with respect to the investigation of infringements.[1655]

Cooperation with the relevant authorities is not necessarily a mitigating factor, just as "how much cooperation" that is necessary to receive a sanctioning premium is unclear. This is rather a discretion for the sanctioning authority or national legislatures to decide. For instance, in setting the SRB and ESMA fines, the entity's senior management lack of cooperation is an aggravating factor paired with an adjustment coefficient of 1,5 as to be added to the basic amount of the fines.[1656] If the senior management has cooperated with the relevant authorities, no sanctioning premium is provided and thus neither guaranteed. However, in accordance with the other sanctioning factors, other voluntary and preventive measures taken by the entity in breach may grant a discount to the extent they fits with one of the four mitigating factors.[1657]

(II) Factors applicable to almost all sanction regimes

(1) Financial strength of the responsible person

The relevant sanctioning authorities must also take into account "the financial strength of the person responsible for the infringement, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person."[1658] This factor does not apply when ESMA exercise supervisory measures,[1659] and it is slightly differently provided under MiFID II and PR with respect to natural persons because these legislative acts provides that the

[1652] Articles 18(3) SSMR; 70(f) CRD; 38(9)(f) SRMR; 114(f) BRRD; 60(4)(f) AMLD IV; 31(1)(e) MAR; 43(1)(f) BR; 72(2)(f) MiFID II; 39(1)(f) PR; 99c(1)(e) UCITS; 18(3) IFD; Annex IV(I)(7) CRAR; and Annex II(I)(g) and IV(I)(g) EMIR.
[1653] Ibid.
[1654] CRAR, Annex IV only refers to Article 36a(2), not Article 24 CRAR; and EMIR, Annex II and IV only refers Article 25j(3) and 65(3) not Articles 25q or 73 EMIR.
[1655] SRMR, Article 38(9)(f), SRMR; Annex IV(I)(7) CRAR; and Annex II(I)(g) and IV(I)(g) EMIR.
[1656] Ibid.
[1657] Articles 38(9) SRMR; Annex IV(II) CRAR; and Annex II(II) Annex IV(II) EMIR.
[1658] Articles 18(3) SSMR; 70(c) CRD; 114(c) BRRD; and 60(4)(c) AMLD IV; 31(1)(c) MAR; 43(1)(d) BR; 18(3)(c) IFD; and 99c(1)(c) UCITS. When the ECB decides to impose sanctions on the basis of Article 18(7) and the ECBSR I, the ECB must be guided by the principle of proportionality as well as take into consideration "the economic size of the undertaking," cf. Article 2(2) and 2(3)(e) ECBSR. It seems reasonably to interpret the 'economic size' criterion as equivalent to the 'financial strength' criterion, because the latter factor is also applicable when the ECB impose sanctions on the basis of the SSMR. See the ECB Fine Guide, point. 8.
[1659] Articles 24 CRAR; and Articles 25q and 73 EMIR.

assessment of 'financial strength' also is indicated and thus may take into account: "the net assets of the responsible natural person."[1660] The latter factor is broader and more dissuasive than the former as the net assets also forms part of the financial strength of the responsible natural person, while the former does not concern other assets than the annual income of natural persons. It is not obvious why MiFID II and PR provides for a broader sanctioning factor compared to other legislative acts, in particular when MAR does not provide so. The basic amount of the SRB and ESMA fines are typically also determined on the basis of whether the annual turnover of the entity belongs to a pre-established lower, middle or higher range.[1661] By setting the level of the sanction in accordance with the financial strength of the legal person responsible, the intention is to make the sanctions, the fines in particular, dissuasive to even larger financial institutions.[1662] Therefore, the same rationale applies in respect of natural persons.

(2) Profits gained or losses avoided

The relevant sanctioning authorities must also take into account "the importance of profits gained or losses avoided by the person responsible for the infringement, insofar as they can be determined."[1663] Some provisions refer to "the benefit derived from the breach,"[1664] where 'benefit' is understood identical to the 'profits gained or losses avoided' due to the infringement. As a main rule, this factor is not provided in the SRB and ESMA sanction regimes.[1665]

This sanctioning factor is closely connected to the proportionality requirement because the benefit derived from the infringement is indicative of the gravity of the violation. Due to certain sanctioning provisions, this factor is also closely connected to the dissuasiveness requirement as, for instance, in setting the level of those fines which may be up to twice the amount of the profit gained or losses avoided, however, without prejudice to the exercise of the disgorgement power.[1666] In addition thereto, and unless a specific method for the calculation of the benefit derived is provided by any law provision, the principle from Case C-45/08

[1660] Articles 72(2)(c) MiFID II; and 39(1)(c) PR.
[1661] Articles 38(3) SRMR; 36a(2) CRAR; 25(j(2) and 65(2) EMIR. See also ECB Fine Guide, point 23.
[1662] EUCSR, p. 9; IASR, p. 14; and CRD, Recital 36.
[1663] Article 18(3) SSMR; 2(3)(d) ECBSR I; 70(d) CRD; 114(d) BRRD; 60(4)(d) AMLD IV; 31(1)(d) MAR; 43(1)(e) BR; 72(2)(d) MiFID II; 39(1)(e) PR; 18(3)(d) IFD; 99c(1)(d) UCITS; and 25j(2) EMIR. BRRD, Article 114(d) does not refer to the 'importance of' but the 'amount of [...]', which nevertheless hardly makes any substantive difference. ECBSR I, Article 2(3)(d) does not expressly provide for the 'losses avoided,' only "the profits obtained by the undertaking by reason of the infringement," but in light of the foregoing, it would be rather unreasonable, if the ECB would not be allowed to take into account the losses avoided by the commission of the infringement, when imposing sanctions having a basis within the Article 18(7) and the ECBSR I. See also Case C-45/08 – Spector Photo Group, ECLI:EU:C:2009:806, paras. 65-73.
[1664] E.g. AMLD IV, Article 60(4)(d).
[1665] Articles 38 SRMR; 24 and 36a CRAR; and 65, 73 EMIR, except from the fines imposed pursuant to Article 25j EMIR.
[1666] See further, Chapter 7, Section III(1)(A)(I) and (II)(2).

– Spector Photo Group seems to suggest that the "method of calculation of those economic gains, and, in particular, the date or the period to be taken into account are to be determined by national law,"[1667] otherwise at least by discretion of the relevant sanctioning authority.

(3) Previous infringements by the responsible person

The relevant sanctioning authorities shall also take into account the previous infringements committed by the responsible natural and legal person.[1668] This sanctioning factor is not provided in the SRB and ESMA sanction regimes. It is also a sanctioning factor that permits to sanction other infringements previously committed than the particular infringement of which the sanctioning proceedings have been initiated. Therefore, the sanctioning factor permits to sanction the accumulation of different types of infringements committed now and in the past to the extent that liability can be established for all of the infringements. Where this is the case, the rationale implies an increase in the level of severity of the sanctions to be imposed. Otherwise, the proportionality requirement restricts the scope of this sanctioning factor.

(4) Preventive measures taken by the responsible person

The relevant sanctioning authorities must take into account all the relevant circumstances, including the "measures taken by the person responsible for the infringement to prevent its repetition."[1669] The SRMR, BR, CRAR, and EMIR all emphasizes that it concerns 'preventive measures' or 'remedial actions' taken *voluntary* by the offender after the infringement has been identified, which therefore must be taken into account by the sanctioning authority.[1670] It is not obvious why this factor is not provided in the MiFID II, IFD, CRD, BRRD and the AMLD IV,[1671] because the reward of a sanction discount for taking voluntary preventive measures or remedial actions would result in the termination of the violation and therefore foster

[1667] Case C-45/08 – Spector Photo Group, para. 73.
[1668] Articles 18(3) SSMR; 2(3)(a) ECBSR I; 70(g) CRD; 114(g) BRRD; 60(4)(g) AMLD IV; 31(1)(f) MAR; 43(1)(g) BR; 72(2)(g) MiFID II; 39(1)(g) PR; 18(3)(g) IFD; and 99c(1)(f) UCITS. In the ECBSR I, Article 2(3)(a), the same idea seems also to be expressed under the ECBSR I in the way that the ECB must take into consideration the "prior sanctions imposed by other authorities on the same undertaking and based on the same facts." However, as wording expressly refer to prior sanctions imposed by "other authorities," it would stricto sensu exclude the ECB from taking into account the sanctions imposed by the ECB itself. If this was the intention behind this sanctioning factor, it would be surprising and certainly questionable.
[1669] ECB Fine Guide, point 30; Articles 2(3)(a) ECBSR I; and 38(5)(e) and 38(6)(d) SRMR; 31(1)(g) MAR; 43(1)(h) BR; 39(1)(h) PR; 99c(1)(f) UCITS; Annex IV(I)(6) and (II)(4) CRAR; and Annex II(I)(f) and IV(I)(f) EMIR.
[1670] Articles 38(5)(e) and 38(6)(d) SRMR; 43(1)(h) BR; Annex IV(I)(6) and (II)(4) CRAR; and Annex II(I)(f) and (II)(d) and Annex IV(I)(f) and (II)(d) EMIR.
[1671] Neither for the European sanction regimes of the securities sector under the CRAR and EMIR in respect of the decisions regarded as 'supervisory measures' under Article 24 CRAR and Articles 25q and 73 EMIR.

compliance. For the fines imposed by the SRB and ESMA, this factor is a mitigating factor to the extent that the preventive or remedial actions have been taken voluntary, and conversely, an aggravating factor to the extent that no remedial actions have been taken voluntarily. As a mitigating factor an adjustment coefficient of 0,7 must be added to the basic amount of the fines, but a coefficient of 1,7 as an aggravating factor.[1672]

(III) Less common factors

(1) Losses to third parties caused by the infringements

Pursuant to the CRD, BRRD, AMLD IV, MiFID II, PR, IFD, and UCITS the sanctioning authority must take into account the "the losses for third parties caused by the infringement, insofar as they can be determined."[1673] Although the wording is slightly different provided in the legislative acts, they nevertheless express the same idea that the losses caused to third parties by the infringement committed is a factor that must be taken into account, in particular with respect to fines. In order for fines to adequately reflect the gravity of the infringement and to be dissuasive, this factor seems to imply that the amount of the fine should be higher than the losses caused to the third parties as a pecuniary sanction lower or equal to the total loss caused the third parties can hardly be reconciled with the proportionality and dissuasiveness requirement. It may nevertheless depend on the particularities of the specific case and the degree of responsibility of the person in breach. This sanctioning factor is not provided in the SRB and ESMA sanction regimes, and neither is it provided in the ECBSR I, MAR and BR.

(2) Potential systemic consequences of the breach

Pursuant to the CRD IV, BRRD, and IFD sanction regimes, the relevant sanctioning authority must take into account "[...] any potential systemic consequences of the breach."[1674] It is not obvious what is meant by 'potential systemic consequences', neither how this sanctioning factor translates into a pecuniary or non-pecuniary sanction. The ECB Fine Guide implies that the factor is only relevant to consider in respect of extremely severe breaches, whereby the ECB looks into whether the breach had or potentially have had systemic consequences.[1675] On that

[1672] Articles 38(5)(e), 38(6)(d), 38(9)(e), first subparagraph, 38(9)(d), second subparagraph, SRMR; 36a(3) and Annex IV(I)(6) CRAR; and 25j(3) and Annex IV(I)(f) and (II)(d), and Article 65(3) and Annex II(I)(f) and (II)(d) EMIR.
[1673] Articles 18(3) SSMR; 70(e) CRD; 114(e) BRRD; 60(4)(e) AMLD IV; 72(2)(e) MiFID II; 39(1)(e) PR; 18(3)(e) IFD; and 99c(1)(d) UCITS.
[1674] Articles 18(3) SSMR; 70(h) CRD; 114(h) BRRD; and 18(3)(h) IFD. See also, the ECB Fine Guide, points 18 and 26.
[1675] ECB Fine Guide, points 18 and 26.

basis, the sanctioning factor is considered an aggravating sanctioning factor, and which imply an increase in the level of severity of the sanction to be imposed.

(3) Internal systemic weaknesses

In the SRB and ESMA sanction regimes with respect to the fines imposed by the SRB and ESMA, the most aggravating and dissuasive factor is whether "[...] the infringement has revealed systemic weaknesses in the organisation of the entity, in particular in its procedures, management systems or internal controls."[1676] When this is the case, an adjustment coefficient of 2,2 must be added to the basis amount of the fines. No other legislative or legal acts provide an obligation to take into account this sanctioning factor.[1677]

(IV) Legislation specific sanctioning factors

A number of sanctioning factors are specific to the particular sanction regime on the basis of the legislative acts in which the factors are provided. It follows that the sanctioning authority must take into account, pursuant to the UCITS: "where applicable, the damage to the functioning of markets or the wider economy, in so far as they can be determined;"[1678] the PR: "the impact of the infringement on retail investors' interests;"[1679] and the BR: "the criticality of the benchmark to financial stability and the real economy."[1680] Similarly, in ESMA's sanction regimes, where ESMA take decisions regarded as 'supervisory measures', then ESMA must take into account "whether financial crime was facilitated, occasioned or otherwise attributable to the infringement."[1681] In the light of the sanctioning factor that takes into account any potential systemic consequences of the breach, all these sanctioning factors can also function as aggravating factors as they look into the wider consequences that follows from the infringements.

C. The sanctioning factors pursuant to national (criminal) law

[1676] Articles 38(5)(d) SRMR; 36a(3) and Annex IV(I)(3) CRAR; and 25j(3) and Annex IV(I)(c), and Article 65(3) and Annex II(I)(e) EMIR.
[1677] Except perhaps the ECBSR I to extent that "the repetition, frequency or duration of the infringement" committed by the undertaking also is a reflection of the internal systemic weakness.
[1678] UCITS, Article 99c(1)(d).
[1679] PR, Article 39(1)(d).
[1680] BR, Article 43(1)(b).
[1681] Articles 24(2)(c) CRAR; and Articles 25q(2)(c) and 73(2)(c) EMIR.

Article 72(2) MiFID II, second subparagraph, is the only provision of the EU legislative acts to be implemented at the national level, which expressly provides that the national legislatures may adopt additional sanctioning factors to be taken into account, when the national sanctioning authorities will decide on the type and level of severity of the sanctions to be applied. Although it is quite surprising that no similar provision is found elsewhere under EU financial law, there is no hindrance for adopting additional sanctioning factors to be applicable under the NFSR for sanctioning the infringements covered by any of the other EU legislative acts so long as they are deemed to be appropriate factors relevant to the circumstances.

This holds even more true in respect of criminal sanctions, because under the NFSRs the relevant sanctioning factors to be taking into account with respect to the imposition of criminal sanctions is mostly a subject matter belonging to the national legislatures. In the context of criminal sanctions, Recital 24 MAD-CRIM also provides for some sanctioning factors when the national judicial sanctioning authorities (courts) are imposing criminal sanctions. It emphasises that the sanctioning authorities should take into account: (i) the profits made and losses avoided by the persons held liable; (ii) the damage resulting from the offence to other persons; and (iii) the damage resulting from the offence to other persons and to the functioning of the markets or the wider economy.[1682] Otherwise, where similar aggravating and mitigating circumstances are applicable for the imposition of administrative and criminal sanctions for the violations of the general prohibitions against market abuse, it is also a relevant criminal classification factor under the Engel-test as it adds criminal colour to the offences and sanctions.[1683]

Article 6(1) AMLD-CRIM also requires that certain circumstances are considered as aggravating circumstances for the commission of money laundering offences pursuant to Articles 3(1), 3(5) and 4, for instance, whether: (a) the offence was committed within the framework of a criminal organisation with the meaning of Framework Decision 2008/841/JHA; or (b) the offender is an obliged entity within the meaning of Article 2 AMLD IV and has committed the offence in the exercise of their professional activities. The latter will be relevant for most legal entities subject to EU financial law. In addition, Article 6(2) AMLD-CRIM also provides that the EU Member States for the same money laundering offences may consider as aggravating circumstances that: (a) the laundering property was of a considerable value; or (b) the laundered property derives from one the predicate offence covered by Article 2(1)(a)-(e)

[1682] MAD-CRIM, Recital 24. However, this is without prejudice to the general rules of national criminal law on the application and execution of sentences in accordance with the concrete circumstances in each individual case.
[1683] Chapter 3, Section II(2)(C).

AMLD-CRIM. Otherwise, Recital 15 AMLD-CRIM provides that the EU Member States should not be obliged to provide for aggravating circumstances under their NFSR when the imposition of criminal sanctions will lead to more severe sanctions. In this way, Recital 15 implies that the aggravating factors provided in the AMLD-CRIM may approximate a minimum level of severity of the criminal sanctions across the NFSRs.

3. Conclusions

The foregoing Section III has made evident that the sanctioning authorities have been granted a wide discretion for choosing the appropriate sanction(s) to be imposed and in setting their appropriate level of severity, and to satisfy the three general requirements to administrative and criminal sanctions of effectiveness, proportionality, and dissuasiveness.

Section III(1) revealed that except from the concept of proportionality, EU financial law, but also EU sanctions law more generally lacked a legal definition of the concept of effectiveness and dissuasiveness. Because the given legal definition of proportionality is logical inconsistent with the dissuasiveness requirement, a new legal definition of the proportionality concept was provided and to which it was found necessary to distinction between reparatory sanctions and punitive sanctions on the merits of the comparison with EU competition law, primarily. It followed that a sanction is effective, when it is capable at compelling compliance with laws and thereby to terminate any violation thereof. Hence, an effective sanction is most often also a reparatory sanction and an proportionate sanction, when the burdens imposed on the offender in order to bring an infringement to an end does not exceed what is appropriate and necessary to attain the objective of reestablishment of compliance with the rules violated and/or the restoration of the damages caused by the violation. Where there is a choice between several appropriate measures (reparatory sanctions), recourse must also be had to the least onerous. Therefore, by the obligation to apply the least onerous measure, the punitive sanctions cannot consistently be required to be dissuasive at the same time. Such a requirement would also more generally conflict with the wide discretion given to sanctioning authorities in performing their sanctioning tasks. The dissuasiveness requirement calls for the application of punitive sanctions, because they aim to deter the offender from repeating the violation(s) and any other potential offenders from committing future violation(s), wherefore administrative pecuniary sanctions and fines are not only required to offset any pecuniary benefit derived from the violation, like an effective reparatory pecuniary sanction, but also to punish beyond this

level of restoration and to be dissuasive even for large financial institutions by taking into account their financial strength. A punitive and dissuasive sanction is nevertheless also a proportionate sanction, when the severity of the punitive sanction adequately reflects the gravity of the violation and do not go beyond what is necessary for the objectives pursued by taking into account the aim and design of the sanctions and the purposes and importance of the rules violated. Therefore, the proportionality assessment to be conducted for punitive and dissuasive sanctions is mainly an assessment of whether the sanctions are excessive (poetic justice). Because the application of sanctions generally has to satisfy the three requirements to sanctions, the result is that a violation may necessitate the application of both reparatory and punitive sanctions at the same time in order to terminate the violation and, in addition, to punish the offender for the violations committed and deter against repetition of the violation and other potential offenders for committing future violations. Under EU financial law, this translates into a call for an interplay between supervisory powers and sanctioning powers.

When the relevant administrative sanctioning authority intends to impose punitive sanctions, Section III(2) discussed the relevant sanctioning factors to be taken into account on the basis of how common the specific sanctioning factors were to all sanctioning regimes found under EU financial law. The gravity of the administrative infringement, the degree of responsibility for the infringements and the level of cooperation by the responsible natural and legal person stands out as sanctioning factors that are common to all sanction regimes under EU financial law. Otherwise, the rest of the sanctioning factors were found less common to all sanction regimes. Except from those sanctioning factors that were found specific to certain legislative acts, it is a bit surprising that the same sanctioning factors are not consolidated across the entire body of EU financial law, because the content of these sanctioning factors seems equally valid and legitimate under each of the sanction regimes and therefore could be consolidated as general sanctioning factors. It should also be pointed out that *the most* aggravating of the sanctioning factors under SRB's and ESMA's sanction regime was the factor of 'internal systemic weaknesses', which required an adjustment coefficient of 2,2 to be added to the basis amount of the SRB and ESMA fines. No other legislative or legal acts provides an explicit obligation to take this sanctioning factor into account. This is surprising, because when an infringement has revealed systemic weaknesses in the organisation of an entity, in particular in its procedures, management systems or internal controls, it is also a strong indication for a lack of respect for the law and law abiding behaviour. When the legal entities that are subject to the provisions of EU banking and securities laws often are very large cross-border financial

institutions, then such a sanctioning factor is also appropriate in the legal frameworks of the SSMR, CRD, MiFID II and MAR in order to provide for the right incentives to comply with the law and in organising and managing the legal entities appropriately.

Otherwise it is general characteristics of the sanctioning factors that they often can be both aggravating and mitigating depending on the factual circumstances. Hence, when the offender does not cooperate with the relevant authorities involved in the prosecution it is an aggravating factor, and vice versa. In this way, the sanctioning factors also more generally concern issues by which the specific legal requirements of effectiveness, proportionality and dissuasiveness must be translated into an practical application of sanctions that always depends on very particular factual circumstances. The sanctioning factors guides the sanctioning authorities in exercising their wide discretion to adopt an appropriate sanctioning decision that satisfies all the requirements discussed in this Section III.

IV. PUBLICATION OF SANCTIONS

Irrespective of whether the rules on the publication of sanctions applies to the NFSR or the EFSR, they are almost identical across the legislative and legal acts of EU financial law to the extent that the rules establish a duty to publish the decisions imposing sanctions or measures, the 'sanctioning decisions'.[1684] In general, it follows that the duty to publish depends upon the classification and categorisation of the legal powers that the sanctioning authority has applied or imposed. With respect to EU criminal law, the CFD, AMLD-CRIM, and MAD-CRIM do not prescribe any obligation to publish the criminal sanctions imposed by the national sanctioning authorities or courts.[1685] With respect to EU administrative law, the main rule is that administrative sanctions and administrative measures must be published on the official website

[1684] Articles 18(6) SSMR; 132 SSMFR; 1a(3) ECBSR I; 68 CRD; 112 BRRD; 41 SRMR; 60 AMLD IV; 34 MAR; 45 BR; 71 MiFID II; 42 PR; 99b UCITS; 20 IFD; 48 AIFMD; 24(5) and 36d CRAR; and 12, 25m, 25q, 68, and 73 EMIR.
[1685] MAD-CRIM, Recital 18 does, however, inform that the sanctions imposed on a legal person "*may* include the publication of a final decision on a sanction." Italics added. Furthermore, the EU Member States are also not precluded from publishing criminal sanctions. See MiFID II, Recital 146.

of the sanctioning authorities, e.g.: ECB[1686] and ESMA.[1687] However, in EU banking law, except for the AMLD IV, there is no obligation to publish 'administrative measures', only administrative penalties (sanctions).[1688] Across EU banking and securities law, there is also no obligation to publish administrative decisions that imposes supervisory powers and supervisory measures,[1689] except under ESMA's sanction regime when ESMA takes a decision to exercise supervisory measures.[1690] Neither is there any obligation under EU financial law to publish decisions adopted for the purpose of exercising investigatory powers as such publication would run counter and contradict the purposes to make use of these investigatory powers.[1691] While the discussion of the rules on publication continues in Section IV(1) and their purpose in Section IV(2), the assessment of the rules and the conclusions will be drawn in Section IV(3).

1. The obligation to publish sanctions

To the extent that there is established a duty to publish, the rules are also very similar for the NFSR.[1692] According to the main and general rule, the national sanctioning authorities have a duty to publish any administrative sanction or measure imposed ('sanctioning decision') for

[1686] Decisions published by the ECB until 31 December 2022: (18) ABANCA Corporación Bancaria, S.A. of 07/12/2022; (17) Crédit Agricole S.A. of 12/07/2022; (16) Crédit Agricole Corporate and Investment Bank of 12/07/2022; (15) CA Consumer Finance of 12/07/2022; (14) Bank of Cyprus Public Company Ltd of 02/02/2022; (13) Banque et Caisse d'Epargne de l'Etat Luxembourg of 31/01/2022; (12) Allied Irish Banks plc of 30/07/2021; (11) EBS d.a.c. of 30/07/2021; (10) Natixis Wealth Management Luxembourg of 21/20/2019; (9) Piraeus Bank S.A. of 13/08/2019; (8) Sberbank Europe AG of 15/02/2019; (7) Novo Banco, SA of 21/12/2018; (6) Crédit Agricole, S.A. of 16/07/2018; (5) Crédit Agricole Corporate and Investment Bank of 16/07/2018; (4) CA Consumer Finance of 16/07/2018; (3) Banca de Sabadell, S.A. of 14/03/2018; (2) Banca Popolare di Vicenza S.p.A. in liquidazione coatta amministative 24/08/2017; and (1) Permanent tsb Group Holdings plc of 13/07/2017. Link: https://www.bankingsupervision.europa.eu/banking/sanctions/html/index.en.html. Compare also with the decisions adopted under the NFSR: (11) The Governor and Company of the Bank of Ireland of 30/11/2021; (10) Supervised Entity of 18/09/2020; (9) Ulster Bank Ireland Designated Activity Company of 03/03/2020; (8) Coöperatieve Rabobank U.A. of 21/01/2020; (7) Natural person related to a supervised entity of 23/10/2019; (6) RBC Investor Services Bank S.A. of 21/05/2019; (5) Citibank Europe plc. of 03/10/2018; (4) 29 natural persons related to Veneto Banca S.p.A. of 22/12/2017; (3) 26 natural persons related to Banca Popolare di Vicenza of 25/05/2017; (2) Caceis Bank Deutschland GMBH of 09/11/2016; and (1) KBC Bank Ireland Plc. of 06/10/2016.

[1687] Decisions published by ESMA until 31 December 2022: (17) ESMA41-356-271, Decision 2022/1 of 22 March 2022; (16) ESMA41-356-234, Decision 2021/7 of 21 September 2021; (15) ESMA41-356-187, Decision 2021/6 of 8 July 2021; (14)(e)(UK) ESMA41-356-129, Decision 2021/1 of 23 March 2021; (14)(d)(France) ESMA41-356-129, Decision 2021/2 of 23 March 2021; (14)(c)(Germany) ESMA41-356-130, Decision 2021/3 of 23 March 2021; (14)(b)(Italy) ESMA41-356-131, Decision 2021/4 of 23 March 2021; (14)(a)(Spain) ESMA41-356-132, Decision 2021/5 of 23 March 2021; (13) ESMA41-356-77, Decision 2020/1 of 28 May 2020; (12) ESMA41-356-34 of 11 July 2019; (11)(c)(UK) ESMA41-356-11 of 28 March 2019; (11)(b)(France) ESMA41-356-14 of 28 March 2019; (11)(a)(Spain) ESMA41-356-13 of 28 March 2019; (10) ESMA41-139-1231, Decision 2019/4 of 11 July 2019; (9) ESMA41-139-1224, Decision 2019/7 of 11 July 2019: (8) ESMA41-139-1229, Decision 2019/5 of 11 July 2019; (7) ESMA41-139-1230, Decision 2019/6 of 11 July 2019; (6) ESMA41-137-1145 of 11 July 2018; (5) ESMA41-137-1005 of 23 May 2017; (4) ESMA/2016/1131 of 21 July 2016; (3) ESMA/2016/408 of 23 March 2016; (2) ESMA/2015/1048 of 24 June 2015; and (1) ESMA/2014/544 of 20 May 2014. Link: https://www.esma.europa.eu/supervision/enforcement/enforcement-actions.

[1688] Articles 18(6) SSMR in conjunction with 132 SSMFR; 1a(3) ECBSR I; 68 CRD; 112 BRRD; 41 SRMR. Compare to AMLD IV, Article 60.

[1689] Supra, fn292.

[1690] Articles 24(5) CRAR; and Articles 25q(3) and 73(3) EMIR.

[1691] Articles 60(1) AMLD IV; 34(1) MAR; 45(1) BR; 71(1) MiFID II; and 42(1) PR.

[1692] Articles 68 CRD; 60 BRRD; 41 SRMR; 60 AMLD IV; 34 MAR; 45 BR; 71 MiFID II; 42 PR; 99b UCITS; 20 IFD; 48 AIFMD. Except from the outdated rules on the publication of sanctions laid down in the AIFMD, cf. AIFMD, Article 48(2).

the infringements of any of the relevant provisions under EU financial law on their official website either immediately,[1693] or without undue delay,[1694] after the person subject to the sanctioning decision is informed about the decision. The publication of the sanctioning decision shall include information of, at least, (i) the type and nature of the infringement, and (ii) the identity of the natural or legal person subject to the sanctioning decision. All of the sanctioning decisions that are published must remain accessible on the website of the relevant sanctioning authorities for at least five years after their publication.[1695]

The main rule to publish sanctioning decisions are nevertheless subject to two general modifications and/or exceptions.[1696] First, by following a case-by-case assessment, the modifications and exceptions are applicable in four situations as following: (1) where the publication of the identity of the natural and legal persons, including their personal data, is found to be disproportionate; (2) where the publication would jeopardise the stability of financial markets or (3) an ongoing (criminal) investigation; and (4) where the publication would cause disproportionate damage to the institutions or natural persons involved.[1697] For those four situations, three alternative solutions are generally provided and for which the national sanctioning authorities have to decide: (i) if the circumstances are likely to cease within a reasonable period of time, the publication may be postponed until the reasons for the non-publication cease to exist; (ii) the sanctioning decision may be published on an anonymous basis if the publication ensures an effective protection of the personal data concerned; or (iii) the sanctioning decision are not to be published when the publication is insufficient to ensure either that: (a) the stability of the financial markets is not jeopardised, or (b) the proportionality of the publication of the sanctioning decision, when the sanctioning decision are imposing "*measures* which are deemed to be of a minor nature."[1698] The main solution opted for in the CRD, BRRD and IFD sanction

[1693] Articles 60(1) AMLD IV; 34(1) MAR; 45(1) BR; and 42(1) PR.
[1694] Articles 68(1) CRD; 112(1) BRRD; 60(1) AMLD IV; 71(1) MiFID II; 99b(1) UCITS; and 20(1) IFD.
[1695] Articles 68(3) CRD; 65(3) BRRD; 60(3) AMLD IV; 34(3) MAR; 45(4) BR; 71(3) MiFID II; 42(4) PR; 99b(4) UCITS; and 20(1) IFD. See further the provisions referred to.
[1696] Articles 68(2) CRD; 112(2) BRRD; 60(1) AMLD IV; 34(1) MAR; 45(2) BR; 71(1) MiFID II; 42(2) PR; 99b(1) UCITS; and 20(3) IFD.
[1697] In Case T-203/18 – VQ v ECB, the CJEU expressly stated it do not consider "the gravity of the breach committed by a credit institution [to be] a relevant consideration," cf. para. 81, and moreover, according to the main rule governing the legal provisions that "[it] necessarily follows that every penalty must, in principle, be published irrespective of the gravity of the breach in question," cf. para. 82, and that "that conclusion is also supported by [the CRD] in account." Even more generally, this should therefore be considered generally applicable under EU financial law.
[1698] Articles 60(1) AMLD IV; 34(1) MAR; 45(2) BR; 71(1) MiFID II; 42(2) PR; and 99b(1) UCITS. Italics added. The references to 'measures' and not 'sanctions' in (iii)(b) suggests that sanctions, generally, are not considered to be of a minor nature, and therefore cannot be exempted from the publication obligation by the virtue of (iii)(b). See further and compare: Articles 34(1)(c)(ii) MAR; 45(2)(c)(ii) BR; 71(1)(c)(ii) MiFID II; 42(2)(c)(ii) PR; and 99b(1)(c)(ii) UCITS.

regimes is to publish the sanctioning decisions on an anonymous basis.[1699] In the other sanction regimes, the choice between the alternative solutions remains more open.

Second, it is a general rule that the obligation to publish the sanctioning decisions also may cover those sanctioning decisions which are subject to an appeal.[1700] However, in this respect, the sanctioning authorities also have an obligation to publish the appeal status and any subsequent outcome thereof either immediately, or without undue delay.[1701] Accordingly, any appeal decision that annuls a previous sanctioning decision must also be published.

Similar rules also applies for the EFSR, in particular for the ECB and SRB sanction regimes as they are very similar to the rules laid down in the CRD and BRRD.[1702] However, in comparison with ESMA's sanction regime, the rules on the publication of supervisory measures provided under the CRAR and EMIR seems largely to be outdated and to require revision,[1703] in particular as the across-going analysis of the relevant provisions seems to make the intention clear that the same rules on the publication of sanctions should apply. On the other hand, ESMA's publication of enforcement actions are much more thorough and informative than the publication of the ECB's (one-two pages) sanctioning decisions, wherefore ESMA's publication practice should be considered the standard-setter under EU financial law.

2. The purpose of the rules on the publication of sanctions

Because the rules on the publication of sanctions are almost identical, it therefore also seems logical to consider the rules to follow the same objectives. Therefore, those recitals that expresses the views on the purposes of the rules on the publication of sanctions speaks more generally on behalf of EU financial law. The rules on the publication of sanctions follow, at least, three objectives. First, the key purpose of the publication of sanctions is "to ensure that decisions made by the competent authorities have a dissuasive effect on the public at large, [and therefore] they should normally be published."[1704] Second, the publication of sanctioning decisions is an important tool for the sanctioning authorities to inform the market participants of what kind of behaviour that is considered a violation and therefore also a mechanism that

[1699] Articles 68(2) CRD; 112(2) BRRD; and 20(3) IFD. Alternatively, the publication may be postponed until the circumstances amounting to one of the three situations cease to exist.
[1700] Articles 68(1) CRD; 112(1) BRRD; 60(1) AMLD IV; 34(2) MAR; 45(3) BR; 71(2) MiFID II; 42(3) PR; 99b(3) UCITS; and 20(2) IFD. On this rule in respect of the ECB's duty to publish administrative pecuniary sanctions pursuant to Articles 18(6) SSMR and 132(1) SSMFR, see Case T-203/18 – VQ v ECB, paras. 108-125.
[1701] Ibid.
[1702] Articles 18(6) SSMR; 132 SSMFR; 1a(3) ECBSR; and 41 SRMR.
[1703] Articles 24(5) and 36d(1) CRAR; and 12(2), 25m(1); 25q(3), 68(1) and 73(3) EMIR.
[1704] Recitals 38 CRD; 73 MAR; 61 BR; 146 MiFID II; 75 PR; and 18 IFD.

more widely promotes what is considered as good behaviour on the financial markets and amongst the market participants.[1705] Third, in respect of the IFD, it is emphasised that: "To enable clients and investors to make an informed decision about their investment options, those clients and investors should have access to information on administrative sanctions and other administrative measures imposed on investment firms."[1706] These objectives, together with the rules they relates to, will be discussed and assessed in the following Section IV(3), however, as an important restriction, only within the limitations of the Engel-test. In this regard, it is necessary to emphasise that within the ECtHR's case-law, where it had applied the Engel-test, there are to this date no framework or any criteria, standards and principles provided for how the rules on the publication of sanctions should be assessed. The following discussion is thus not conclusive. It only aims to point out certain elements that should be taken into account.

3. Conclusions and assessment

As a first observation, the rules exempt on the basis of a proportionality assessment the sanctioning authorities from the duty to publish "*measures* which are deemed to be of a minor nature."[1707] Generally, the legal provisions provide for a distinction between 'administrative sanctions' and 'administrative measures', wherefore only the latter are covered by the exemption. This distinction also implies that administrative sanctions are viewed as more severe power than administrative measures, because the publication of administrative measures may be restricted by the proportionality requirement when the consequences following from the publication are deemed disproportional to the minor nature of the administrative measure. Therefore, the rules on the publication sanctions (and measures) establishes a need for distinguishing between administrative sanctions and administrative measures, and they contributes by implying that the latter may be of a minor nature. This task is pursued in Chapter 7.

This brings us to the purposes of publishing sanctions and a second observation. The first and second purposes are in line with the deterrence theory, because the rules on the publication of sanctions allows for 'exemplified sanctioning' so that the sanctioning authorities may use the individual case, where it has sanctioned the particular offender (specific

[1705] Recitals 73 MAR; 61 BR; and 146 MiFID II.
[1706] IFD, Recital 18.
[1707] Articles 60(1) AMLD IV; 34(1) MAR; 45(2) BR; 71(1) MiFID II; 42(2) PR; and 99b(1) UCITS. Italics added. The references to 'measures' and not 'sanctions' in (iii)(b) suggests that sanctions, generally, are not considered to be of a minor nature, and therefore cannot be exempted from the publication obligation by the virtue of (iii)(b). See further and compare: Articles 34(1)(c)(ii) MAR; 45(2)(c)(ii) BR; 71(1)(c)(ii) MiFID II; 42(2)(c)(ii) PR; and 99b(1)(c)(ii) UCITS.

deterrence) to deter any other potential offenders from committing future violation(s) (general deterrence), and thereby to promote good market behaviour.[1708] This in line with the conclusions and new legal definitions proposed for the effectiveness, proportionality and dissuasiveness requirements, because when supervisory powers generally qualifies as reparatory sanctions,[1709] they are not having any punitive and deterrent effect to enhance by the publication, and therefore should also not be required to be made published, because the publication of reparatory sanctions would give them a punitive and deterrent effect which, per se, are contrary to their very nature and purpose. Therefore supervisory powers are not required to be published. On the other hand, in respect of the punitive sanctions, if these were not required to be published, no one except the sanctioned natural or legal person would know about the violation and sanctions imposed, and the requirement for general deterrence would not be satisfied. Accordingly, the rules on the publication of sanctions is in line with the three general requirements to sanctions and, in particular, the distinction between reparatory and punitive sanctions.

Third, the third purpose is to make sure that the financial markets have access to all relevant information for the proper functioning of those markets, including the information which would be likely to have a significant effect of the prices of the relevant financial instruments issued by, for instance, the credit institutions, investment firms and other types of legal persons ('issuers'). Therefore, the two first objectives will ensure that the sanctions will have a stigmatising and deterrent effect on the offender, while the third purpose is in line with the 'efficient market theory' or 'efficient market hypothesis', whereby the prices of financial instruments are considered to reflect all information and thus concerns the basic elements.[1710] Therefore, there is full confluence between the purpose of deterrence and the objectives of transparency and orderly functioning of the financial markets and their pricing mechanisms.

On this background, it has also been argued that the rules on the publication of administrative sanctions and measures (referred to in the following as the 'publication of sanctions') is a legal mechanism for 'naming and shaming',[1711] which by itself can "be seen as an administrative sanction."[1712] Under this view, it follows that the publication of sanctions is a mechanism for imposing additional sanctions on the offender, that is, additional and separate sanctions to those legal sanctions imposed by the sanctioning authorities. These fresh and additional

[1708] Chapter 2, Section II(2).
[1709] Chapter 7, Section II(2)(C).
[1710] See more generally: James Bradfield, *Introduction to the Economics of Financial Markets* (Oxford University Press 2007).
[1711] Veil (n 106) 139.
[1712] ibid 170.

sanctions may be referred to as '*reputational sanctions*'.[1713] However, the deterrent effects following from the rules on the publication of sanction are not restricted thereto. In addition to the reputational sanctions, the rules on the publication of sanctions also implies a view whereby the publication will have negative effects on those sanctioned legal persons having their financial instruments traded on the secondary markets, because the publication will influence the price of the financial instruments accordingly. Such consequences may be regarded as '*market sanctions*', because they only applies to those legal persons that are generally referred to as issuers.[1714] This entails that the concept of market sanctions is not identical to the concept of reputational sanctions, because the former has a broader scope than the latter. For instance, natural persons can be subject to reputational sanctions in the way that a manager, which has been imposed a fine, and thereby stigmatised, in addition to the fine not only may suffer to lose his managerial position within the legal person but as well to be excluded from acquiring a similar position within another legal person, but natural persons cannot be subject to market sanctions. In a similar way, all legal persons having been fined and thereby stigmatised may also suffer the loss of new customers or clients (market share) and thereby also to lose their foundation for their very existence, but of the legal persons, only the issuers of the financial instruments can also be subject to any additional market sanctions.[1715] In respect of the issuers, it therefore follows that they are subject to, at least, three types of sanctions by the adoption of one sanctioning decision: (i) the legal sanctions imposed for the violations of financial laws (dissuasive requirement causing stigmatisation); (ii) the reputational losses due to the publication of the legal sanctions imposed (reputational sanctions causing loss in market share); and (iii) decreases in market value due to the pricing mechanism (market sanctions).[1716] In addition,

[1713] Armour J, Mayer C and Polo A, 'Regulatory Sanctions and Reputational Damage in Financial Markets' (2010). Oxford Legal Studies Research Paper No. 62/2010. European Corporate Governance Institute (ECGI) – Finance Working Paper No. 300/2010.

[1714] Lackhoff (n 103) 199. Lackhoff refers to the concept of "market discipline" in relation to the disclosure requirements under EU banking law. As the financial markets have a well-known disciplining effect on the market participants, the nature of that effect is similar to the effects and consequences of sanctions, as the disclosure of information may cause suffering to the credit institution publishing the (negative) information. In paragraph 893, at p. 209, Lackhoff also writes in respect of the supervisory power provided in SSMR, Article 16(2)(l), that: "The power to require additional disclosures provides the ECB with the possibility to make use of market discipline mechanism underlying the Pillar 3 of the current supervisory framework. The disclosure of information and in particular of the additional information and that this will result in corresponding actions required based on Article 16(2)(l) SSMR shall enable and induce investors to react taking into account this additional information. This power rests on the assumption that investors will take into account such additional information and that this will result in corresponding actions. Whether this assumption is always justified is another question."

[1715] See on the removal-power in Chapter 7, Section III(2)(A)(I)(2).

[1716] In Case T-203/18 – VQ v ECB, para. 96, the applicant argued accordingly: "that publication of the penalty is disproportionate given the significance of its consequences as compared with the minor nature of the breach and its short duration. In that regard, first, it highlights its good faith, the transparency of its activity on the market and its cooperation during the administrative procedure. Second, it considers that the amount of the administrative pecuniary penalty is, in itself, sufficient to ensure its dissuasive effect *[(i) stigmatisation]*. Third, it stresses the severity of the effects of publication, which would entail reputational losses that would translate into a decrease of the market value of its shares *[(ii) reputational sanctions and (iii) market sanctions]*. Referring to a study by Oxford University (United Kingdom) on the result of reputational losses sustained by a sample of regulatory enforcement actions, it argues that adverse effects on reputation are far greater than the amount

it was argued above that the effectiveness, proportionality and dissuasiveness requirements implies the interplay and imposition of reparatory and punitive sanctions in one and the same sanctioning decisions. Therefore, the same sanctioning decision is not precluded from imposing additional specific prudential but financial burdens on the issuer, thereby exercising and applying the (iv) specific supervisory powers, which intervenes into activities of the issuer for the purpose of restoring compliance with the (prudential) requirements it is subject to. Even more, the infringement committed may subject the issuer to (v) damages claims (civil liability).

This brings us to the (necessity of the) Engel-test. The ECtHR has acknowledged that all types of sanctions, irrespective of whether they classify as criminal or disciplinary sanctions, are stigmatising and therefore having a stigmatising effect proportionate to their severity.[1717] However, the ECtHR has never directly dealt with the rules on the publication of sanctions, reputational sanctions or shared any views on what would be equivalent to market sanctions. Therefore, the rules on the publication of sanctions, reputational sanctions, and market sanctions raise new issues which is for the ECtHR and CJEU to decide in the future under the Engel-test. In this regard, at least three points and arguments should be considered:

First, although the sanctioning authorities have the possibility to exempt from the duty to publish sanctions, for instance, in crises scenarios where the publication of sanctions would jeopardise the financial markets as the pricing mechanism may cause or accelerate bank runs,[1718] these considerations themselves acknowledge that the publication of sanctions may result in extremely severe consequences for the issuers that are subject to the punitive sanctions.

Second, punishment and deterrence are the main and two twin-objectives of criminal sanctions.[1719] The deterrent purposes governing the rules to publish sanctions was argued to be complementary to the orderly functioning of the financial markets and pricing mechanism, wherefore the rules on the publication of sanctions essentially is a mechanism for stigmatisation and thereby to cause additional punishment on the offender by making the offender subject to both reputational and market sanctions. On the one hand, this points out that the publication of the sanction itself may qualify as a criminal sanction, and not an administrative sanction,

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of the penalty, if not entirely detached from it. It is therefore disproportionate to publish a penalty which has been limited to 0.03% of turnover. The applicant also refers to the consequences for the value of its shares of publication of a penalty imposed by the ECB on another credit institution." However, the applicant needs to put forward the "evidence to show that that might have been the case," cf. para. 99, in order to require anonymised publication.

[1717] Chapter 3, Section II(2)(I).

[1718] Chapter 5, Section II(2)(G), and EUCSR, p. 12, and the SR Feedback Statement, p. 2-3.

[1719] Chapter 3, Section II(1)(B)(II)(1) and Klip A, 'European Criminal Law: An Integrative Approach' (4th Edition, Intersentia 2021), p. 2.

because there is full confluence between the publication and individual and general deterrence. On the other hand, it was also argued in Chapter 3 for the constitutional concept of sanctions that punitive sanctions, including criminal sanctions, ultimately result in a deprivation of a right. Which right is actually at stake as a result of the publication of sanctions? – It does not seem very likely that the ECtHR or the CJEU would recognised that the deprivation of customer relationship and market share (reputational sanctions) nor market value (market sanctions) to qualify as rights worthy of any protection, not even as economic rights. Rather they are logical and reasonable consequences to be expected from legal person engages in illegal behaviour and subject to the already applicable disclosure rules under EU financial laws. Therefore, the publication of the sanctions should instead be seen as an enhancement of the enforcement arm of the sanctioning authorities in the way that the dissuasive and deterrent effect from the imposition of legal punitive sanctions are ensured and enhanced by the publication and enforced through the market and pricing mechanisms. Hence, we are dealing with the concept of enforcement of sanctions rather than the imposition of additional sanctions.[1720]

Third, and what seems to be the best argument. Criminal sanctions are not required by the EU legal framework to be published, only the administrative sanctions. The enhancement of the stigmatisation and deterrent effect argued under the second point is thus only attached as a direct legal consequence of the imposition of administrative sanctions, but not to the criminal sanctions. This results in the rather asymmetrical and unintended legal position that the administrative sanctions in reality is more stigmatising and deterrent compared to the criminal sanctions. This cannot be according to criminal justice as protected by the EU legal order. If this argument will be acknowledged by the ECtHR and CJEU, asymmetrical rules favouring the publication of administrative sanctions over criminal sanctions may become an additional criminal classification factor to the ones already argued for in Chapter 3, Section II(3).

V. CONCLUSION

Let us now bring the sections and their conclusions together. The relevant supervisory and/or sanctioning authorities must exercise their discretion in order to determine (1) whether there have been a violation of EU financial law; (2) whether the violation qualifies as a criminal offence or administrative infringement; (3) whether the responsible natural or legal person can be held liable for the violation, and if so, to what extent that the responsible person should be

[1720] Chapter 3, Section III(1)(C)(I); and Chapter 5, Sections II(2)(G) and III(2)(E).

liable. The questions relating to these three initial elements have been discussed in Sections II-III, and the sanctioning authorities' answers to these questions will often provide them with a further task to decide on how the responsible person(s) should be sanctioned. Accordingly, a sanctioning decision has to be adopted by which the sanctioning authorities will have to determine: (4) which of the available types of sanctions that is appropriate to the circumstances of the particular case and (5) how severe the sanctions should be in order to (6) satisfy the three general requirements of effectiveness, dissuasiveness, and proportionality. In particular with respect to the dissuasiveness and proportionality requirements for sanctions, (7) a number of sanctioning factors are provided in order to satisfy these requirements. Lastly, once the sanctioning decisions has been adopted, the sanctioning decision must be published (8).

Once is has been determined that there has been a violation of EU financial law ((1)), the distinction by administrative and criminal liability requires a fundamental decision to be taken with respect the key determination of whether the particular violation (2) qualifies as a violation of the general prohibition against money laundering or market abuse. While money laundering only provides for criminal liability, the violations against market abuse provides concurrent administrative and criminal liability, wherefore the sanctioning authority must continue with the qualification exercise in order to determine whether the market abuse violations were committed with intent and/or amount to a serious and/or reckless case of market abuse (3). When this is the situation, the offender has criminal liability and will therefore be subject to criminal sanctions. Otherwise, the offender has administrative liability and will be subject to administrative sanctions. For the commission of *any other type* of violations, EU financial law only provides for administrative liability. For the implementation in the NFSRs, the EU Member States may nevertheless provide for criminal sanctions to such administrative infringements, wherefore the liability will also requalify as criminal liability. In order to determine whether a natural or legal person was responsible for any of the criminal offences, EU financial law requires a determination of to whom the violation has benefitted, the natural or legal person. Otherwise, in respect of the administrative pecuniary penalties and fines imposed by the ECB, SRB and ESMA it is a general requirement that their imposition requires intent or negligence, while the imposition periodic penalty payments requires a continued breach. No such rules are found under EU financial law for the imposition of administrative sanctions under the NFSRs. However, it is indicative of the general distinction to be made between punitive and reparatory sanctions: punitive sanctions requires culpa for the commission of the violation, while culpa is not required for the imposition of reparatory sanctions. This distinction

and observation will be made more clear in the discussions in Chapter 7. Nonetheless, it is the detection and presence of the violation that *sanctions* the imposition of all sanctions.

These overall conclusions still holds with respect to the Engel-test. In the assessment conducted pursuant of the first and second Engel-criterion, in particular by the first Öztürk-criterion, it was showed that primarily the market abuse violations and Article 9 CRD was considered governed by general norms; hence also criminal norms. This entails that when a punitive and deterrent sanction is imposed or is available and threatening for the violation thereof, the offender must be afforded the criminal guarantees pursuant to the alternative character of the second Engel-criterion, without it being necessary to take into account the severity of sanctions pursuant to the third Engel-criterion. This conclusion we will need to carry over to Chapter 7. We will also need to carry over the main conclusion, which is that EU financial law is primarily and overwhelmingly disciplinary law, so that a violation thereof will qualify as a disciplinary offence and establish disciplinary liability for the purposes of the Engel-test. More generally, the sanction regimes found in EU financial law are disciplinary sanction regimes. This entails that the third Engel-criterion becomes very important for the assessment in Chapter 7, when we discuss the administrative sanctions, while the first and second Engel-criteria are more important for the EU legal framework on criminal sanctions.

Otherwise, I refer to the conclusions already made in Section III(1)(B), III(3) and Section IV(3). However, in addition thereto, I would like to point out that the new legal definitions provided for the concept and requirements of effectiveness, proportionality and dissuasiveness have not been acknowledged by the CJEU. Their legal validity, relevance and applicability may therefore be tested in future cases before the CJEU, but it should nevertheless also be noted that the legal definitions are consistent with the definition of the constitutional concept of a legal sanction laid down in Chapter 3, including most importantly the principles and standards on sanctioning in EU competition law. EU competition law seems to be the most developed areas of EU law from which general standards and principles follows, hence also the areas of EU law that the CJEU seems most likely to adhere and compare to in respect of fundamental rights protection for punitive sanctions imposed in administrative proceedings. The logic of the standards and principles that governs the legal definitions should therefore have some merit, because it provides for a key distinction between reparatory sanctions and punitive sanctions, a distinction that proves fundamental to explain the legal position of the de lege lata in various of specific legal areas relating to sanctions, including the reasons that explains the purposes of the rules on the publication of sanctions. Only the punitive sanctions, and not the reparatory

sanctions, are intended to be required to be published, wherefore the supervisory powers provided under EU financial law in most cases also not are required to be published. When reparatory sanctions do not punish, they are also not, and neither required to be, dissuasive, wherefore they do not have any dissuasive and deterrent effect to enhance by the publication. The distinction between reparatory and punitive sanctions is therefore not only a governing principle that is useful for resolving any consistency issues between the black letters of conflicting law provisions, it is also a source for coherency between the various areas of EU law, which together may be referred to as *'EU sanctions law'*, because the very general issues discussed in Chapter 3 and 5 and the principled-based conclusions derived on the basis of the assessment and discussions, transgresses the specific areas of EU law from which they are derived.

> "33. European States are confronted with a dilemma. In order to ensure the integrity of European markets and to enhance investor confidence in those markets, States have created very broad administrative conduct-based offences, which punish the abstract risk of harm to the market with severe, undetermined pecuniary and non-pecuniary penalties, which are classified as administrative sanctions and applied by "independent" administrative authorities in inquisitorial, unequal and prompt proceedings. These authorities combine punitive and prosecutorial powers with a broad power of supervision over a particular sector of the market, and exercise the latter in such a way as to pursue the former, sometimes imposing on the supervised/suspected person an obligation to cooperate in the bringing of charges against him or her. The succession of three, or even four, stages of written defence pleadings – twice before the administrative authority, once before the court of appeal and again before the Court of Cassation – is an elusive guarantee which does not compensate for the intrinsic unfairness of the proceedings. The temptation has clearly been to outsource conduct which cannot be dealt with through the classical instruments of criminal law and procedure to these "novel" administrative proceedings. Nevertheless, market pressure cannot prevail over the international human rights obligations of the States bound by the Convention. The punitive nature of the offences and the severity of the punishment cannot be eluded, and clearly call for the protection afforded by the procedural guarantees of Article 6 and the substantive guarantees of Article 7 of the Convention."
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> Separate opinion by Judge Karakas and Judge Pinto de Albuquerque
> Grande Stevens and Others v. Italy, pp. 53-54, para. 33.

§ 7. EU FINANCIAL SANCTION REGIMES III – EU FINANCIAL SANCTIONS – ASSESSMENT III

I. INTRODUCTION

Chapter 7 follows two main tracks and purposes. First, as referred to in the title by "Assessment III," the main purpose of Chapter 7 is to challenge the EU financial sanctions on the basis of the Engel-test and the constitutional conception of a legal sanction as laid down in Chapter 3. Second, to succeed with the main purpose, the second purpose is to discuss the EU financial sanctions on the basis of the provisions found within the legislative and legal acts of EU financial law as restricted in accordance with the first pillar of the concept of EU financial sanction regimes. The second track is thus a pre-condition for the first track and thereby lays out the methodology for Chapter 7, which may result in a re-classification of the legal powers in question. In this respect, Chapter 7 takes a broad view on the concept of sanctions, because the international standards and principles discussed in Chapter 4 also took a broad view on the different types of legal powers and provided evidence for the difficulty in distinguishing between corrective and remedial powers on the one side, and sanctioning powers on the other. Hence, Chapter 7 intends to provide the background and basis for questioning the qualification and classification of the different legal powers that are applicable under EU financial law once a violation is detected, including the general category of legal powers referred to as

'supervisory powers' in EU financial law. This is necessary, because we may see, as it will be argued, that some of these supervisory powers may qualify and classify as criminal sanctions.

Chapter 7 is initiated by first providing for some general observations on the legislative categories of legal powers found within EU financial law. Then it moves on by discussing the powers according to the formal (black letter) structures provided by EU financial law, starting with the EU administrative sanctions and ending with the EU criminal sanctions. The conclusions and assessments under each section will primarily conclude in accordance with the overall assessment conducted under the Engel-test, but the Engel-test will also be applied on an ongoing basis for conducting a standalone assessment of each of the individual legal powers and sanctions. Finally, Chapter 7 will also bring in the conclusions made in Chapter 6, in particular those conclusions made on the basis of an assessment in accordance with the first and second Engel-criteria, including the first Öztürk-criterion, from Chapter 6, Section II(3). Hence, Chapter 7 is mostly devoted to the second Engel-criterion and second Öztürk-criterion, and the third Engel-criterion. Because EU financial law general aim to comply with the international standards and principles on sanctioning, we will also adhere thereto, including those parts of the FSSA-review of the ECB sanction regime, where it proves appropriate.

II. CATEGORISATION OF EU LEGAL POWERS

1. General observations on the legislative categories of legal powers

Primarily the need for determining which types of due process rights and safeguards and their level of protection of the natural and legal persons subject to administrative and criminal proceedings requires consistent and coherent categories and definitions of the legal powers.[1721] In addition, the structures of the SSM and distribution of sanctioning powers between the ECB sanction regime and the NFSRs also depends upon the consistency of the categorisation and definitions of the specific legal power, because the ECB does not have the power to impose sanctions on natural persons, and criminal sanctions and non-pecuniary sanctions on legal persons ('significant supervised entities / SSEs').[1722] Section II(1) will therefore initiate this

[1721] Raffaele D'Ambrosio, 'Due Process and Safeguards of the Persons Subject to SSM Supervisory and Sanctioning Proceedings'; Marco Lamandini, David Ramos Muñoz and Javier Solana, 'Depicting the Limits to the SSM's Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection' (Banca D'Italia 2015) Quaderni di Ricerca Giuridica 79.

[1722] Christos Gortsos, 'The Power of the ECB to Impose Administrative Penalties as a Supervisory Authority: An Analysis of Article 18 of the SSM Regulation' [2015] European Center of Economic and Financial Law 27; Klaus Lackhoff, *Single Supervisory Mechanism: European Banking Supervision by the SSM: A Practitioner's Guide* (CH Beck; Hart; Nomos 2017) 218; Rüdiger Veil, *European Capital Markets Law* (Second edition, Hart Publishing 2017) 175.

endeavour by providing some fundamental observations about the consistency and coherency of the legal concepts and categories that have been used by the EU legislators.[1723] At least seven common and general types of legal powers can be found in the legal provisions going across the legislative and legal acts of EU financial law:

(i) Investigatory powers;
(ii) Supervisory powers;
(iii) Supervisory measures;
(iv) Early intervention measures;
(v) Administrative measures;
(vi) Administrative sanctions; and
(vii) Criminal sanctions.

A first observation notes a distinction in terms of a classification of the legal powers whereby the last type of the legal powers (vii) is the only one classified as 'criminal' and the others (i)-(vi) are envisaged or expressly classified as 'administrative'. Because the last two legal powers (vi)-(vii) establishes a category of legal powers signified by the concept of 'sanctions' there is a need to determine when sanctions falls into the two main classes of 'administrative sanctions' and 'criminal sanctions'. The starting point for this classification is the classification already given by the EU criminal and administrative law acts. It provides the main structures for this chapter, as the 'EU administrative sanctions' is discussed in Section III and the 'EU criminal sanctions' in Section IV. The conclusions provided in these sections will nevertheless question and discuss their legal classification in light of the Engel-test.

Second, the specific types of administrative and criminal sanctions are provided on a certain list within the administrative and criminal law acts. However, there are no legal definitions of the concept of a 'sanction' or 'penalty'. EU financial law nevertheless makes use of the concept of 'sanction' synonymously with the concept of 'penalty'; wherefore there is no conceptual difference between the concepts.[1724] Neither is there any provision or recital that engages in justifying the reasons for why and when a sanction classifies as criminal or administrative. Rather, there is evidence for considering the EU legislators to be in doubt about the legal definition of a sanction and what makes them classify as criminal or administrative. This

[1723] Lackhoff (n 2) 218; Veil (n 2) 175. For instance, in respect of EU banking law, Lackhoff compares Article 18(5) SSMR with Article 16 SSMR and thereby the categories of 'administrative penalties and measures' and 'supervisory measures'. He writes that "it is clear that Article 18(5) SSMR (which limits the power of the ECB to the initiation of a procedure by the NCA) does not derogate from Article 16 SSMR. I.e. for any measures mentioned in Article 16 SSMR (even if such measure is an administrative sanction or measure in the meaning of Article 18(5) SSMR) ECB may exercise the power and is not limited to initiating a procedure by the national competent authority," cf. p. 218, fn1047. In this way, if such supervisory measure may qualify as a sanction, Lackhoff also implies that the ECB may have non-pecuniary sanctioning powers. In respect of EU securities law, Veil writes under the headline of 'supervisory measures" that the legislative acts on level 1 refer to the disgorgement of profits, trading suspensions, injunction measures and the prohibition of further activities [and] do not clarify whether these rules are to be understood as administrative measures or administrative sanctions," cf. p. 175, paragraph 17.
[1724] Chapter 5, Section III(2)(C).

is a problem that is evidenced and amplified by the fact that both classes of administrative and criminal sanctions are required to satisfy the requirements on effectiveness, proportionality and dissuasiveness. EU financial law has also granted the EU Member States the option to choose not to lay down 'administrative sanctions and measures' for infringements that already are subject to 'criminal sanctions'.[1725] Hence, much indicates that the view of the EU legislator is that the category of administrative sanctions are "functionally interchangeable with criminal law penalties which also are reactive and repressive and may have a preventive effect."[1726] In particular, the Engel-test comes in hand to identify the criminal sanctions, and to question the classification of the administrative sanctions. The conclusions will provide the assessments.

A third observation also concern the concept of 'sanctions'. Some of the legal provisions refer to 'pecuniary sanctions', and thereby establishes another category of sanctions. There are no provisions that directly apply the term 'non-pecuniary sanctions' except Article 134 SSMFR, which make use of the concept to structure and distribute the sanctioning powers between the ECB sanction regime and the NFSRs. Accordingly, the ECB does not have any non-pecuniary sanctioning powers. EU financial law, including Article 134 SSMFR, does not define what is a pecuniary or non-pecuniary sanction. From a comparison of the legal provisions providing 'administrative pecuniary sanctions/penalties', it is nevertheless evident that they qualify as 'fines' because where other legal provisions provides for the same exact type of pecuniary sanction they refer to the same type as 'administrative fines'. As we shall, these are also governed by the archetypical notion of what constitutes a 'fine' and provides for the most common type of the 'punitive' pecuniary sanctions.[1727] However, because not all types of pecuniary sanctions are punitive in nature and purpose, we need to make an abstraction to include the punitive-element as well as the non-punitive-element from the definitions. Accordingly, a sanction is of a 'pecuniary' nature, when the sanction directly imposes an obligation on the offender to pay an amount of money; reversely, of 'non-pecuniary' nature, when the sanction does not impose any obligation on the offender to pay an amount of money. Therefore, the distinction is very basic and used for structuring the discussion in Sections III(1) and (2).

A fourth observation also relates to the concept of 'non-pecuniary sanctions' but in comparison with the other types of legal powers, in particular: (v) administrative measures;

[1725] Articles 65(1) CRD; 110(1) BRRD; 58(2) AMLD IV; 30(1) MAR; 42(1) BR; 70(1) MiFID II; 38(1) PR; and 99(1) UCITS. AMLD IV, Article 58(2) provides that the EU Member States must ensure that where the NCAs identify breaches which are subject to criminal sanctions, they must inform the law enforcement authorities in a timely manner.
[1726] Lackhoff (n 2) 212.
[1727] Section III(1)(A)(II).

(iv) early intervention measures; (iii) supervisory measures; (ii) supervisory powers; and (i) investigatory powers. The administrative non-pecuniary sanctions and the (v) administrative measures must satisfy the requirements of effectiveness, proportionality and dissuasiveness, while the other types of legal powers (i)-(iv) do not need to satisfy the dissuasiveness requirement, only effectiveness and proportionality.[1728] Because the legal powers in (i)-(v) also have a non-pecuniary nature, the question becomes which features that characterises, and thereby distinguishes, the non-pecuniary 'sanctions' from the non-pecuniary (v) administrative measures, which also must be distinguished from the non-pecuniary: (iv) early intervention measures; (iii) supervisory measures; (ii) supervisory powers; and (i) investigatory powers. That the legal powers in (i)-(v) have a non-pecuniary nature is blurred by the fact that ESMA has the power to impose fines, which the CRAR and EMIR also categorise as (iii) 'supervisory measures'.[1729] The question therefore becomes whether the fines imposed by ESMA, which are almost identical to the fines imposed by the SRB, also should be satisfying the dissuasiveness requirement, and more fundamentally, whether a fine legitimately can be non-dissuasive? – Chapter 3 have nevertheless already answered this question, because when fines are punitive, they are in reality also dissuasive. Nonetheless, the ECtHR is reluctant to qualify disciplinary fines as deterrent, because that would classify the fines as criminal sanctions.[1730]

A fifth observation notes that across the EU financial laws there are legal bases for considering the following types of legal powers as non-pecuniary 'administrative sanctions' and/or 'administrative measures':

(1) Withdrawals and suspensions of authorisations or registrations;[1731]
(2) Suspension of voting rights;[1732]
(3) Cease-and-desist orders ('CDOs');[1733]
(4) Bans;[1734]
(5) Public statements and public warnings.[1735]

[1728] The post-crisis EU legal framework on financial sanctions has therefore inherited the most fundamental problem derived under the review of the pre-crisis NFSR. See Chapter 5, Section II. For now, the EU legislator seems even to have given up on the issue. For instance, MiFID II, Recital 148, therefore refers to "sanctions and measures in order to cover all actions applied after an infringement, and which are intended to prevent further infringements, irrespective of their qualification as a sanction or as a measure under national law." See also Recital 41 CRD.
[1729] Articles 25(1)(b) CRAR and 25q(1)(b) and 73(1)(b) EMIR.
[1730] Chapter 3, Section III(1)(A)(II)(2) and III(1)(B).
[1731] Articles 14(5) SSMR; 18, 64(1) and 67(2)(c) CRD; 59(2)(c) AMLD IV; 30(2)(d) MAR; 42(2)(d) BR; 70(6)(c) MiFID II; 99(6)(c) UCITS; 46(2)(k) AIFMD; 20 and 24(1)(a) CRAR; and 25p, 25q(1)(d), 71 and 73(1)(d) EMIR.
[1732] Articles 66(2)(f) CRD, and Article 28b(2) TD.
[1733] Articles 66(2)(b) and 67(2)(b) CRD; 111(2)(b) BRRD; 59(2)(b) AMLD IV; 30(2)(a) MAR; 42(2)(a) BR; 70(6)(b) MiFID II; 38(2)(b) PR; 99(6)(b) UCITS; and 18(2)(b) IFD.
[1734] Articles 67(2)(d) CRD; 111(2)(c) BRRD; 59(2)(d) AMLD IV; 30(2)(e)-(f) MAR; 42(2)(e) BR; 70(6)(d) MiFID II; 99(6) UCITS; and 18(2)(c) IFD.
[1735] Articles 66(2)(a) and 67(2)(a) CRD; 111(2)(a) BRRD; 59(2)(a) AMLD IV; 30(2)(c) MAR; 42(2)(c) BR; 70(6)(a) MiFID II; 38(2)(a) PR; 99(6)(a) UCITS; and 18(2)(a) IFD.

According to main rule, these are required to satisfy the effectiveness, proportionality and dissuasive requirements. However, there exist a consistency problem which matters in respect of the dissuasiveness requirement, if these legal powers also qualify as supervisory powers, supervisory powers and/or early intervention powers. This consistency problem is most evident in respect of the withdrawal-power (1), because depending on the specific legislative act or provision one looks, it is a legal power which at the same time may be considered as a non-pecuniary sanction, an administrative measure, a supervisory power and a supervisory measure.[1736] Therefore, to answer the question of which category the withdrawal-power belongs to it becomes necessary to determine the essential nature of these categories of legal powers and to describe their fundamental characteristics. The endeavour is initiated already in Section II(2) in the discussion of the categories of legal powers referred to in (i)-(iv).

A sixth observation reflects further on the five legal powers (1)-(5) in contrast to the legal provisions that provides for the specific types of supervisory powers and supervisory measures and follows the rationale just laid out in respect of the withdrawal-power (1). The first (1) and second (2) of legal powers employ the concept of a *'suspension'* to signify the category and application of 'administrative sanctions' and 'administrative measures', but elsewhere it is also used to signify the category and application of 'supervisory powers' and 'supervisory measure'.[1737] A similar observation applies in respect of CDOs (3). A *'cease-and-desist order'* is essentially an order that requires the responsible natural or legal person to cease a specific conduct and desist from repeating that conduct. On the other hand, certain supervisory powers and measures essentially requires the temporary or permanent *'cessation'* of any practice or conduct, or *'to cease'* certain activities or products, or *'to bring an infringement to an end'*.[1738] The same pattern continues in respect of bans (4). A *'ban'* essentially prohibits a natural person from temporarily or permanently to exercise a certain function or to pursue a certain conduct. On the other hand, certain supervisory powers and measures imposes a '*temporary prohibition'* on the exercise of professional activity or '*prohibits'* and/or similarly '*restricts'* a certain conduct, activity, practice or product.[1739] Such bans and prohibitions also appears very similar to the supervisory powers and early intervention measures that requires the

[1736] Supra fn11.
[1737] Articles 23(2)(j) MAR; 69(2)(m), (s), and (t) MiFID II, 31(2)(d)-(e), (g), (j) and (m) PR; 98(2)(j) UCITS; 46(2)(j) AIFMD; and 24(1)(c) CRAR.
[1738] Articles 23(2)(k) MAR; 41(1)(h) BR; 69(2)(k) MiFID II, 32(1)(e) PR; 98(2)(e) UCITS; 46(2)(e) AIFMD; 24(1)(d) CRAR; and 73(1)(a) EMIR.
[1739] Articles 16(2)(i) SSMR; 104(2)(i) CRD; 23(2)(l) MAR; 41(1)(i) BR; 69(2)(f), (o) and (p) MiFID II; 40-42 MiFIR; 32(1)(e)-(f), (h) and (j) PR; 98(2)(g) UCITS; 46(2)(g) AIFMD; and 24(1)(b) CRAR.

'removal of members of the management body' or even the entire management body.[1740] The removal-power may also be used *'to remove a financial instrument'* from trading irrespective of whether it trades on a regulated market or other trading arrangement.[1741] Furthermore, the same pattern also continues in respect of public statements and public warnings (5). A *'public statement'* or *'public warning'* indicates or identifies the natural or legal person responsible for the infringement and the nature of the infringement committed. On the other hand, certain types of supervisory powers and measures also provides for the disclosure of *'public notices'*, or other types of *'disclosure measures'* imposing a duty to disclose information, for instance, to ensure that the public is correctly informed.[1742] All these different types of disclosure sanctions and measures seems to be subject to the same rationale that governs the requirement to publish sanctions, and therefore needs to be viewed in light thereof. Moreover, the sixth observation intends to point out that terminology of the legislative texts amplify the need to be able to distinguish when a legal power qualifies as a 'sanction' and one of the powers referred to in (ii)-(v), primarily for the purposes of effectiveness, proportionality and dissuasiveness. Perhaps, this is most evident in respect of the supervisor power whereby the NCAs may *'request or require the freeze and sequestration of assets, or both',*[1743] because the nature of this power is governed by the CFD, which is a EU legislative act of EU criminal law. Because these supervisory powers appears so similar to the administrative sanctions and measures, the discussion in Section III(2)(A) will take into account the nature of all types of powers to contrast, compare, and demarcate more clearly the qualification of these legal powers. On the other hand, because certain product and activity intervention powers provided in MiFIR and PR stands out from the ones above, they will be discussed in Section II(2)(B)(II).

Finally, a seventh observation notes that provisions in EU securities laws mostly mix together the 'supervisory powers' and 'investigatory powers' on the same lists without qualifying which category the specific power belongs to.[1744] Stricto sensu, the enlisted types of legal powers may at the same time be considered as investigatory powers and supervisory powers although this is contrary to their nature and purpose. In particular, the legal provisions of EU securities law stresses the need for distinguishing between investigatory and supervisory powers, while EU banking law proves much more consistent. Therefore, a short comparison

[1740] Articles 16(2)(m) SSMR; 91 CRD; 28 BRRD; 39(2)(m) IFD; and 69(2)(n) MiFID II.
[1741] Article 69(2)(n) MiFID II.
[1742] Articles 69(2)(q) MiFID II; 40(5), 41(5), 42(5) MiFIR; 24(1)(e) CRAR; 25q(1)(c) and 73(1)(c) EMIR; 23(2)(m) MAR; 41(1)(j) BR; and 32(1)(i) and (l) PR.
[1743] Articles 23(2)(i) MAR; 41(1)(g) BR; 69(2)(e) MiFID II, 98(2)(f) UCITS; and 46(2)(f) AIFMD.
[1744] Articles 23(2)-(3) MAR; 41(1) and (3) BR; 69(2) MiFID II; 32(1) PR; 98(1)-(2) UCITS; and 46(1)-(2) AIFMD.

between the legal provisions of EU banking and securities law may help to sort out and distinguish the supervisory powers from the investigatory powers listed together in EU securities law to establish a more consistent category of 'investigatory powers' and narrow down the supervisory powers of our concern and in need of being distinguished from the administrative non-pecuniary sanctions and measures. The first task of establishing the category of investigatory powers will be undertaken in the following section, and following is the attempt to establish the category of supervisory powers, while the latter task of distinguishing between the concept of supervisory powers from the concept of administrative non-pecuniary sanctions' and 'measures' remains an ongoing theme in the rest of this chapter.

2. The legal categories of investigatory and supervisory powers

A. Investigatory powers

When exercised by the supervisory authorities, investigatory powers are necessary powers in order for the supervisors to pursue and exercise their functions of monitoring and ensuring compliance with EU financial law as well for the detection and sanction of breaches. In EU banking law, the concept of 'investigatory powers' generally consists of the specific types of legal powers: (i) to require, demand or request information; (ii) to investigate, summon, interview and question any natural and legal person; (iii) to conduct on-site inspections at the business premises of the natural and legal persons; and (iv) where necessary, to obtain authorisations by a judicial authority for the exercise of investigatory powers, typically on-site inspections.[1745] The CRD and BRRD has even stipulated the essential nature common to the specific powers, that is, that investigatory powers are essentially: "information-gathering and investigatory powers."[1746] The same view seems also to be accepted in the literature.[1747] In EU securities law, it is also upheld in the IFD.[1748] In the CRAR and EMIR the legal provisions covering the investigatory powers are constructed on the same notion as in EU banking law.[1749] Therefore, it seems fair to use the governing notion of 'information-gathering'-powers as the

[1745] Articles 10-13 SSMR; 138-146 SSMFR; 65(3) CRD; 34-37 SRMR; 110(3) BRRD; 58(4) AMLD IV; 23b-d CRAR; 25f-h and 61-63 EMIR; and 19 IFD. Compare with Articles 23(2) MAR; 41(1) BR; 69(2) MiFID II; 32(2) PR; and 98(2) UCITS.
[1746] Articles 65(3) CRD and 110(3) BRRD.
[1747] Lackhoff (n 2) 176. Lackhoff also makes the observation that "[the] Section of "Investigatory powers" of the SSMR confers in three Articles information gathering powers to the ECB which resemble to a certain extent Articles of 17 to 22 Regulation 1/2003," cf. p. 176, paragraph 754.
[1748] IFD, Article 19(1).
[1749] Articles 23b-d CRAR, and 25f-h and 61-6 EMIR.

essential criterion to more generally sort out and distinguish between the supervisory and investigatory powers enlisted together on the same lists elsewhere in the EU securities law.

B. Supervisory powers

(I) EU banking law

While the types of investigatory powers and sanctioning powers are very similar across the legislative and legal acts of EU financial law, and therefore also more easy to identify, the situation is a bit different in respect of the types of legal powers that typically are referred to as 'supervisory powers', 'supervisory measures', or 'early intervention measures'. With respect to European banking law, the specific types of legal powers that these given labels actually refers to are having their legal bases within Articles 102 and 104 CRD, 16 SSMR, and 27-30 BRRD, but they centres around the lists containing 'supervisory powers' provided in Articles 104(1) CRD and 16(2) SSMR. The European Banking Authorities ('EBA') has reflected upon the specific types of supervisory powers contained on these lists in its "Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP),"[1750] referred to in the following as: 'SREP Guidelines', of which Title 10 concern the application of the legal powers conferred on the supervisory and resolution authorities irrespective of whether they are referred to as 'supervisory powers', 'supervisory measures' or 'early intervention measures'.[1751] The SREP Guidelines categorises (non-exhaustively) the specific types of legal powers into three main categories:

(I) Capital measures;[1752]
(II) Liquidity measures;[1753] and

[1750] European Banking Authority, 'Guidelines on common procedures and methodologies for the supervisory review and evaluation process (SREP)'. EBA/GL/2014/13. 19 December 2014. Link: https://www.eba.europa.eu/sites/default/documents/files/documents/10180/935249/4b842c7e-3294-4947-94cd-ad7f94405d66/EBA-GL-2014-13%20%28Guidelines%20on%20SREP%20methodologies%20and%20processes%29.pdf?retry=1.
[1751] SREP Guidelines, para. 456.
[1752] The concept of 'capital measures' cover Articles 16(2)/104(1)(a), (d), (h), and (i) SSMR/CRD. In relation to a SREP-review, the capital measures may be imposed on the basis of deficiencies and vulnerabilities identified in the assessment of any of the SREP-elements, however, primarily, the risk-elements (III)(3)-(8). In particular, the supervisory authorities should determine whether the own funds "provide sound coverage of risks to capital to which the institution is or might be exposed, if such risks are assessed material to the institution" (para. 319). SREP Guidelines, paras. 465-466, and further Title 7.
[1753] The concept of 'liquidity measures' covers primarily Articles 16(2)/104(1)(k) SSMR/CRD and Articles 105 CRD. In relation to the SREP-review, the liquidity measures are imposed on the basis of deficiencies and vulnerabilities identified in the assessment of risks to liquidity (III)(7) and funding (III)(8). In particular, the supervisory authorities should determine "whether the liquidity held by the institution provides appropriate coverage of the risks to liquidity and funding [and] whether it is necessary to set specific liquidity requirements to cover risks to liquidity and funding to which an institution is or might be exposed" (para. 426). SREP Guidelines, paras. 467-468 and 494-496, and further Title 8 and 9.

(III) Other supervisory measures.[1754]

More specifically, the third category (III) contains legal powers that deals with the appropriateness and adequacy of the supervised entities':

(III)(1) Business model;[1755]
(III)(2) Internal governance and institution-wide controls,[1756] and
(III)(3)-(8) The appropriateness and adequacy of risk coverage in relation to:

(3) Credit and counterparty risk;[1757]
(4) Market risk;[1758]
(5) Operational risk;[1759]
(6) Non-trading interest rate risk;[1760]
(7) Liquidity risk;[1761] and
(8) Funding risk.[1762]

However, the categorisation and concepts applied within the legal provisions of EU banking law generally provides for around thirteen types of legal powers contained in Articles 104(1) CRD and 16(2) SSMR – Here combined with the SREP Guidelines' qualification:[1763]

(a) require additional own funds in excess of the capital requirements laid down in the CRR under the conditions set out in Article 104a CRD related to elements of risks and risks not covered by relevant EU banking law.[1764] – SREP: Capital measure (I).

[1754] The concept of 'other supervisory measures' covers the residual types of legal powers referred to in Articles 16(2)/104(1) SSMR/CRD. Because not all of these types of legal powers are directly linked to the quantitative capital and liquidity requirements, they may have a more different and varying (qualitative) nature. SREP Guidelines, paras. 469-499.
[1755] (III)(1) concerns deficiencies identified in the business model analysis ('BMA') and relates primarily to the powers covered by Articles 16(2)/104(1)(b), (e), and (f) SSMR/CRD. SREP Guidelines, paras. 470-473.
[1756] (III)(2) concerns deficiencies identified in the assessment of internal governance and institution-wide controls and relates primarily to powers in Articles 16(2)/104(1)(b) and (g) SSMR/CRD. SREP Guidelines, paras. 474-476.
[1757] (III)(3) concerns deficiencies identified in the assessment of the credit and counterparty risk and the associated management and control arrangements and relates primarily to the powers in Articles 16(2)/104(1)(b), (d), (e), (f), and (j) SSMR/CRD. SREP Guidelines, paras. 477-481.
[1758] (III)(4) concerns deficiencies identified in assessment of the market risks and the associated management and control arrangements and relates primarily to powers in Articles 16(2)/104(1)(b) and (f) SSMR/CRD. SREP Guidelines, paras. 482-485.
[1759] (III)(5) concerns deficiencies identified in the assessment of the operation risks and the associated management and control arrangements and relates primarily to powers covered by Articles 16(2)/104(1)(b), (e) and (f) SSMR/CRD. SREP Guidelines, paras. 486-488.
[1760] (III)(6) concerns deficiencies identified in assessment of the non-trading interest rate risk relates primarily to the powers covered Articles 16(2)/104(1)(b), (f) and (j) SSMR/CRD. SREP Guidelines, paras. 489-493.
[1761] See above on (II) Liquidity measures.
[1762] (III)(8) concerns deficiencies identified in the assessment of the funding risks and the associated management and control arrangements and relates primarily to powers covered by Articles 16(2)/104(1)(b), (j) and (k) SSMR/CRD. SREP Guidelines, paras. 497-499.
[1763] For a discussion of these powers, see, inter alia: Lackhoff (n 4), pp. 205-210; Gortsos CV (2022): *'Article 16 SSMR'* in *'Brussels Commentary on European Banking Union'*, Binder, J.-H., Gortsos, Ch.V, Ohler, C. and K. Lackhoff (editors), C.H. Beck, München – Hart Publishing, Oxford – Nomos Verlagsgesellschaft, Baden-Baden. Gortsos has written the Chapters on "Article 6 SSMR;" "Article 16 SSMR:" and "Article 13 SRMR," referred to in the following as "Gortsos/Art. 6 SSMR;" "Gortsos/Art. 16 SSMR;" and "Gortsos/Art. 13 SRMR."
[1764] This is essentially a 'capital add-on'-power reflecting its capability to require institutions to hold additional own funds on the basis of the relevant requirements of EU banking law. In T-52/16 – Crédit Mutual Arkéa v ECB, ECLI:EU:2017:902, para. 167, the CJEU stated that "it is apparent from a combined reading of Article 16(1)(c) and (2)(a) [that] the ECB is entitled to require the credit institution to maintain a level of capital exceeding those minimum requirements." Furthermore, the imposition of additional capital amounts do not covert a penalty, cf. paras. 171, and 207-213. See further: paras. 161-213, and Case T-712/15 – Crédit Mutuel Arkéa v ECB, ECLI:EU:T:2017:900. The conditions now provided in Article 104a CRD is discussed in more detail in Gortsos/Art. 16 SSMR, Section B(II)(1).

(b) require the reinforcement of the governance arrangements, processes, mechanisms and strategies implemented in accordance with Articles 73-74 CRD. – SREP: Other supervisory measure (III). This power is very general as it is often relevant to consider and apply in relation to deficiencies identified under the assessments of (III)(1)-(8).[1765]

(c) require institutions to submit a plan to restore compliance with supervisory requirements laid down in the CRD and CRR and set a deadline for its implementation, including improvements to that plan regarding its scope and deadline.[1766] – SREP: No qualification.

(d) require the application of a specific provisioning policy or treatment of assets in terms of own funds requirements.[1767] – SREP: Capital measure (I). Relevance: (III)(3).[1768]

(e) restrict or limit the business, operations, or network of institutions, or to request divestment of activities that pose excessive risks to the soundness of an institution. – SREP: Other supervisory measure (III). Relevance: (III)(1), (3)-(6).[1769]

[1765] SREP Guidelines, paras. 471, 475, 478, 483, 487, 490, 496, and 499. For instance, the power may be applied under ***(III)(1)*** to make adjustments to the risk management and control functions, and governance arrangements and other organisational structures to match or help with the implementation of the business model and strategy, including adjustments to the financial plan assumed in the strategy when not supported by the internal capital planning or credible assumptions; ***(III)(2)*** to strengthen the governance and control arrangements or reducing the risk inherent in its products, systems and operations, including (2)(a) changes to reporting lines; risk policies or how they are developed and implemented across the organisation; and increase the transparency of governance arrangements; (2)(b) to make changes to the organisation, composition or working arrangements of the management body; and (2)(c) to strengthen the overall risk management, including by reductions in risk appetite and overall risk strategy; enhancement of stress-testing capacities and programme; enhancement of adequate staffing of the internal audit function; and enhancement of information systems or business continuity arrangements; ***(III)(3)*** to involve the management body or its committees more actively in relevant credit decisions, improve credit risk measurement systems and processes, and to enhance collateral management, evaluation and monitoring. In relation to ***(III)(4)-(8)*** the power focuses at addressing deficiencies that concern the institutions' ability to identify, measure, monitor the material sources of the risks in order to control them. Thus the power may often involve enhancements to reporting requirements to the institutions management body and enhancements of the institution's stress-testing capacities. In addition, the power may, inter alia, be applied to require more frequent and in-depth internal audits of market activity ***(III)(4)***; involve the management body more actively in operational risk management decisions and improve operational risk identification and measurement systems ***(III)(5)***; enhance its ability to monetise its liquidity assets and its liquidity contingency plan and liquidity early warning indicators framework ***(III)(7)***; enhancing the funding plan and placing limits on its risk appetite and tolerance ***(III)(8)***.

[1766] Lackhoff (n 4), at p. 207, para. 883, argues that the wording of 'restore compliance' does not necessarily means that a breach already exists, but rather that it "should be read in the meaning of "ensure compliance." This is compatible with Articles 16(1)(b)/104(1)(b) SSMR/CRD allowing supervisory measure to be taken at an early stage to address relevant problems that within the next 12 months is likely to materialise into a breach. Gortsos nevertheless emphasises that the stricto sensu point of view of the phrase "restore compliance" should be interpreted as to require the existence of a breach. He also notes that the plan differs from the recovery plan drawn in accordance with Article 5 BRRD, "since the latter provides for measures to be taken in order to restore its financial position upon a significant deterioration of its financial situation." Gortsos further argues that the power covers "enhancement/improvement of incomplete policies on the basis of which compliance with supervisory requirements is pursued by a supervised entity." See further Gortsos/Art. 16 SSMR, Section B(II)(2).

[1767] Lackhoff (n 4), at p. 208, para. 884, argues that the power should be understood in the context of the ECB's limited powers in respect of accounting (Recital 19 SSMR), whereby the ECB does not have the power to make specific provisions, but only to oblige the supervised entity to apply election right in a specific manner, such as, "to ask for a change of the general approach relating to provisioning within the applicable accounting framework." See also Gortsos/Art. 16 SSMR, Section B(II)(2), and Joined Cases T-150/18 and T-345/18 – BNP Paribas v ECB, ECLI:EU:T:2020:394.

[1768] The SREP Guidelines, paras. 466 and 479, considers it as one of the (I) capital measures relevant for ***(III)(3)***. The power may require a specific provisional policy and to increase the provisions where permitted by accounting rules and regulations; floors or caps to internal risk parameters and/or risk weights used to calculate risk exposure amounts for specific products, sectors or types of obligors; higher haircuts to the value of collateral; and hold additional own funds to compensate for the difference between the accounting value of provisions and a prudent valuation of assets indicating the expected losses not covered by the accounting provisions.

[1769] The SREP Guidelines, paras. 472, 480, 484, 488, and 491. For instance, the power may be used to make changes to the business model or strategy when the business model or strategies (i) are not supported by appropriate organisational, governance or risk control and management arrangements; (ii) are not supported by capital and operational plans, including the appropriate allocation of financial, human and technological resources; and/or (iii) leads to an increase in systemic risk or poses threat to financial stability ***(III)(1)***; to (i) reduce large exposures or other sources of credit concentration risk; (ii) tighten credit-granting criteria for all or some product or obligor categories; and/or (iii) reduce the exposure to, or require the protection for specific facilities such as mortgages, export finance, commercial real estate, securitisations, etc., or for obligor categories, sectors, and countries, etc. ***(III)(3)***; to (i) restrict investment in certain products when the policies of the institution and procedures do not ensure that the risk from those products will be adequately covered; (ii) require the institution to present a plan to reduce its exposures to distressed assets and/or illiquid positions gradually; and (iii) require the divestment of financial

(f) require the reduction of the risk inherent in the activities, products and systems, including outsourced activities. – SREP: Other supervisory measure (III). Relevance: (III)(1), (3)-(5).[1770]

(g) require limitations on variable remuneration to a percentage of net revenues where it is inconsistent with the maintenance of a sound capital base.[1771] – SREP: Other supervisory measure (III). Relevance: (III)(2).[1772]

(h) require the use of net profits to strengthen own funds.[1773] – SREP: Capital measure (I).

(i) restrict or prohibit distributions or interest payments by an institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution.[1774] – SREP: Capital measure (I).

(j) impose additional or more frequent reporting requirements, including reporting on own funds, liquidity and leverage.[1775] – SREP: Other supervisory measure (III). Relevance: (III)(6)-(8).[1776]

(k) impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities. – SREP: Liquidity measures (II). Relevance: (III)(7)-(8).[1777]

(l) require additional disclosures.[1778] – SREP: No qualification.

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products when the valuation processes of the institution do not produce conservative valuations that comply with the CRR ***(III)(4)***; to (i) reduce the extent of outsourcing, and (ii) mitigate operational risk exposures by requiring insurance or more control points ***(III)(5)***; to apply variations to internal limits to reduce risks inherent to activities, products and systems ***(III)(6)***.

[1770] SREP Guidelines, paras. 473, 480, and 485. For the purposes of ***(III)(3)*** and ***(III)(5)*** see the previous note as the SREP Guidelines considered it to be used in the same way. Otherwise, the power may be used to require the institution to reduce risk inherent in the products they originate or distribute by requiring: (i) changes to the risks inherent in certain product offerings; (ii) require improvements to the governance and control arrangements for product development and maintenance; (iii) reduction of risk inherent in its systems by requiring improvements to the systems, or increasing the level of investment or speeding-up of the implementation of new systems or improvements to the governance and control arrangements for system development and maintenance ***(III)(1)***; to (i) reduce the level of inherent market risk through hedging or sale of assets when significant shortcomings have been found in the institution's measurement systems; and/or (ii) increase the amount of derivatives settled through central counterparties ***(III)(4)***.

[1771] Lackhoff (n 4), at p. 208, para. 887, considers the application of this power only to make sense "if it can be exercised in cases going beyond the ones covered by the provisions on the maximum distributable amount (MDA) [Article 141 CRD]," and that it is "a power directed to preventive capital protection." See also Gortsos/Art. 16 SSMR, Section B(II)(3).

[1772] SREP Guidelines, para. 476. The power may be used to require the institution to make changes to renumeration polices and/or limit variable remuneration as a percentage of net revenues.

[1773] Lackhoff (n 4), p. 209. para. 888, writes that it is "a power directed to preventive capital protection."

[1774] See further Lackhoff (n 4), p. 209. para. 889; Gortsos/Art. 16 SSMR, Section (A)(II) and B(II)(3). The nature of this supervisory power is discussed in more detail in Section III(2)(A)(II)(2).

[1775] Lackhoff (n 4) at p. 209, para. 890, argues that the power may go beyond the powers under Article 10 SSMR, because the application of Article 16(2)(j) is triggered by one of the situations provided in Article 16(1) SSMR. See also Gortsos/Art. 16 SSMR, Section B(II)(4). Furthermore, Article 104(2) CRD provides that the additional or more frequent reporting requirements must only be imposed on institutions where the relevant requirement is appropriate and proportionate with regard to the purpose for which the information is required and the information requested is not duplicative.

[1776] SREP Guidelines, paras. 492, 495, and 498. For instance, the power may be used to require additional or more frequent reporting: (i) of the institution's IRRBB positions ***(III)(6)***; (ii) of liquidity positions, including liquidity coverage and/or net stable funding and additional monitoring metrics ***(III)(7)***; of funding position, including the funding profile, additional monitoring metrics, and the institution's funding plan to the supervisor ***(III)(8)***.

[1777] SREP Guidelines, paras. 468, 494, and 497. The liquidity measure is relevant primarily relevant to apply for addressing deficiencies identified in the assessment of liquidity and funding risk ***(III)(7)-(8)***, including to: (i) impose requirements on the concentration of liquid assets held, for instance in the composition of its liquid-assets profile in respect of counterparties, currency, and/or caps, limits or restrictions on funding concentrations; and (ii) to impose restrictions on short-term contractual or behavioural maturity mismatches between assets and liabilities, for instance limits on maturity mismatches in specific time buckets between assets and liabilities ***(III)(7)***; to require amendments to the institution's funding profile by: (i) reducing its dependency on certain funding markets like wholesale funding that potentially are volatile; and (ii) reducing the concentration of its funding profile in respect of counterparties, and mismatches in currencies ***(III)(8)***.

[1778] Lackhoff (n 113), p. 209, para. 892, argues that the power allows the ECB to make use of market discipline mechanism in respect of additional information to "enable and induce investors to react taking into account this additional information. This power rests on the assumption that investors will take into account such additional information and that this will result in corresponding actions." See also Gortsos/Art. 16 SSMR, Section B(II)(3), and Chapter 6, Section IV.

(m) remove members of the management body who do not fulfil the CRD requirements.[1779] – SREP: No qualification.

In accordance with the tasks conferred on the ECB (Article 4(1)(d)-(h) SSMR), the supervisory powers and measures contained in Article 16 SSMR can be applied by the ECB in three circumstances: (a) the SSE does not comply with the relevant banking laws;[1780] (b) the ECB has evidence that the SSE is likely to breach any of the requirements referred to in *((a))* within the next 12 months; and (c) when: (i) the arrangements, strategies, processes and mechanisms implemented by the SSE and the own funds held by the SSE does not ensure a sound management and coverage of its risks; and (ii) the assessment under (i) is made within the framework of a supervisory review in accordance with Article 4(1)(f) SSMR and of which the predominant one is the SREP-review as referred to above.[1781] The same three circumstances also provides the main three circumstances in which the NCAs may apply the same supervisory powers and measures in respect of the LSSEs pursuant to Articles 102 and 104 CRD. The three circumstances may also trigger the application of the early intervention measures contained in Article 27(1) BRRD, however, with the modification that the early intervention measures may be applied when the institution "due to, inter alia, a rapidly deteriorating financial condition [...] is likely in the near future to infringe the" same essential requirements.[1782] In addition, the early intervention measure that allows for the removal of a member or the entire management body pursuant to Article 28 BRRD is triggered by "a significant deterioration in the financial situation of an institution or where there are serious infringements of law, [...] and other measures taken in accordance with Article 27 are not sufficient to reverse that deterioration."[1783] Finally, where a replacement of the management under Article 28 is deemed insufficient to remedy the situation, the competent authority "may appoint one or more temporary administrators to the institution."[1784] By reference to Article 13 SRMR, Gortsos has also pointed out that "[neither] the national resolution authorities (NRAs) nor the [Single Resolution Board / SRB] has any powers to apply early invention measures [Articles 27-29 BRRD]; [these are crisis prevention measures] which falls under the competence of supervisory

[1779] This removal-power allows the supervisory authority to remove members of the management body that do not satisfy the requirements provided in Articles 91 CRD and 93-94 SSMFR. It is discussed in Section III(3)(A)(III).
[1780] Due to the design of Article 4(3) SSMR, there must be a breach of the CRR, the national laws implementing the CRD, or other national prudential rules or requirements.
[1781] Lackhoff (n 2) 202–203. In paras. 865-866, he points out that the concept of 'supervisory reviews' must be understood broadly so that 'supervisory reviews' may be carried out in respect of the annual SREP or any other review carried out for the same supervisory purposes, e.g. in relation to the exercise of the investigatory powers or as part of the stress testing. Thus, the concept of 'supervisory reviews' (SSMR, Article 4(1)(f) is broader than the concept of a 'SREP review'.
[1782] Article 27(1) BRRD.
[1783] Article 28(1) BRRD.
[1784] Article 29(1) BRRD.

authorities;"[1785] hence within the competences of the ECB or NCAs. On this basis, Lackhoff has very fittingly described that the early intervention measures "are only "early" in relation to a resolution. From a supervisory perspective they are "later" as they are at least in part measures (Article 28, 29 BRRD) requiring a more severe situation ("significant deterioration in the financial situation or ... serious infringements") than supervisory measures."[1786] With a view towards the triggers, Articles 27-29 provides legal bases for more intrusive measures than Articles 16 SSMR and 102 and 104 CRD, despite these also are intrusive.[1787] From a similar perspective, the BRRD qualifies the powers to take early intervention measures (Article 27) and appoint a temporary administrator under (Article 29) as 'crisis preventive measures'.[1788]

This framework of legal powers makes it apparent that the different labels of 'supervisory powers', 'supervisory measures', or 'early intervention measures' are umbrellas that overwhelmingly provides for almost identical legal powers in respect of their type and nature.[1789] The types of supervisory powers and measures listed in Article 16(2) SSMR is almost entirely identical to the powers and measures listed in Article 104(2) CRD, with the exception of litra (m),[1790] and they are very similar to the early intervention measures provided by Article 27(1) BRRD. Gortsos has also noted that "in the majority of the cases, whenever the conditions for adopting supervisory measures are fulfilled, those for early invention are met as well."[1791] For the same reason, the SREP Guidelines is also applicable to the same supervisory powers and measures.[1792] Lackhoff has also observed that "certain early intervention measures cannot be differentiated from supervisory measures [which] shows that early intervention measures are supervisory measures [and that the] differences with regard to the specific measures can be dealt with by the application of the proportionality principle (more severe measures like removing members of the management body require with a view to proportionality a more severe situation)."[1793] That these types of legal powers largely are identical is not altered by the fact that some of the early intervention measures "are intended to supplement the set of supervisory measures specified in Articles 104 and 105 [CRD],"[1794] and that some of the early intervention measures provided in Articles 28-29 BRRD only are applicable in more serious situations.

[1785] Gortsos/Art. 13 SRMR, Section B(I)(1).
[1786] Lackhoff (n 2) 205.
[1787] See also Gortsos/Art. 13 SRMR, Section B(II)(2).
[1788] Article 2(1)(101) BRRD. See also Gortsos/Art. 13 SRMR, Section B(I).
[1789] In particular, this is evident from Article 13 SRMR.
[1790] Gortsos has nevertheless spelled-out certain differences. See further Gortsos/Art. 16 SSMR, Section B(II)(2).
[1791] See further Gortsos/Art. 13 SRMR, Section B(II)(2); and Gortsos/Art. 16, Section A(II)(2).
[1792] SREP Guidelines, para. 456, p. 168.
[1793] Lackhoff (n 2) 205. Brackets maintained.
[1794] SREP Guidelines, para. 500, p. 180.

Their application are "directly linked to the outcomes of any supervisory activities,"[1795] which subject the supervised entity to a prudential assessment and individual examination.[1796] When used for the ECB's and NCAs' shared tasks to conduct prudential supervision over the SSEs and LSSEs, they can also be characterised as 'microprudential supervisory powers'.[1797]

Because the specific types of legal powers are so similar, they also shares the same essential nature. Therefore, the CRD can speak more generally on behalf of EU banking law, when the CRD considers the concept of a 'supervisory power' to mean a legal power granted to the supervisory authority in order to "intervene in the activity of the [supervised entities] that are necessary to exercise their function."[1798] Hence, in their application and function, the supervisory powers characterise as 'intervention powers'.[1799] By their intervention, the powers "interfere [...] with the principle that the management body of the supervised entity is solely competent to decide on business matters and the risks taken."[1800] They allow the supervisors to intervene into the activities of the supervised entities for the task and purpose to ensure compliance with prudential laws and requirements and supervisory decisions. In their capacity to ensure compliance, the supervisory powers employ means or measures, which are capable: (i) to address, correct or remedy more or less serious problems at either an early or later stage;[1801] and (ii) to "counteract and rectify a breach."[1802] More generally, "the ECB may impose corrective measures on the basis of the vulnerability and weaknesses identified."[1803] Hence, the term 'problem' seems primarily to include the notions of weaknesses, deteriorations, vulnerabilities, and "deficiencies,"[1804] which not necessarily seems equivalent to a breach of the legal requirement (infringement), but in any such case, it is nevertheless required that

[1795] SREP Guidelines, para. 459, p. 169.
[1796] T-52/16 – Crédit Mutual Arkéa v ECB, para. 167; and Cases T-150/18 and T-345/18 – BNP Paribas v ECB, para. 83.
[1797] Lackhoff (n 2) 195–210. See also Gortsos/Art. 6 SSMR, Section C and D.
[1798] CRD, Article 64(1).
[1799] See, for instance, SRMR, Recital 10, and BRRD, Recitals 5, of which the latter, first sentence, provides: "[a] regime is therefore needed to provide authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system."
[1800] Lackhoff (n 2) 208.
[1801] Articles 16(1) SSMR; 102(1) CRD; and 27(1) BRRD.
[1802] Lackhoff (n 2) 212.
[1803] Cases T-150/18 and T-345/18 – BNP Paribas v ECB, para. 54.
[1804] SREP Guidelines, p. 168, paras. 456-458. For instance, under the SREP, the "[competent] authorities should exercise their supervisory powers on the basis of deficiencies identified during the assessments of the individual SREP elements and take into account the overall SREP assessment, including the score, considering the following [six factors]: a. the material of the deficiencies/vulnerabilities and the potential prudential impact of not addressing the issue (i.e. whether it is necessary to address the issue with a specific measure); b. whether the measures are consistent with/proportionate to their overall assessment of a particular SREP element (and the overall SREP assessment); c. whether the deficiencies/vulnerabilities have already been addressed by other measures; d. whether other measures would achieve the same objective with less of an administrative or financial impact on the institution; e. the optimal level and duration of application of the measure to achieve the supervisory objective; and f. the possibility that risks and vulnerabilities identified may be correlated and/or self-reinforcing, meriting an increase in the rigorousness of supervisory measures," p. 168, para. 457.

identified problems are likely to materialises into an infringement within the next 12 months.[1805] However, when the supervisory powers are applied at early stage to address problems that have not yet materialised into an infringement, the supervisory powers are exercised for the purpose of ensuring future compliance,[1806] but when applied to address, remedy, correct or rectify a breach, it may rather be said that they have been applied to for the purpose of legal restoration by restoring the legal position into compliance. In the meaning of legal restoration, the rationale governing the application is that the nature of the particular infringement committed determines and calls for a supervisory power or measure of a similar kind in order to repair the specific infringement or problem.[1807] Intervention through the application of supervisory powers and measures is thus also 'preventive intervention', because the purpose of ensuring or restoring compliance derives more fundamentally from the objective to contribute to the safety and soundness of the particular credit institution.[1808] Similarly, when the early intervention measures as crisis preventive measures provided under the resolution and recovery framework intervene in order to prevent a failing-scenario. Therefore, "Article 16 SSMR is the *vital* supervisory power employed by the ECB for supervisory interventions."[1809] The same may be said of the NCAs by virtue of Articles 102 and 104 CRD, and 27 BRRD.

The application of the supervisory powers and their level of intervention is relative to the seriousness of the infringement and the particularities of the specific (financial) situation of the institution as the supervisory authorities in exercising their task to ensure compliance, and thereby also to remedy a problem (i) and/or to rectify a breach (ii), may decide to either: (1) impose a specific solution directly on the supervised entities,[1810] and thus applying one or more of the specific supervisory powers, or (2) require from these entities that they take the necessary measures themselves, whereby it is the entities themselves that provides a specific solution to the problems raised after a supervisory review.[1811] Accordingly, it will also be the (management body of the) entity that decides on which measure(s) they deem appropriate to solve the problem. The choice between (1) or (2) gives a wide discretion to the supervisory

[1805] Articles 16(1)(a)-(c) SSMR; 102(1)(a)-(b) CRD; and 27(1) BRRD. Lackhoff (n 2) points out in light of the strict proportionality requirement that "[a] likely breach within a time horizon of twelve months requires further that the ECB displays in the relevant ECB supervisory decision facts which in a reasonable assessment make it likely [in the way that it is not only possible but according to the assessment better reasons speak in favour of assuming a breach than against it] that a breach will occur within that time horizon," p. 206, para. 879.
[1806] T-52/16 – Crédit Mutual Arkéa v ECB, para 211, including, "the need to correct a situation in which a credit institution's capital and liquidity do not ensure sound management and coverage of risk."
[1807] Therefore, the strict proportionality concept is a requirement that is, first and foremost, determined by the principle of proportionality in kind.
[1808] SSMR, Article 1, first subparagraph.
[1809] Lackhoff (n 2) 206. Italics added.
[1810] Articles 104(1)/16(2)(a)-(d), (f)-(g), (l) CRD/SSMR.
[1811] Articles 104(1)/16(2)(i)-(k) CRD/SSMR, and Article 16(2)(m) SSMR, and Article 91 CRD.

authorities justified by the complexity of EU banking law.[1812] However, the (ECB) application of the intervention powers are subject to the 'manifestly error-clause' for its supervisory decisions,[1813] and thus must be balanced with, the effectiveness requirement and the strict proportionality requirement.[1814] That the applicable proportionality concept provides for a strict proportionality assessment is reasonable, because the supervisory powers may employ very intrusive and heavy intervention measures that interferes with the longstanding private and company law principle that the management body is solely competent company organ to decide on company matters and its risk appetite.[1815] Hence, the application of the proportionality principle also includes an obligation for the supervisory authorities to apply the least onerous measure(s) in those situations where the supervisory authorities are having a choice between several appropriate measures.[1816] Therefore, the proportionality requirement also seems to justify an obligation for the supervisory authority to exercise on the second choice (2) as a main rule, and the first choice (1) as the exception,[1817] when measures from both categories are deemed to be appropriate and applicable.[1818] The ECB is also fully aware that the different types of supervisory powers varies in terms of intensity on the basis of their nature (content and form). The supervisory powers' level of intervention is thus also taken into account by the ECB together with the seriousness of the deficiencies and the institutions' specific circumstances.[1819]

Finally, as supervisory powers, supervisory measures and early intervention measures are 'preventive intervention powers' for the purpose of ensuring the safety and soundness of the supervised entities, including to prevent a crisis scenario and failing situations, they do not qualify as punitive sanctions. In Case T-52/16 – Crédit Mutual Arkéa v ECB, the CJEU did not consider a capital add-on measure in Articles 16(2)(a) SSMR and 104(1)(a) CRD to covert a

[1812] T-52/16 – Crédit Mutual Arkea v ECB, paras. 177-180.
[1813] Ibid. It provides an assessment of whether the ECB has relied on evidence that is "factually accurate, reliable and consistent in order to assess a complex situation and whether it is capable to substantiating the conclusions drawn from it" (para. 178).
[1814] T-52/16 – Crédit Mutual Arkea v ECB, para. 200.
[1815] Lackhoff (n 2) 210. In T-52/16 – Crédit Mutual Arkea v ECB, para. 197, the applicant argued that the decision to impose additional capital on the supervised entity/applicant "deprives that applicant of the freedom to draw on part of its financial capacity, which causes it serious detriment." Aligned therewith, Lackhoff writes with reference to Articles 16 and 52(2) EUCFR that "[as] the conditions under which the powers of Article 16(2) SSMR can be exercised are rather broad (e.g. any breach of prudential supervisions), the review of the proportionality requirement of the measures is of particular relevance in order to protect the freedom to conduct a business and to ensure that this freedom is only limited in a proportional manner," cf. para. 894. See also SSMR, Recital 86, and Gortsos/Art. 16 SSMR, Section A(I)(3)-(4), and more generally Grundmann S, *European Company Law: Organization, Finance and Capital Markets* (Second edition, Intersentia 2012).
[1816] Chapter 6, Section III(1)(A)(III).
[1817] In the ECB, Guide to banking supervision (2014) (https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf), p. 37, para. 78, the ECB provides that: "*[before] making use of its supervisory powers* with regard to significant credit institutions, the ECB may consider first addressing the problems informally, for example by holding a meeting with the management of the credit institution or sending a letter of intervention." Italics added.
[1818] Supra fn83.
[1819] ECB, Guide to banking supervision (2014), pp. 37-38, paras. 79-80. In para. 80, the ECB states that: "Supervisory powers consists of measures characterised by increasing intensity in terms of content and form and may imply: [...]."

penalty.[1820] This was re-affirmed in Case T-203/18 – VQ v ECB, where the CJEU considered the nature and purpose of the specific supervisory powers conferred on the ECB "to enable it to ensure compliance with prudential requirements by credit institutions *and not to punish* those institutions."[1821] However, the misuse of preventive intervention powers can nevertheless be re-qualified as to result in an imposition of a punitive sanction.[1822]

(II) EU securities law

EU securities law also contains legal provisions that provides for supervisory powers and supervisory measures. A first observation notes that the IFD framework of supervisory powers and measures is very similar to the framework of legal powers discussed above in respect of EU banking law.[1823] The discussion of the legal powers provided in EU banking law is thus equally applicable for the legal powers contained in the IFD.

Second, pursuant to MiFID II, UCITS and AIFMD, the NCAs may 'adopt any type of measure' that ensures that investment firms, regulated markets and other persons continue to comply with the provisions of MiFIR and the national provisions applicable to them by virtue of the implementation of the MiFID II, and, similarly, for investment companies, management companies or depositories subject to the national provisions implementing the UCITS, and AIFMs or depositaries subject to the national provisions implementing the AIFMD.[1824] The provisions do not specify which types of 'compliance measures' that the NCAs may adopt to remedy or correct an infringement. Because the scope of this power is so broad, there are no inherent restrictions that excludes compliance measures from taking a form similar to those interventions powers provided in the IFD under national law with respect to prudential issues.

[1820] T-52/16 – Crédit Mutual Arkéa v ECB, paras. 171, and 207-213.
[1821] T-203/18 – VQ v ECB, para. 66, italics added.
[1822] T-52/16 – Crédit Mutual Arkéa v ECB, para. 210. The CJEU argued that when the applicant submits that the level of CET 1 capital imposed is in the nature of a covert penalty, the applicant was essentially claiming the application of the capital add-on power in Article 16(2)(a) SSMR result in a 'misuse of powers' understood in accordance with the settled case-law on this concept, where an administrative authority has used its powers for a purpose other than that for which were conferred on it. Accordingly, a "decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose" (para. 210). See also Case T-712/15 – Crédit Mutuel Arkéa v ECB, para. 213, where the CJEU stated that the applicant has to put forward "objective, relevant and consistent evidence, [...], to show that its level of capital was determined in such a way as to punish it." In Case T-203/18 – VQ v ECB, para. 66, the CJEU also stated: "Moreover, the ECB is right to observe in its written submissions that the alternatives to the imposition of an administrative pecuniary penalty highlighted by the applicant, such as the exercise of the powers it derives from Article 16(2) of Regulation No 1024/2013, are irrelevant to the present complaint, since they cannot constitute appropriate measures within the meaning of the case-law cited in paragraph 61 above. *Indeed, the purpose for which those powers were conferred on the ECB is to enable it to ensure compliance with prudential requirements by credit institutions and not to punish those institutions* [...]." Italics added. See also the Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB, paras. 205-213 and 297-304; and Case C-52/17 – VTB Bank v Finanzmarktaufsichtsbehörde, ECLI:EU:C:2018:648.
[1823] IFD, Title V, Chapter 2, Section 4, Articles 38-45.
[1824] Articles 69(2)(l) MiFID II; 98(2)(i) UCITS; and 46(2)(i) AIFMD.

In this way, the microprudential supervisory powers provided in EU banking law may provide the archetypes for the more specific powers to be applied in respect of the natural and legal persons subject to the IFD, MiFID II, UCITS and AIFMD. As for EU banking law, the nature of such compliance measures will essentially qualify as preventive intervention powers. Beyond the scope of addressing prudential issues, compliance measures may nonetheless also be taken, but which exact type of measure envisaged remains open for national law to decide.

Third, MiFID II and MiFIR lays down rules on product governance, monitoring and intervention.[1825] The MiFID II and MiFIR rules grants 'temporary intervention powers' to be exercised by ESMA, EBA, but primarily the national supervisors (NCAs), which accordingly is the focus here. The nature of the intervention powers manifests in the more specific forms by way of imposing temporary 'restriction(s)' or a 'prohibition' against: (a) the marketing, distribution or sale of financial instruments and structured deposits; or (b) a type of financial activity or practice.[1826] In addition, the NCAs also have the power to temporarily suspend the marketing or sale of financial instruments or structured deposits, when the conditions prescribed in Articles 40-42 MiFIR are satisfied.[1827] Complementary thereto, the NCAs may also suspend the scrutiny of a prospectus submitted for approval or suspend or restrict an offer of securities to the public or admission to trading on a regulated market, when the NCAs are making use of the power to impose a prohibition or restriction pursuant to Article 42 MiFIR and until such prohibition or restriction has ceased.[1828] In the following, the reference to 'product intervention powers' therefore covers the more specific powers of suspension, restriction or prohibition applied in relation to (a), despite suspensions have a more narrow scope (marketing or sale). The reference to 'activity [including practice] intervention powers' covers the powers of imposing restrictions and prohibition in relation to (b). The distinctions matters, because the product intervention powers "are designed as 'last resort' powers," intended to be applied only "where organisational and conduct rules have failed."[1829] They must be exercised

[1825] MiFID, Articles 9(3), 16(3), 24 and 69(2)(s) (primarily); and MiFIR, Articles 39-42. In relation to supervision and enforcement, Article 39 MiFIR provides that ESMA shall monitor the market for financial instruments which are marketed, distributed and sold in the Union, and that EBA has the same monitoring-task in respect structured deposits, while the NCAs shall monitor both. The scope of their respective temporary product intervention powers follows accordingly.
[1826] MiFIR, Articles 40(1); 41(1); and 42(1).
[1827] MiFID II, Article 69(2)(s). See further Danny Busch and Guido Ferrarini, *Regulation of the EU Financial Markets: MiFID II and MiFIR* (Oxford University Press 2017) 142.
[1828] PR, Article 32(1)(j).
[1829] Niamh Moloney, *EU Securities and Financial Markets Regulation* (Third edition, Oxford University Press 2014) 829.

pre-emptively, on a precautionary basis, before the product has been marketed, distributed or sold to clients.[1830] Instead, the activity intervention powers can be exercised at any time.[1831]

The product, activity and practice intervention powers only apply under very serious circumstances when a set of cumulating conditions are met.[1832] For instance, when exercised by the NCAs, and (i) a financial instrument, a structured deposit, activity or practice gives rise to significant investor protection concerns or poses a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system within at least one EU Member State; or (ii) a derivative has a detrimental effect on the price formation mechanism in the underlying market.[1833] In addition thereto, it is also required that the issue would not be better addressed by improved supervision or enforcement of existing requirements, and that the temporary intervention powers are proportionate taking into account the nature of risks identified; the level of sophistication of the investors or market participants concerned, and the likely effect of the suspension, restriction or prohibition on the investors and the market participants who may hold, use or otherwise benefit therefrom.[1834] Because the powers aim to suspend, restrict, or prohibit the marketing, distribution or sale, or a type of financial activity or practice, rather than targeting certain specific addressees for their commission of an infringement, the temporary intervention powers have some sort of *ex parte* nature and aim. Although their exercise may entail suffering in the form of losses to the issuers and originators of the products and parties engaged in the financial activities or practice, the exercise of the intervention powers temporarily outweighs these interests in the protection of more fundamental interests: the financial markets, investors and the stability of the financial system. The powers seeks only temporarily to suspend, restrict or prohibit (removing) the harmful products,[1835] or activity or practice. As the temporary intervention powers only are applicable under conditions deemed serious and harmful to the markets, investors and/or stability of the financial system, they have a preventive nature and purpose rather than a punitive one.[1836] Therefore, the temporary intervention powers qualifies as 'preventive measures' and

[1830] MiFIR, Article 42(2), as well as 40(2) and 41(2).
[1831] While MiFIR Articles 40-41 are titled "[ESMA/EBA] temporary intervention powers," MiFIR Article 42 is titled "Product intervention powers by the competent authorities." Because 'temporary intervention powers' covers both product and activity intervention, the title of Article 42 by only referring to product and not activity intervention is misleading.
[1832] MiFIR, Article 42(2). See also Veil (n 2) 607–610; Moloney (n 109) 829–831; Danny Busch and Guido Ferrarini, *Regulation of the EU Financial Markets: MiFID II and MiFIR* (Oxford University Press 2017) 137–146.
[1833] MiFIR, Article 42(2)(a)(i)-(ii) and specified by Article 42(7).
[1834] MiFIR, Article 42(2)(b)-(c). See further MiFIR, Articles 40; 41; and 42.
[1835] Busch and Ferrarini (n 112) 123.
[1836] Pursuant to Article 69(2)(p) MiFID II, the NCAs may also limit the ability of any person from entering into a commodity derivative, including by introducing limits on the size of a position any person can hold at all times pursuant to Article 57 MiFID II. Such position limits are set in order prevent market abuse and support orderly pricing, cf. Article 57(1)(a)-(b).

'precautionary measures',[1837] and they may more generally be regarded as 'precautionary intervention powers'.[1838] The suspension, restrictions or prohibition are 'temporary', because the application of the specific power shall be removed when the conditions no longer apply.[1839]

A number of very similar types of temporary intervention powers to those provided in the MiFIR have been conferred on the NCAs by virtue of the PR. The NCAs may apply temporary intervention powers: (i) "where there are reasonable grounds for suspecting [or believing] that [the PR] has been infringed;"[1840] (ii) "where [the PR] has been infringed or where there are reasonable grounds for suspecting that it would be infringed," or "failing to comply with its obligations;[1841] (iii) "where [the NCA] considers that the issuer's situation is such that trading would be detrimental to investor's interests;"[1842] (iv) where the PR has been "repeatedly and severely infringed;"[1843] and (v) where there is a need to disclose (and correctly) inform the public and the market of "all material information."[1844] As with the intervention powers provided in EU banking law, some of the intervention powers provided under the PR may be exercised directly by the NCAs: (1) prohibitions, (2) refusal of approval; (3)(a) disclosure to the public and markets; and (4)(a) suspensions.[1845] Other types may be exercised indirectly by way of imposing requirements on the natural or legal person concerned: (3)(b) to disclose to the market of all material information;[1846] or (4)(b) to suspend or (5) to cease a certain product or activity.[1847] The distinction between direct (I) and indirect (II) intervention powers concerns

[1837] Chapter 3, Section III(1)(C)(II); III(1)(D) and Section IV.
[1838] Busch and Ferrarini (n 112) 138; Veil (n 2) 607. See also MiFIR, Articles 40(2); 41(2); and 42(2), prescribing that EBA, ESMA or the NCAs may impose restrictions and prohibition on a precautionary basis."
[1839] MiFIR, Article 42(6).
[1840] PR, Article 32(1)(d), (e), and (g). In particular: (d) "to suspend an offer of securities to the public or admission to trading on a regulated market for a maximum of 10 consecutive working days on any single occasion where there are reasonable grounds for suspecting that [the PR] has been infringed;" (e) "to prohibit or suspend advertisements or require issuers, offerors or persons asking for admission to trading on a regulated market, or relevant financial intermediaries to cease or suspend advertisements for a maximum of 10 consecutive working days on any single occasion where there are reasonable grounds for believing that [the PR] has been infringed;" and (g) "to suspend or require the relevant regulated markets, MTFs or OTFs to suspend trading on a regulated market, an MTF or an OTF for a maximum of 10 consecutive working days on any single occasion where there are reasonable grounds for believing that [the PR] has been infringed."
[1841] PR, Article 32(1)(f), (h), and (i). In particular: (f) "to prohibit an offer of securities to the public or admission to trading on a regulated market where they find that [the PR] has been infringed or where there are reasonable grounds for suspecting that it would be infringed;" (h) "to prohibit trading on a regulated market, an MTF or an OTF where they find that this Regulation has been infringed;" (i) "to make public the fact that an issuer, an offeror or a person asking for admission to trading on a regulated market is failing to comply with its obligations."
[1842] PR, Article 32(1)(m): "to suspend or require the relevant regulated market, MTF or OTF to suspend the securities from trading where it considers that the issuer's situation is such that trading would be detrimental to investors' interests."
[1843] PR, Article 32(1)(k): "to refuse approval of any prospectus drawn up by a certain issuer, offeror or person asking for admission to trading on a regulated market for a maxi-mum of five years, where that issuer, offeror or person asking for admission to trading on a regulated market has repeatedly and severely infringed the PR."
[1844] PR, Article 32(1)(l): "to disclose, or to require the issuer to disclose, all material information which may have an effect on the assessment of the securities offered to the public or admitted to trading on a regulated market in order to ensure investor protection or the smooth operation of the market."
[1845] PR, Article 32(1)(d)-(i), (k), and (m).
[1846] PR, Article 32(1)(l).
[1847] PR, Article 32(1)(e), (g), and (m).

the nature of the intervention powers, because the direct intervention powers (I) must be imposed and/or decided by an authority, while the indirect intervention powers (II) must be adopted, implemented and executed by the natural or legal persons themselves. The disclosure measures (3) and suspensions (4) are nonetheless unique in the way that they have capability to fall into both categories. As with the temporary intervention powers under MiFIR, most of the PR's powers are also having an ex parte nature or aim, because they rather targets the specific product and/or activity with a view to their potentially detrimental consequences and effects for the investors and operation of the markets on the basis of a compliance assessment, than targeting the addressees that have, or may have, committed an infringement. In particular, the powers can be exercised in relation to: (aa) an offer of securities to the public; (bb) an admission of securities to trading on a regulated market; (cc) advertisements: (dd) trading on regulated markets, MTFs or OTFs; and (ee) approvals of prospectus. Although some of these intervention powers appears to be sanctions, and therefore questioned and discussed in Section III(2)(A) below,[1848] the PR's powers are generally exercised for the purpose of protecting the investors and the smooth operation and orderly functioning of the primary and secondary markets.[1849] Therefore, the PR's intervention powers are generally having a preventive, rather than punitive, nature and purpose; wherefore they are subject to effective and proportionality requirements, but not the dissuasiveness requirement. The PR do not expressly prescribe when the temporary intervention should be lifted. However, in accordance with the proportionality requirement as well as in light of the similar powers under MiFIR, it seems reasonable that the NCAs should remove and cease the intervention once the conditions for their application ((i)-(v) above) no longer apply or exists. Because the PR mostly are silent on which remedies or corrective actions that the NCAs may impose or require the natural or legal persons to be taken in order to ensure compliance,[1850] it also seems reasonable to conclude that the NCAs are obliged to engage in such a compliance task so that the adversely affected parties may implement the necessary remedies and corrections to proceed with their activities ((aa)-(dd)).

C. Conclusions and assessment

Together, the investigatory powers and supervisory powers are necessary in order to ensure adequate enforcement.[1851] From the above discussion it follows more generally that

[1848] PR, Article 32(1)(h), (i), and (k).
[1849] PR, Article 32(1)(a), (l), and (m) explicitly.
[1850] With the exception of Article 32(1)(a).
[1851] AMLD IV, Article 48(1a), third subparagraph.

'investigatory powers' is a concept that essentially covers legal powers of an information-gathering nature and purpose. Instead, the concept of 'supervisory powers', including 'supervisory measures' and 'early intervention powers', essentially covers temporary intervention powers whereby the banking and securities supervisors directly or indirectly are imposing obligations on the natural or legal persons subject to their supervision in the form of correction measures or remedies for the purpose to positively repair or rectify a breach of law or address a specific problem before it materialises into a breach or dangerous situations (failure scenarios) risking the soundness and stability of primarily credit institutions or the stability of the financial system or markets. Breaches and problems are typically identified under prudential and/or compliance assessments of requirements that governs prudential, products and activity based issues. Because of their preventive objective to positively intervene for the purpose of ensuring or restoring compliance, they are not punitive sanctions. According to the constitutional conception of sanctions they are governed by the archetype and notion of reparatory sanctions and primarily qualifies as 'reparatory non-pecuniary sanctions'.[1852] This entails that the legal concept of 'supervisory powers' essentially is a construction of two types of measures, in particular, when they are imposed on the basis of a breach: (i) a measure that for preventive purposes intervenes into sphere of the supervised entity on the basis of a prudential and/or compliance assessment (positive prevention and intervention); and then (ii) imposes one or more reparatory non-pecuniary sanctions on the supervised entity that, accordingly, do not aim to go beyond the level of legal restoration (reparation). For the same reasons, the concept of 'supervisory powers' are only subject to the requirements of effectiveness and proportionality but not the dissuasiveness requirement (negative prevention).[1853] In situations, where reparatory non-pecuniary sanctions are not imposed, but instead required or the similar, the reparatory remedies or corrective measures which are taken by the entities are not required to reach beyond the level of legal restoration. The reparation imposed or required may be very substantial, similar to a suffering, due to the prudential or compliance assessments, wherefore the reparation still are subject to a strict proportionality requirement by which the least onerous, of appropriate, measures must be applied. The same can be concluded in respect of the (temporary) intervention powers provided by the PR, while the product and activity intervention powers that primarily are provided by the MiFID II and MiFIR framework rather qualifies as that species of preventive measures,

[1852] Chapter 3, Section II(1)(B)(II)(2) and Section III(1)(B), but particularly the conclusion; and Chapter 5, Section II(2)(I).
[1853] On the basis of the IFD, Articles 18(1), 38(1) and 39(1), and MiFID II, Articles 69(1) and 70(1), it may be said that the concept of 'supervisory powers' provides for powers 'to intervene in the exercise of their functions in the activity of the investment firms in an effective and proportionate way in order to impose remedies necessary to address problems.'

which have been referred to as: 'precautionary measures'.[1854] Hence, the supervisors may positively and proactively employ temporary precautionary measures to intervene into products, practices and activities pursued by persons subject to the MiFID/MiFIR provisions to protect some more fundamental interests at stake due to some qualified serious, detrimental, and emergency-like situations, which requires more or less immediate supervisory and/or enforcement action to be taken.[1855] In comparison, but governed by the same rationale, the early intervention measures provided in Articles 27-29 BRRD also qualifies as precautionary measures.[1856] Similar to the supervisory powers and measures in Articles 16 SSMR and 102 and 104 CRD, the precautionary measures still pursue the purpose of reparation and employ measures that are intended to repair, rehabilitate and prevent the escalation of failing or crisis scenarios. All the powers are very intrusive into the private realm, and the level of intrusion increases with the move from *preventive* reparation towards *precautionary* reparation, which rather have some kind of last-resort-application and thus also justifies the application of more intrusive measures. Neither preventive or precautionary intervention powers aim to punish. Therefore they are only subject to the two requirements of effectiveness and proportionality, but not dissuasiveness.

The conclusion that the supervisory powers and measures in Article 16 SSMR, thus also Articles 102 and 104 CRD and 27 BRRD, are governed by the notion of reparatory sanctions may be further evidenced by the FSSA-review of the ECB sanction regime.[1857] In a number of places, the FSSA-review expresses that a sanction "punish the infringement;"[1858] and that "[pecuniary] penalties are the only enforcement tool directly available to the ECB in every jurisdiction"[1859] (implied as punitive sanctions). In this regard, it is explained in respect of ECB's supervisory approach that referral to the ECB's Enforcement and Sanctions Division is mandatory if the ECB has reason to suspect that a breach of prudential requirements, a breach of ECB supervisory decisions, or a breach of ECB (regulatory) regulations has been committed.[1860] In other places of the FSSA-review, it is explained that the ECB before making use of its supervisory powers employs a progressive *remedial* process, whereby the ECB first under a non-binding procedure engages in an informal form of communication with the management of the SSE, whereby the ECB suggests non-binding recommendations as solutions to the

[1854] Chapter 3, Sections III(1)(C)(II)(3)(a), III(1)(D), and IV.
[1855] See also Articles 86 MiFID II; 37 PR; 21(7) UCITS;
[1856] See also Articles 43 and 154 CRD; 18(4) SRMR, and Recital 35 SSMR.
[1857] Chapter 5, Section III(3)(B).
[1858] IMF-CRN-18/233, pp. 136-137.
[1859] Ibid, p. 137.
[1860] Ibid, pp. 136-137.

problems identified typically under the SREP.[1861] The informal intervention may, for instance, be exercised by way of a letter of intervention referred to as "operational acts,"[1862] which then secondly either can escalate into the adoption of formal supervisory measures if the SSE will not comply with the ECB's recommendations to the problems identified, or result directly in the adoption of formal supervisory measures if the seriousness of the *problems* or *deficiencies* identified requires so.[1863] The formal supervisory measures identifies with the supervisory powers provided in Article 16(2) SSMR, which also identifies with the *"timely corrective actions*."[1864] These formal supervisory measures may also be adopted when the SSE has breached applicable legal requirements.[1865] On this background, the FSAP-assessors has expressed that the supervisory "powers are generally sufficient to resolve issues [but that] in the event an institution remains non-compliant, the ECB may resort to enforcement and sanctions."[1866] EC4 to BCP 11 further requires that a range of supervisory measures and sanctions, in practice, is applied in accordance with the gravity of a situation.

This indicates a three-step enforcement procedure. First, when the problems and deficiencies have not yet, but are likely so, to materialise into a breach, the informal proceedings will be initiated to prevent the problems and deficiencies to escalated into more serious dangers and to materialise into severe breaches. The first step is thus governed by the concept of *prevention* with a view towards *reparation* into compliance through an informal dialogue whereby the ECB suggests informal recommendations to be taken by the SSE.

The second step is then initiated when either (i) the SSE is not complying with the recommendations suggested, and/or (ii) the problems and deficiencies have become serious, and/or (iii) the problems and deficiencies have materialised into a breach or breaches. In these situations, an formal enforcement procedure will be initiated in order to prevent the problems and deficiencies to become even more serious and to materialise into an even more severe breach or breaches, and requires the formal adoption of a formal ECB supervisory decision under which the formal supervisory measures will be imposed rather than required to be taken. The second step is thus still governed be the concept of prevention and reparation with a view

[1861] See also European Central Bank, "SSM Supervisory Manual – European Banking Supervision: functioning of the SSM and supervisory approach," March 2018, pp. 16-30, p. 20 in particular. See the following link: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorymanual201803.en.pdf, referred to as: 'ECB, SSM Supervisory Manual'.
[1862] IMF-CRN-18/233, pp. 136 and144.
[1863] Ibid, p. 136.
[1864] Ibid, p. 138, and more generally pp. 135-146, and 2012 BCP Core Principle 11.
[1865] SSMR, Article 16(1); and IMF-CRN-18/233, p. 137.
[1866] IMF-CRN-18/233, p. 137.

towards resolving the problems and deficiencies and repair the breach committed, and it does not aim to go beyond the level of legal restoration.

The third step will then be initiated when the SSE remains non-compliant with the formal supervisory measures imposed or the breaches already requires a punishment for the infringement, whereby the SSE is in culpa and found liable, negligently or intentionality, and in deserving of a fine. Thereby, the third step moves beyond the level of restoration because it is governed by the concepts of a punishment and deterrence.

The decisions taken under the second and third enforcement steps resulting in either formal supervisory measures (ECB supervisory decision) or fines (ECB sanctioning decision) are both taken by the Supervisory Board and the Governing Council of the ECB, while the first enforcement step does not require their engagement.[1867] Although there may be practical and legal nuances to these three rigidly sketched-out enforcements steps, the points made remains rather as principled ones. First, from a practical perspective, the three enforcement steps fits very well with EC 4 to BCP 11 when it requires that all three enforcement steps, in practice, must be applied in accordance with the gravity of the situation, and thereby in observance of the strict proportionality requirement. Second, the ECB sanction regime is first and foremost engaged in prevention and reparation before the ECB will adhere to punishment and deterrence. Third, these observances made in the FSSA-review thereby provides a good and practical insight into how the EU constitutional conceptions of reparatory sanctions and punitive sanctions governs and materialises into enforcement in practice.

Therefore, it follows from the FSSA-review that the FSAP-assessors considered the nature of the supervisory powers provided under EU banking law, Articles 16(2) SSMR and 103-106 CRD, to qualify as *'corrective powers'*.[1868] In its "SSM Supervisory Manual," the ECB has also specified that the aim of the supervisory measures is: "to *address* any relevant *issues* arising with regard to the supervised entity."[1869] This is in full alignment with the observations and conclusions just made. The reparatory sanctions are therefore *sanctioned* by the occurrences of problems, issues, deficiencies, and breaches committed. Reparatory sanctions can be required to be taken or imposed as obligations that brings along financial reparatory burdens, while punitive sanctions and ECB fines requires an imposition.[1870] Primarily through

[1867] IMF-CRN-18/233, p. 136.
[1868] IMF-CRN-18/233, p. 144. The FSSA-review stated that Article 16(2) SSMR "lists a broad range of authorities that permit the imposition of both affirmative obligations and significant consequences to *correct* deficiencies," cf. p. 144. Italics added.
[1869] ECB, SSM Supervisory Manual, point 4.11.1, p. 99.
[1870] Chapter 4, Section IV.

the exercise of reparatory sanctions, the ECB aim to ensure the safety and soundness of the SSEs and, ultimately, the stability of the financial system. So far, the ECB sanction regime is thus a disciplinary sanction regime that mostly imposes preventive and reparatory sanctions.

III. EU ADMINISTRATIVE SANCTIONS

1. Administrative pecuniary sanctions

A. The types of administrative pecuniary sanctions

If taken literal by their formal wording, then EU financial law would provide for at least six different types of pecuniary sanctions: (1) 'administrative pecuniary sanctions'; (2) 'administrative pecuniary penalties'; (3) 'administrative fines'; (4) 'periodic penalty payments'; (5) 'non-criminal fines'; and (6) 'criminal fines'. However, as the structure of this section indicates, it will be argued that there only are two fundamental types of pecuniary sanctions, those that qualifies as a 'fine' and those that do not. In respect of their legislative classification they are 'administrative' and manifests in the form of: (I) disgorgement, and (II) fines.

(I) Disgorgement

For their violation-regimes, MAR and BR provides for the disgorgement power.[1871] Article 30(2)(b) MAR reads: "the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined."[1872] The provisions makes it clear that the disgorgement power is pecuniary in nature as only an infringement that has resulted in either a monetary / pecuniary profit gained or loss avoided (benefit derived due to the infringement(s) committed) can be required disgorged. Therefore, the application of the disgorgement power is depending on the nature and type of the infringement committed in the way that only infringements that have resulted in a pecuniary benefit makes disgorgement a relevant and appropriate power to apply. The provisions also makes it clear that the application of the disgorgement power may still be hindered by the practical circumstances when it is not possible to determine the actual benefit derived due to the infringement committed. Furthermore,

[1871] Articles 30(2)(b) MAR and 42(2)(b) BR.
[1872] MAR, Article 30(2)(b).

disgorgement also differs from private enforcement as it may be imposed irrespective of whether any actions of the offender has caused a loss or profit foregone to any victim.[1873]

Disgorgement is one of those reparatory pecuniary sanctions that do not result in a deprivation of property.[1874] First, irrespective of whether the disgorgement power are imposed on the basis of criminal or disciplinary offence, the former in respect of market abuse violations, the offender risk no more than the potential benefit, wherefore it lacks a surcharge and punitive element. Therefore, as a stand-alone power it is also not sufficiently dissuasive, and can hardly be considered as a dissuasive sanction.[1875] The offender will also not be deprived of any property, because the offender has not obtained any right to the pecuniary profit or loss illegally gained or avoided due to the infringement committed. Instead, disgorgement has a reparatory and preventive purpose, because it seeks to repair for the violation committed and prevent the offender from benefitting therefrom. Hence, it essentially requires repayment of an illegal pecuniary advantage, and cannot classify as a criminal sanction on the basis of the second Engel/Öztürk-criterion,[1876] not even if it is imposed for a market abuse violation.

(II) Fines

Despite the different pecuniary sanctions are labelled and named as 'administrative pecuniary sanctions', 'administrative pecuniary penalties' and 'administrative fines' found under EU financial law, the provisions only provide for one essential type of pecuniary sanction to be imposed, namely a fine. As an initial observation in accordance with the second Engel/Öztürk-criterion, all of the fines provided for are punitive in nature. The difference that nonetheless exists among the fines is primarily a function of the way the fines are calculated and which prescribed elements that goes into the formula for setting the fine to be imposed. On this basis, it is possible to distinguish at least between four types and categories of fines, that is: (1) fines

[1873] Marco Ventoruzzo and Sebastian Mock, *Market Abuse Regulation: Commentary and Annotated Guide* (1st edition., Oxford University Press 2017) 487. Moreover, Cools writes that "[disgorgement] differs from private enforcement, though, in that it is imposed by the competent authority in the public interest and not initiated by the victim on his own behalf and in that the amount to be paid to corresponds with the profits made or losses avoided by the offender rather than with the losses made or forgone by the victim," cf. p. 487 at B.30.16.
[1874] Chapter 3, Section II(1)(B)(II)(2).
[1875] Ventoruzzo and Mock (n 153) 487. In addition, Cools argued that "[in] the UK, disgorgement is part of the pecuniary sanction, whereas in other jurisdictions it is a distinct measure," cf. p. 487, fn57, at B.30.16.
[1876] Veil (n 2) 170. Veil writes that: "[criminal] sanctions consists of imprisonment, fines and the disgorgement of the profits the offender obtained through the offence," cf. p. 170, paragraph 1. This view implies that disgorgement is ordered for the commission of a criminal offence, and imposed together with other punitive sanctions.

based on a certain percentage of the annual turnover;[1877] (2) fines based and set up to a certain coefficient multiplied with a determined profit gained or loss avoided (benefit);[1878] (3) fines that can be set up to a fixed maximum amount;[1879] and (4) fines imposed by the European sanctioning authorities,[1880] which distinguishes between: (a) fines imposed by the SRB and ESMA, and (b) the ECB, as well as (c) periodic penalty payments. While the following focus on a discussion of the legislative texts, the conclusion will go deeper into the assessment of the fines.

(1) Fines based on a percentage of the total annual turnover

Across the legislative and legal acts under EU financial law it is first of all a common and essential trait of the fines that are set as based on a percentage of the total annual turnover that they are only imposed against legal persons and not natural persons. For instance, in EU banking law, the ECB and national sanctioning authorities may impose administrative fines for a maximum of up to 10 % of the total annual turnover of a legal person in the preceding business year.[1881] In EU securities law, there are different variations of the punitive percentage of the total annual turnover and thus different levels of severity provided for this fine varying between 2 till 15 % of the total annual turnover.[1882] Therefore, the elements that adds up to the definition of 'the total annual turnover in the preceding business year' of a legal person is not only crucial for the calculation and setting of the fine, but also for making a comparison between the fines and how severely they punish for the specific types of violations.

In EU banking law, Article 18(1)-(2) SSMR and Article 4a(2)(a) ECBSR I both refers to the total annual turnover "as defined in relevant EU law." In accordance therewith, Article 128 SSMFR then provides that the definition of the total annual turnover to be applied by the

[1877] Article 18(1) SSMR in conjunction with Article 120(a) SSMFR; Articles 18(7) SSMR and 120(b) SSMFR in conjunction with Article 4a(1)(a) ECBSR I; and Articles 66(2)(c) and 67(2)(e) CRD; 111(2)(d) BRRD; 59(3)(a) AMLD IV; 30(2)(j) MAR; 42(2)(h) BR; 70(6)(f) MiFID II; 38(2)(d) PR; 99(6)(e) UCITS and 18(2)(d) IFD.
[1878] Articles 18(1) SSMR in conjunction with Article 120(a) SSMFR; Articles 18(7) SSMR and 120(b) SSMFR in conjunction with Article 4a(1)(a) ECBSR I; and Articles 66(2)(e) and 67(2)(g) CRD; 111(2)(f) BRRD; 59(2)(e) AMLD IV; 30(2)(h) MAR; 42(2)(f) BR; 70(6)(h) MiFID II; 38(2)(c) PR; 99(6)(g) UCITS; and 18(2)(e) IFD.
[1879] Articles 66(2)(d) and 67(2)(f) CRD; 111(2)(e) BRRD; 59(3)(a) and 59(3)(b) AMLD IV; 30(2)(i)-(j) MAR; 42(2)(g)-(h) BR; 70(6)(f)-(g) MiFID II; 38(2)(d)-(e) PR; 99(6)(e)-(f) UCITS; and 18(2)(d) IFD.
[1880] Articles 38 SRMR; 36a CRAR ; and 25j, 25(1)(b), 65, and 73(1)(b) EMIR. See also Article 12 EMIR, and the references made in the previous three footnotes in respect of the SSMR, SSMFR, and ECBSR I.
[1881] Article 18(1) SSMR in conjunction with Article 120(a) SSMFR; Articles 18(7) SSMR and 120(b) SSMFR in conjunction with Article 4a(1)(a) ECBSR I; and Articles 66(2)(c) and 67(2)(e) CRD; 111(2)(d) BRRD; 59(3)(a) AMLD IV. In addition thereto, the AMLD IV makes it clear that this type of fine only can be imposed on those obliged entities that qualifies as a credit or financial institution, cf. Article 3(1)-(2) as distinguished from the other types of oblige entities listed in Article 2, cf. AMLD IV, Article 59(3).
[1882] Articles 30(2)(j) MAR; 42(2)(h) BR; 70(6)(f) MiFID II; 38(2)(d) PR; 99(6)(e) UCITS; and18(2)(d) IFD.

ECB is the same concept provided and defined in Article 67 CRD. Pursuant to Article 67(2)(e) CRD, and Article 66(2)(c) CRD, the 'total annual turnover' is:

> "the total annual net turnover including the gross income consisting of interests receivable and similar income, income from shares and other variable or fixed-yield securities, and commissions or fees receivable in accordance with Article 316 [CRR] in the preceding business year."[1883]

The provisions also makes the usual case clear that this type of fine is not calculated on the basis of the annual turnover of the individual entity (subsidiary) but rather from a group perspective.[1884] Hence, where the undertaking who have committed the infringement is a supervised entity belonging to a supervised group, as a subsidiary to a parent undertaking, the relevant total annual turnover is considered to be the total annual turnover resulting from the most recent available consolidated annual accounts of the ultimate parent undertaking of the supervised group in the preceding business year.[1885] Although the inference is slightly different for the BRRD, the same concept defined in Article 67 CRD must also be considered applicable under the BRRD at least in respect of banks and banking groups.[1886] Despite the IFD does not refer to Article 316 CRR, the IFD provides a wording that is almost entirely identical to Article 67 CRD, wherefore the IFD depends on the same concept.

The definition of the total annual turnover provided in the AMLD IV is similar to the definition provided elsewhere in EU securities law. Article 59(3)(a) AMLD IV refers to "the total annual turnover according to the latest available accounts approved by the management body," or "the last available consolidated accounts approved by the management body of the ultimate parent undertaking."[1887] Although a slightly different wording, the same definition is also provided by MAR; BR; MiFID II; PR; and the UCITS.[1888] The provisions therein also makes the usual situation clear that "where the obliged legal person is a parent undertaking or a subsidiary of a parent undertaking which is required to prepare consolidated financial

[1883] CRD, Article 67(2)(e). See further Articles 18(2) SSMR; 128 SSMFR; 4a(2) ECBSR I; and 66(2) and 67(2) CRD. See further CRR, Article 316, which refers to Article 27 of Council Directive 86/635/EEC.
[1884] Veil (n 2) 176.
[1885] Lackhoff (n 2) 217. At paragraph 926, p. 217, Lackhoff therefore points out that "the total annual turnover is determined based on the consolidated financial statements prepared in accordance with the accounting provisions."
[1886] BRRD, Article 111(2)(d). The BRRD refers to the 'total annual turnover', but it does not make a reference to Article 67 CRD or provide any definition of the concept in its enlisted definitions in Article 2. The BRRD is nevertheless part of the SRM, which often borrows and shares its concepts from the SSM, in particular the CRD and CRR, wherefore there are no obvious reasons why the same concept should be any different than the one provided by Article 67 CRD.
[1887] AMLD IV, Article 59(3)(a).
[1888] MAR, Article 30(2)(j)(i)-(ii) in conjunction with Article 30(2), third subparagraph; BR, Article 42(2)(h)(i)-(ii) in conjunction with Article 42(2), second subparagraph; MiFID II, Article 70(6)(f); PR, Article 38(2)(d); UCITS, Article 99(6)(e).

accounts pursuant to Article 22 of Directive 2013/34/EU,[1889]"[1890] the relevant total annual turnover is the total annual turnover, or the corresponding type of income, determined in accordance with the relevant EU accounting directives. In cases were the offender of the provisions under MAR and BR is a bank or part of a banking group, the relevant accounting directive, which is also referred to in Article 316 CRR, is Council Directive 86/635/EEC.[1891] Therefore, for the application of this type of fine, the concept of the total annual turnover as defined in EU banking law is being used irrespective of whether the bank in breach violates provisions of EU banking or securities law. However, for other types of legal persons and groups, the concept of the total annual turnover is also being used for setting and calculating this type of fine, but the more specific elements that signifies and adds up to the total annual turnover depends on the type of undertaking having committed the infringements of EU securities law, and the EU accounting directives of which it is subject to. Nevertheless, irrespective of whether the undertaking in breach is a bank or non-bank legal person, the concept of the total annual turnover functions as the basis for the calculation of this type of fine.[1892]

On this background, we can then compare the punitive percentage provided for this type of fine provided across the provisions in EU banking and securities law. In EU banking law, the punitive percentage of the fine is fixed across the legislative and legal acts as the fine may be up to 10 % of the total annual turnover.[1893] In EU securities law, a comparison of the fine entails that it can be categorised into the following categories:

(1) MAR: 15 %;[1894]
(2) BR, MiFID II, UCITS, IFD: 10 %;[1895]
(3) PR: 3 %;[1896]
(4) MAR, BR: 2 %.[1897]

This entails that across the legislative and legal acts under EU financial law of an administrative designation, and thus not only across the legislative and legal acts belonging to

[1889] Council Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC OJ L 182, 29.6.2013, p. 19-76.
[1890] Supra, fn163.
[1891] Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions. OJ L 372, 31.12.1986, p. 1-17. For insurance companies, it is Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings . OJ L 374, 31.12.1991, p. 7-31.
[1892] Veil (n 2) 138. In paragraph 11, Walla points out that the "reference to annual turnover will be new for legal practice and might give rise to various interpretations."
[1893] SSMR, Article 18(1); ECBSR, Article 4a(1)(a); CRD, Articles 66(2)(c) and 67(2)(e); BRRD, Article 111(2); AMLD IV, Article 59(3)(a).
[1894] MAR, Article 30(2)(j)(i).
[1895] Articles 42(2)(h)(i) BR; 70(6)(f) MiFID II; 99(6)(f) UCITS; and 18(2)(d) IFD.
[1896] PR, Article 38(2)(d).
[1897] Articles 30(2)(j)(ii) MAR, and 42(2)(h)(ii) BR. For instance, Article 30(2)(j)(ii) MAR prescribes a fine of at least up to 2 % of the annual turnover in respect of infringements of Articles 16-17.

EU securities law, that, where this type of fine may be imposed, the violations of the general prohibitions against market abuse are considered the most serious and reckless types of infringements under EU financial as the maximum fine at least may be up to 15 % of the total annual turnover.[1898] Thus, violations of the preventive rules are considered less serious.

Furthermore, in the ECB Fine Guide the ECB has published its guidelines on how it will set and apply this first type of fine. The method also applies to the second type of fine discussed in the following section. However, because the ECB method bears close resemblance with the method provided in the SRMR, CRAR and EMIR for setting the fines to be imposed by the SRB and EMIR, the ECB method will be discussed after a discussion of the SRB and ESMA fines in Section III(1)(A)(II)(4)*(a)-(b)*. It can nevertheless be more generally said about the ECB fines that, as punitive pecuniary sanctions, they are similar to the ones provided for the NFSR, but the method for their application are more similar to the SRB and ESMA fines.

(2) Fines based on a coefficient multiplied with a determined profit or loss

The second type of fine is based on a calculation of up to a certain given coefficient to be multiplied with an amount fixed and determined as either a profit gained or loss avoided.[1899] In EU financial law, this type of fine has also been given many different labels and names, for instance, as a "fine;"[1900] "administrative pecuniary penalties;"[1901] "administrative fine;"[1902] "maximum administrative pecuniary sanction;"[1903] and a "maximum administrative fine."[1904] However, irrespective of their name, they all provide for the essential same type of fine. A comparison of the provisions nevertheless allows for the following observations to be made.

First, where some of the sanctioning provisions refer to the 'profits gained or loss avoided', then other provisions refer to the 'benefit derived' from the infringement(s). These concepts allows for the same type of fine to be imposed as 'the profit gained or loss avoided' only functions as a specification of 'the benefit derived' from the violation(s) committed.

[1898] This result is also mirrored in the amount of the alternative fines to be imposed.
[1899] A 'coefficient' in mathematical terms means "a numerical or constant quantity placed before and multiplying the variable in an algebraic expression". See Paragraph 1 in Oxford Dictionaries: https://en.oxforddictionaries.com/definition/coefficient. E.g. 7 in an expression of 7xy.
[1900] Article 4a(1)(a) ECBSR I, and as referred to and in conjunction with Article 18(7) SSMR and Article 120(b) SSMFR.
[1901] Articles 18(1) SSMR; 66(2)(e) and 67(2)(g) CRD, and 18(2)(d) IFD.
[1902] BRRD, Article 111(2)(f).
[1903] Articles 59(2)(e) AMLD IV, 30(2)(h) MAR, 42(2)(f) BR, 38(2)(c) PR, and 99(6)(g) UCITS.
[1904] MiFID II, Article 70(6)(h) MiFID II.

Second, the comparison allows us to establish a main rule for its addressees, which is, that the fine may be imposed on both natural persons and legal persons. However, a certain modification and exception applies in respect of Articles 18(1) SSMR, 4(1)(a) ECBSR I, and 18(2)(e) IFD. With respect to Article 18(2)(e) IFD, the provision only applies to legal persons. It is not obvious what justifies this exception in terms of asymmetry,[1905] because the IFD's sanctioning provisions otherwise generally allows for both natural persons and legal persons to be sanctioned by both non-pecuniary sanctions and pecuniary sanctions. With respect to of Articles 18(1) SSMR and 4(1)(a) ECBSR I, the sanctioning provisions provide for a modification based on the functioning of the single supervisory mechanism and the structures and distribution of sanctioning between the ECB-NCA sanction regimes because the ECB is not allowed to impose pecuniary sanctions on natural persons and neither non-pecuniary sanctions on legal persons.[1906] The ECB may nevertheless require that the NCAs, under the NFSRs, to initiate national enforcement proceedings in order to ensure that appropriate penalties are imposed on natural persons, including the imposition of this type of fine.[1907]

Third, the main idea behind setting the amount of the fine is that a punitive coefficient is multiplied with the benefit derived from the infringement(s) committed, when it is possible to determine that a profit has been gained or loss avoided. As with the disgorgement power, the imposition of this type of fine is therefore depending on whether it can be established that an actual profit has been gained or loss avoided due to the infringement(s) committed. Hence, the specific circumstances of the case may hinder the imposition of the fine.

Fourth, a comparison with disgorgement also point towards the logical nature of this fine, which is the implied application of the disgorgement power. For instance, where a benefit due to an infringement can be determined as EUR 100, the application of the disgorgement power would require the disgorgement of the total amount of EUR 100. However, by the application of this type of fine it is required that the coefficient (x2) is to be multiplied with the benefit, amounting to EUR 200. Hence, the EUR 100 of the EUR 200 can be considered disgorged through the imposition of this fine. Therefore, where there are legal bases for both disgorgement and this fine, the availability of this fine seems to make the disgorgement power irrelevant, unless there are particular circumstances which makes it necessary to only disgorge

[1905] Chapter 5, Section II(2)(E).
[1906] SSMFR, Article 134.
[1907] SSMR, Article 18(5) in conjunction with CRD, Articles 66(2)(e) or 67(2)(g). See further: Gortsos (n 2).

the benefit, but not to punish and fine the offender. However, it is a judgement that remains as a discretion for the relevant sanctioning authority to decide.

Fifth, Articles 70(6)*(h)* MiFID II and 99(6)*(g)* UCITS expressly emphasises what must be considered as the general case under EU financial law, which is, that this fine may be imposed "even if [the total amount of the fine] exceeds the maximum amounts [provided by any of the other types of fines],"[1908] including in particular the fines based on a percentage of the total annual turnover,[1909] and on natural persons the fines up to a fixed maximum amount.[1910] Although this sanctioning rule is not expressly provided elsewhere in any of the other provisions under EU financial law, it would also be redundant to provide for such legal bases, because the discretion that is conferred on the sanctioning authorities in choosing the appropriate type of (pecuniary) sanctions is generally characterised by not being restricting the choice among the appropriate type(s) of available sanctions, but only restricted by the prescribed levels of severity within the legal provisions. Hence, to avoid the maximum restrictions given for one type of pecuniary sanction, the sanctioning authorities may instead apply another type of pecuniary sanction, which exceeds the amount of the other type of pecuniary sanction available. The legislative technique of listing the different types of available sanctions not only allows the sanctioning authorities to decide on the appropriate type of sanctions to be imposed, but also to make use of their interplay within the prescribed restrictions on maximum severity and to the extent they deem it appropriate to sanction at a higher level of severity.[1911]

Finally, it follows from the comparison that MAR and the BR provides for the most severe and punitive coefficient to be applied because the coefficients may be up to, at least, *three* times the benefit derived. Elsewhere, which is also provides the main rule under EU financial law, the punitive coefficient may be up to *twice* the amount of the benefit derived. Because MAR and the BR do not restrict the application of this fine to any specific type of infringement, the scope of application of this type of fine therefore not only covers cases of market abuse, but also the infringements of preventive and disciplinary rules.[1912] Therefore, under the perspective of this type of fine, the violation of the disciplinary norms governed by MAR and the BR are considered the most serious of those provided under EU financial law.

[1908] Articles 70(6)*(h)* MiFID II and 99(6)*(g)* UCITS.
[1909] Discussed above in Section III(1)(A)(II)(1).
[1910] Discussed below in Section III(1)(A)(II)(3).
[1911] See also the ECB Fine Guide, points 5, 19 and 27. In point 5, the ECB refer to Case T-576/18 – Crédit Agricole SA v European Central Bank, ECLI:EU:T:2020:304, para. 133, where the CJEU also considered the ECB to enjoy a wide margin of discretion within the prescribed limitations in exercising its power to impose sanctions. Thus, Article 70(6)*(h)* MiFID II and Article 99(6)*(g)* UCITS describes more explicitly what is the general rule under EU financial law.
[1912] See Chapter 6, Section II(2)(B).

(3) Fines up to a fixed maximum amount

The third type of fine may be imposed up to at least a fixed amount in EUR, or for the EU Member States whose currency is not the euro, the amount is fixed as the corresponding value in the national currency on a certain fixed date provided in the legislative act. This third type of fine is more simple than the previous ones. The amount fixed in EUR is a minimum level for the maximum amount, which typically reads as a "maximum administrative pecuniary sanction of at least EUR 5 000 000,"[1913] or just "administrative fine of up EUR 5 000 000."[1914]

In EU banking law, the main rule is for this third type of fine that the fine can only be imposed on natural persons, but the AMLD IV also provides legal basis for the fine to be applicable against those legal persons that qualifies as credit institutions or financial institutions.[1915] The fine is not paired with any specific type of violation, and it is generally fixed at minimum of EUR 5 000 000 both against natural and legal persons. However, the latter is only the case of the AMLD IV, where the fine is provided as an alternative to the fine based on a percentage (10%) of the total annual turnover.[1916] Furthermore, also under the AMLD IV, the same type of fine is also provided in Article 59(2)(e), where the minimum amount is fixed at EUR 1 000 000 and functions as an alternative to the fine based on a coefficient of the benefit derived from the violation. This fine fixed at EUR 1 000 000 may also be imposed on both natural and legal persons, including credit institutions or financial institutions. Hence, with respect to the AMDL IV, the list of available sanctions against credit institutions and financial institutions, including the natural persons thereof, is larger than the list of available sanctions to be imposed against the other types of obliged entities and the natural persons thereof.

In EU securities law, the severity of the this type of fine varies depending on whether the offender is a natural person or legal person. With respect to natural persons, the fine is generally found in two different variations. The first variation is provided in MAR and BR where the fine may be imposed against certain specific infringements listed in these provisions.[1917] The second variation is provided in MiFID II, PR, UCITS and IFD, where the fine is

[1913] E.g. Articles 59(3) AMLD IV; and 30(2)(i)-(j) MAR.
[1914] E.g. Articles 111(2)(e) BRRD; and similarly 70(6)(f)-(g) MiFID II.
[1915] Articles 66(2)(d) and 67(2)(f) CRD; 111(2)(e) BRRD; and 59(3)(a)-(b) AMLD IV.
[1916] AMLD IV, Articles 59(3)(a)-(b).
[1917] Articles 30(2)(i) MAR and 42(2)(g) BR. The first variation is provided in Articles 30(2)(i) MAR and 42(2)(g) BR. With respect to MAR, this third type of fine of at least up to EUR 5 000 000 may be imposed for market abuse infringements, i.e. Articles 14-15 MAR; EUR 1 000 00 000 for the infringements of Articles 16-17 MAR; and EUR 500 000 for the infringements of Articles 18-20 MAR.[1917] Accordingly, under MAR, this third type of fine imposed on natural persons have certain minimum levels for their maximum levels (EUR 5 000 000 – 500 000) depending on the type of infringement committed. The same

not related to any specific infringements except from the broader category of infringements listed in the violation-regimes provided in these legislative acts.[1918] This allows us to compare the level of severity of the third type of fine to be imposed against natural persons across the legislative and legal acts of EU financial law:

(1) Main Rule: EUR 5 000 000;[1919]
(2) MAR, AMLD IV: EUR 1 000 000;[1920]
(3) PR: EUR 700 000;[1921]
(4) MAR, BR: EUR 500 000;[1922]
(5) BR: EUR 100 000.[1923]

This reveals for this type of fine to be imposed against natural persons, in accordance with the main rule, that the infringements of the prohibitions against market abuse are not considered more serious or reckless violations than the infringements provided elsewhere under EU financial law, except from those captured by the exceptions given in (2)-(5).

With respect to legal persons, then first of all, the same principles relating to two variations of the third type of fine imposed on natural persons also applies in relation to the legal persons, except that the IFD does not provide for this type of fine. Second, a similar comparison can also be conducted for the severity of this third type of fine for legal persons:

(1) MAR: EUR 15 000 000;[1924]
(2) Main Rule: EUR 5 000 000;[1925]
(3) MAR: EUR 2 500 000;[1926]
(4) BR: EUR 1 000 000;[1927]
(5) BR: EUR 250 000.[1928]

In comparison to natural persons, this reveals in respect of legal persons that the infringements against the general prohibitions of market abuse are considered the most serious and reckless types of violations, thereby providing for an asymmetry in the level of severity

principles and legal design is found in the BR, where the categorisation is provided in the following way: "(g) in respect of a natural person, maximum administrative pecuniary sanctions of at least: (i) for infringements of Articles 4, 5, 6, 7, 8, 9, 10, points (a), (b), (c) and (e) of Article 11(1), Article 11(2) and (3), and Articles 12, 13,14, 15, 16, 21, 23, 24, 25, 26, 27, 28, 29 and 34, EUR 500 000 or in the Member States whose official currency is not the euro, the corresponding value in the national currency on 30 June 2016; or (ii) for infringements of point (d) of Article 11(1) or of Article 11(4), EUR 100 000 or in the Member States whose official currency is not the euro, the corresponding value in the national currency on 30 June 2016." Accordingly, depending on the type of infringement, this fine varies under the BR between EUR 500 000 – 100 000.

[1918] MiFID II, Article 70(6)(g); PR, Article 38(2)(e); UCITS, Article 99(6)(f); and IFD, Article 18(2)(f). In all these legislative acts, except the PR, the fine to be imposed may be up to EUR 5 000 000, but in the PR it is set at EUR 700 000.

[1919] Articles 66(2)(d) and 67(2)(f) CRD; 111(2)(e) BRRD; 59(3)(a)-(b) AMLD IV; 30(2)(i)(i) MAR; 70(6)(h) MiFID II; 18(2)(f) IFD; and 99(6)(f) UCITS.

[1920] Articles 30(2)(j)(ii) MAR and 59(2)(e) AMLD IV.

[1921] PR, Article 38(2)(d).

[1922] Articles 30(2)(j)(iii) MAR and 42(2)(h)(i) BR.

[1923] BR, Article 42(2)(h)(ii).

[1924] MAR, Article 30(2)(j)(i).

[1925] Articles 59(3)(a) AMLD IV; 70(6)(f) MiFID II; 38(2)(d) PR; and 99(6)(f) UCITS.

[1926] MAR, Article 30(2)(j)(ii).

[1927] BR, Article 42(2)(h)(i).

[1928] MAR, Article 30(2)(j)(iii); and BR, Article 42(2)(h)(ii).

for sanctions on natural and legal persons. Where natural persons are a priori liable to EUR 5 000 000 as a main rule for most types of violations, including market abuse infringements, legal persons are a priori liable to EUR 15 000 000 for violations on market abuse as an exception to the main rule on EUR 5 000 000. Therefore, it is considered more serious when a legal person commits market abuse violations than when a natural person commit the same violations in comparison to the other types of infringements that they may potentially commit.

(4) Fines imposed by European sanctioning authorities

EU financial law provides more detailed rules for the European sanction regimes in setting the appropriate level of the fines to be imposed by the European sanctioning authorities of the ECB, the SRB and ESMA. First of all, Articles 38 SRMR, 36a CRAR, and 25j and 65 EMIR provides the legal bases for a type of fine which both shares and builds on many of the features that characterises the other types of fines just discussed in Section III(1)(A)(II)(1)-(3), but also provides for a more detailed and complexed prescriptions on how to set and apply the SRB and ESMA fines in explicit methodological steps. Second, as the ECB fines are similar to types of fines provided for the NFSR, but the method for setting and applying the ECB fines bears resemblance with the method for the SRB and ESMA fines, the discussion of the ECB fines deserves its own subsection in order to not confuse the analysis of the very complexed rules.

(a) Fines imposed by the SRB and ESMA

First of all, the provisions generally prescribes that where an entity subject to the provisions of the SRMR, CRAR, or EMIR has intentionally or negligently committed one of the infringements listed in the SRMR, CRAR or EMIR, the SRB or ESMA shall adopt a decision imposing a fine in accordance with the prescribed rules on setting the appropriate level of the amount of the fine as given in the provisions.[1929] Second, in comparison to the other types of fines, where the relevant sanctioning authority are granted a high level of discretion in choosing the appropriate type of pecuniary or non-pecuniary sanction and in setting the appropriate level of the amount of fines, the rules on setting the appropriate level of the SRB and ESMA fines determines in a more detailed fashion how that discretion should be exercised. Third, the SRB and

[1929] Articles 38(1) SRMR; 36a(1) CRAR; and 25j(1) and 65(1) EMIR

ESMA fines serves as an example for bringing in and applying the sanctioning factors discussed in Chapter 6, Section III(2), in setting the exact severity levels of the fines.

The rules in the SRMR, CRAR and EMIR for setting the appropriate level of the amount of the fines are based on almost the same legislative design and scheme. The methodological approach provided for setting and calculating the fine are based on four principles and steps, which are applied in a chronological fashion. The first principle concerns the scope of the fines as they can only be imposed against certain listed infringements.[1930] The second principle concerns the basic amount of the fine under which the gravity of the infringements are converted into a punitive pecuniary sanction but restricted within certain fixed limits.[1931] The third principle concerns the adjustment of the basic amount of the fine with the aggravating and mitigating factors according to their relevant coefficients.[1932] Finally, the fourth principle restricts the maximum amount of the fine calculated on the basis of three former principles.[1933]

In accordance with the first principle and methodological step, the scope of the fines are only to be imposed for certain types of infringements enumerated on a list (violation-regimes).[1934] In the SRMR, the listed types of infringements concern the lack of compliance with the obligations to supply the information (Art. 34); to submit to a general investigation or on-site inspection (Art. 35-36); and to comply with a decision addressed by the SRB (Art. 29).[1935] The lists provided in the CRAR and EMIR are much longer and provides for more variety in the types of infringements.[1936] While the CRAR's list is divided into three subsections concerning different types of infringements,[1937] the lists of infringements under the EMIR depends both upon the type of the entity supervised, CCP or trade repository, and the type of the infringement.[1938] Irrespective thereof, the SRMR, CRAR and EMIR applies the same principle, namely that the fines are to be imposed on the basis of the commission of one or more of the infringements enumerated on the list and that the basic amount of the fines varies according to

[1930] Articles 38(1)-(2) SRMR; 36a(1) and Annex III, CRAR; and 25j(1) and 65(1) and Annex I and III, EMIR.
[1931] Articles 38(3) SRMR; 36a(2) CRAR; and 25j(2) and 65(2) EMIR.
[1932] Articles 38(4)-(6) and 38(9) SRMR; 36a(3) and Annex IV, CRAR; 25j(3) and Annex IV; and 65(3) and Annex II, EMIR.
[1933] Articles 38(7) SRMR; 36a(4) CRAR; and 25j(4) and 65(4) EMIR.
[1934] Articles 38(1), first subparagraph, SRMR; 36a(1), first subparagraph, CRAR; and 25j(1)/65(1), first subparagraph, EMIR.
[1935] SRMR, Article 38(2)(a)-(c). On the disciplinary nature of the infringements, see Chapter 6, Section II(2)(A).
[1936] However, with respect to infringements not covered by Article 38(2) SRMR, the SRB may recommend to the NRAs that they take action in accordance with sanctioning powers provided by Articles 110-114 BRRD, cf. SRMR, Article 38(8).
[1937] CRAR, Annex III divides the infringements into three groups as relating to: (I) the conflicts of interest, organisational or operational requirements; (II) obstacles to the supervised activities; and (III) disclosure provisions.
[1938] EMIR, Annex I applies to the trade repositories and divides the infringements into four groups as relating to: (I) organisational requirements or conflicts of interests; (II) operational requirements; (III) transparency and the availability of information; and (IV) obstacles to the supervisory authority. EMIR, Annex III applies to CCPs and divides the infringements into five groups as relating to: (I) capital requirements; (II) organisational requirements and conflicts of interest; (III) operational requirements; (IV) transparency and the available information; and (V) obstacles to the supervisory activities.

the type of infringement committed. Except for the fines imposed on the basis of Article 25j of EMIR, the severity of the SRB and ESMA fines depends upon which of the established groups of infringements the particular type infringement committed falls into, because the groups are prescribed with different severity levels for the fines. In this respect, it also follows that any of the infringements are considered to have been committed intentionally, if there are objective factors which demonstrate that the entity, its management body, or senior management acted deliberately to commit the infringement.[1939] Otherwise, the infringements may be deemed to have been committed negligently. The discretion thereof is granted to the SRB or ESMA.

The second principle concerns the 'basic amount' of the fine by which the gravity of the infringement is converted into a punitive pecuniary sanction. In respect of the SRMR, the basic amount of the fine is set by a restricted percentage-range from 0,05-0,15% or 0,25-0,5% depending on the particular group in which the type of the infringement belongs to pursuant to the first principle.[1940] The percentage-range is then paired with the concept of "the total annual net turnover," which is identical to the concept provided in Article 67 CRD and generally applicable in EU banking law.[1941] In order to decide whether the basic amount of the fine should be set at the lower, middle or higher ends of the limits within the percentage-ranges given, the SRB must take into account the annual turnover in the preceding business year of the entity concerned, thereby depending on the financial strength of the entity. Accordingly, the basic amount of the fine must then be set at the lower end of the limits for those entities whose annual turnover is below EUR 1 000 000 000; at the middle end of the limits for those entities whose annual turnover is between EUR 1 000 000 000 and 5 000 000 000; and at the higher end of the limits for those entities whose annual turnover is higher than EUR 5 000 000 000.[1942]

The basic amount of the fine provided in the CRAR are determined along lines similar to the SRMR, but there are more variations on the possible severity of the ESMA fine as there are nine categories of infringements grouped together with their own level of severity ((a)-(i)).[1943] The financial strength of the credit agencies must then also be taken into account in order to decide in which of the lower, middle or higher ends within the severity limits given that the basic amount of the fine should be set at. However, the lower end for the financial strength of credit agencies are set below EUR 10 000 000; the middle end is set between EUR

[1939] Articles 38(1), second subparagraph, SRMR; 36a(1), second subparagraph, CRAR; 25j(1), second subparagraph, and 65(1), second subparagraph, EMIR.
[1940] SRMR, Article 38(3)(a)-(b).
[1941] SRMR, Article 38(3).
[1942] Ibid.
[1943] CRAR, Article 36a(3), second subparagraph.

10 000 000 and 50 000 000; and the higher end is set above EUR 50 000 000.[1944] Overall, the severity of the fines range between EUR 10 000 – EUR 750 000.

The basic amount of the fines imposed on the basis of Article 25j and 65 EMIR also follow the same lines, but the EMIR fines are nevertheless determined in two different ways. The fine imposed against trade repositories on the basis of Article 65 EMIR is very similar to the fine provided by Article 36a CRAR, although Article 65(2)(a)-(c) EMIR only provides for three groups of infringements with different levels of severity ranging between EUR 5 000 – EUR 200 000.[1945] For the application of this fine, ESMA is also required to take into account the financial strength of the trade repositories by adhering to the annual turnover in the preceding business year. Accordingly, at the lower end are trade repositories whose annual turnover is below EUR 1 000 000; the middle end between EUR 1 000 000 and 5 000 000; and the higher end above EUR 50 000 000.[1946] On the other hand, the basic amount of the fine imposed against CCPs are very similar to the ECB fines imposed on the basis of Article 18(1) SSMR. The basic amount of the fine shall be up to twice the amount of the profits gained or losses avoided because of the breach and where the profits or losses can be determined, or up to 10 % of the total annual turnover from the preceding business year, as defined in EU law.[1947]

The third principle concerns the adjustment of the basic amount of the fine with the aggravating and mitigating factors as paired with their relevant coefficients.[1948] The relevant mitigating or aggravating coefficient shall be applied one by one to the basic amount of the fine.[1949] However, if more than one mitigating coefficient is applicable, the difference between

[1944] CRAR, Article 36a(2), first subparagraph. Accordingly, the infringements listed under Section I of Annex III to the CRAR provides for the most severe fine as these types of infringements are fined within the limits of at least EUR 100 000 but not exceeding EUR 750 000 ((a)-(c)); the infringements listed under Section III of Annex III to the CRAR then provides for fines at the middle level of severity as these types of infringements are fined within the limits of at least EUR 40 000 but not exceeding EUR 300 000 ((g)-(i); and finally the infringements listed under Section II of Annex III to the CRAR then provides for fines with the lowest level of severity as these types of infringements are fined within the limits of at least EUR 10 000 but not exceeding EUR 150 000 ((d)-(f)).

[1945] EMIR, Article 65(2)(a)-(c). More precisely, pursuant to these provisions, Pursuant to Article 65(2), the basic amount of fine shall be included within certain fixed limits based on three categories of fines with their own level of severity. The infringements listed in Annex I, Section I(c), Section II(c)-(g), and Section III(a)-(b) provides for the most severe fine as these types of infringements are fined within the limits of at least EUR 10 000 but not exceeding EUR 200 000 (a); the infringements listed in Annex I, Section I(a)-(b) and (d)-(k) and Section II(a)-(b) and (h) provides for fines set at the middle level of severity as these types of infringements are fined within the limits of at least EUR 5 000 but not exceeding EUR 100 000 (b); and the infringements listed in Annex I, Section IV provides for the least severe fine as these types of infringements are fined within the limits of at least EUR 5 000 but not exceeding EUR 10 000 (c).

[1946] EMIR, Article 65(2), second subparagraph.

[1947] EMIR, Article 25j(2). The concept of the 'total annual turnover' seems to be a reference to the same concept as in EU financial law generally. In a number of definitions provided in Article 2 EMIR similarly refers to Council Directive 86/635/EEC, for instance, in the definition of the term 'capital', cf. Article 2(25). See Articles 2(21)-(25) EMIR.

[1948] Articles 38(4), first subparagraph, SRMR; 36a(3) CRAR; and 25j(3) and 65(3) EMIR.

[1949] Articles 38(4), first sentence of the second and third subparagraph, SRMR; 36a(3), first sentence of the second and third subparagraph, CRAR; 25j(3), first sentence of the second and third subparagraph, EMIR; and 65(3), first sentence of the second and third subparagraph, EMIR.

the basic amount and the amount resulting from the application of each individual mitigating coefficient shall be subtracted from the basic amount of the fine. Conversely for the aggravating coefficients, these are added to the basic amount of the fine.[1950]

Across the SRMR, CRAR and EMIR the coefficients attached to the aggravating and mitigating factors are almost identical.[1951] The aggravating factors with their coefficients are here referred to and sorted in a decreasing order from the highest level of severity:[1952]

> (1) A coefficient of 2,2 applies, where the infringement has revealed systemic weaknesses in the organisation of the entity, in particular in its procedures, management systems or internal controls;
>
> (2) A coefficient of 2 applies, where the infringement has been committed intentionally;
>
> (3) A coefficient of 1,7 applies, if no remedial action has been taken since the infringement was identified;
>
> (4)(i) A coefficient of 1,5 applies, where the infringement has been committed over a period of exceeding three (SRMR) or six months (CRAR, EMIR);
>
> (4)(ii) A coefficient of 1,5 applies, where the entity's senior management has not cooperated with the SRB or ESMA in carrying out their investigations;
>
> (4)(iii) For the CRAR and EMIR only, an additional factor applies. A coefficient of 1,5 applies, where the infringement has a negative impact on the quality of the ratings rated by the credit rating agency concerned, or of the activities and services of the CCP, or of the data the trade repository maintains.
>
> (5) A coefficient of 1,1 applies, where the infringements has been committed repeatedly and every time the infringement has been repeated.

The mitigating factors with their coefficients can then also here be sorted in a decreasing order from the highest level of discount:

> (1) A coefficient of 0,9 applies, where the infringement has been committed over a period of less than 10 working days;[1953]
>
> (2) A coefficient of 0,7 applies, where the entity's senior management can demonstrate that they have taken all measures necessary to prevent the infringement;
>
> (3) A coefficient of 0,6 applies, where the entity voluntarily has taken measures to ensure a similar infringement cannot be committed in the future;
>
> (4) A coefficient of 0,4 applies, where the entity has brought quickly, effectively and completely the infringement to the SRB's or ESMA's attention.

[1950] Articles 38(4), second sentence of the second and third subparagraph, SRMR; 36a(3), second sentence of the second and third subparagraph, CRAR; 25j(3), second sentence of the second and third subparagraph, EMIR; and 65(3), second sentence of the second and third subparagraph, EMIR.
[1951] Articles 38(5)-(6) and 38(9) SRMR; Annex IV, CRAR; and Annex II and Annex IV, EMIR.
[1952] Article 38(9) SRMR; Annex IV(I)(4), CRAR; and Annex IV(I)(d) and Annex II(I)(d), EMIR.
[1953] Under the CRAR this factor is slightly different as it only applies to the infringements listed in Section II-III of Annex III.

Finally, in accordance with the fourth principle, then two restrictions to the amount of the final fine, which now has been calculated, applies. The first restriction entails that the fine shall not exceed 1 % of the annual turnover of the entity (SRMR), 20 % of the annual turnover of the credit rating agency (CRAR), CCP (EMIR), or trade repository (EMIR) in the preceding business year, unless the entity under resolution, the credit rating agency, the CCP, or trade repository have directly or indirectly benefitted financially from the infringement. In these situations, the fine shall at least be equal to the financial benefit.[1954] The second restriction also restricts the maximum amount of the fine in those situations where an act or omission amounting to one of the infringements constitutes more than one of the infringements listed. In these situations, only the higher fine calculated relating to one these infringements shall apply.[1955] However, in accordance with the principles that governs the disgorgement power, the first restriction will nevertheless convert the SRB and ESMA fine into a disgorgement power, when equal to the financial benefit. Thus, it will no longer qualify as a fine, but a reparatory sanction.

(b) Fines imposed by the ECB

In accordance with Article 18(1) SSMR, the ECB may, similarly as to the SRB and ESMA, by way of decision, impose 'administrative pecuniary penalties' on the significant supervised entities where these intentionally or negligently have breached a requirement established by directly applicable acts of EU law (CRR) in relation to which administrative pecuniary sanctions are available to competent authorities under relevant EU law (CRD).[1956] The concept of 'administrative pecuniary penalties' covers the fines discussed in Section III(1)(A)(II)*(1)-(2)*.[1957] In addition, and pursuant to Article 18(7) SSMR, the ECB may also impose sanctions in accordance with the ECBSR I on the same supervised entities, where these intentionally or negligently have breached a requirement laid down in ECB regulations or ECB decisions.[1958] The concept of 'sanctions' provided in the ECBSR I is defined as meaning 'fines' and 'periodic penalty payments'.[1959] However, by virtue of Articles 1a(2) and 4a(1)(a) ECBSR I the fines

[1954] Articles 38(7), first and second subparagraph, SRMR; 36a(4), first subparagraph, CRAR; 25j(4), first subparagraph, EMIR; and 65(4), first subparagraph, EMIR. However, it nonetheless presupposes that either the profit gained or the losses avoided, because of the infringement committed, can be determined.
[1955] Articles 38(7), third subparagraph, SRMR; 36a(4), second subparagraph, CRAR; 25j(4), second subparagraph, EMIR; and 65(4), second subparagraph, EMIR.
[1956] See in particular: Gortsos C, 'The Power of the ECB to Impose Administrative Penalties as a Supervisory Authority: An Analysis of Article 18 of the SSM Regulation' (2015).
[1957] Article 18(1) SSMR in conjunction with Article 120(a) SSMFR.
[1958] SSMR, Article 18(1) in conjunction with Article 18(7); and ECB Fine Guide, point. 4.
[1959] ECBSR I, Article 1(7) as defined in Article 1(5) and 1(6). ECBSR I, Article 1(5) defines a 'fine' as to "mean a single amount of money which an undertaking is obliged to pay as a sanction."

covered by the concept of 'administrative pecuniary penalties' in SSMR/SSMFR are identical to the fines covered by the concept of 'sanctions' in Articles 1(5), 1(7) and 4a(1)(a) ECBSR I. Therefore, irrespective of whether the fines technically are labelled as 'administrative pecuniary penalties', 'sanctions', or even 'administrative penalties',[1960] the provisions primarily provides for: (1) fines based on a percentage of the total annual turnover, and (2) fines based on a coefficient multiplied with a determined profit or loss. Therefore, the ECB Fine Guide also provides guidelines for the two fines together ((1)-(2)) and irrespective on which legal basis the fines may be imposed.[1961] Excluded therefrom is the periodic penalty payments. Accordingly, the ECB Fine Guide applies to fines covered by Articles 18(1) and 18(7) SSMR.[1962]

The ECB Fine Guide should be viewed in the light of the Case T-576/18 – Crédit Agricole v ECB,[1963] whereby the CJEU considered the offender to have "a right to know the method for calculating the amount of the penalty which was imposed on it, without being obliged, in order to achieve that, to bring an action before the Court."[1964] The CJEU considered "in view of both the wide discretion conferred on the ECB by Article 18(1) [SSMR] and the very substantial amounts of the administrative pecuniary penalties incurred [EUR 4 300 000], the obligation to state reasons for decisions imposing such a penalty [to be] of particular importance."[1965] This obligation of the ECB to state its reasons for the imposition of fines should first of all allow the CJEU to assess whether the ECB sanctioning decision complied with EU law, "in particular, the principle of proportionality, [as well as] to verify whether the ECB correctly assessed the criteria appearing in Article 18(3) [SSMR], which emphasises, in addition to the proportionate nature of the penalty, its effectiveness and its dissuasive nature."[1966] However, for such a review to be conducted, "the statement of reasons for the contested decision must show, to the requisite legal standard, the methodology used by the ECB for the purposes of determining the amount of the penalty [...] and the weighting and assessment of factors taken into account."[1967] In accordance therewith, the publication of the methodology, which the ECB "intends to use when exercising its decision-making power may lessen its obligations to state the reasons for its individual decisions, to the extent that it applies that

[1960] SSMFR, Article 120.
[1961] ECB Fine Guide, fn2, at point 4. Therefore, stricto sensu, the terminology of the ECB Fine Guide deviates from the terminology in Article 120 SSMFR, as the concept of 'administrative pecuniary penalties' also covers the fines, (1) and (2), provided in the ECBSR I, cf. Articles 1a(2) and 4a(1).
[1962] ECB Fine Guide, point 6.
[1963] This case was appealed, but without any success. See Joined Cases C-456/20 P – C-458/20 P – Crédit Agricole v ECB, ECLI:EU:C:2021:502. The principles derived from Case T-576/18 – Crédit Agricole v ECB, therefore remains in force.
[1964] Ibid, para. 146.
[1965] Case T-576/18 – Crédit Agricole SA v ECB, para. 134.
[1966] Ibid, para. 135.
[1967] Ibid, para. 136.

methodology."[1968] Hence, the ECB Fine Guide provides the methodology to be applied for setting the severity level of the amount of the fines to be imposed in order to comply with the requirement of effectiveness, proportionality, and dissuasiveness.[1969] The methodology is principle-based,[1970] and serves only as guidelines for a standard-approach to setting the level of fines.[1971] It takes into account all the relevant circumstances relating to the particular breach committed and a number of aggravating or mitigating factors for setting the final amount.[1972] Accordingly, the ECB will then first (1) determine the base amount of the fine, and then (2) adjust the base amount according to certain aggravating or mitigating circumstances which either allows for an increase or reduction of the final amount of the fine.[1973] Therefore, the guidelines very much resembles the principles and methodological approach provided in the SRMR, CRAR and EMIR for setting the final amount of the SRB and ESMA fines to be imposed.[1974]

The first step (1), determining the base amount of the fine, consists of two elements: (A) assessing the severity of the breach, which then provides the basis for (B) setting the base amount of the fine. In assessing the severity of the breach (1)(A), the ECB will first determine: (1)(A)(i) the impact of the breach; then (1)(A)(ii) the degree of the misconduct; and finally (1)(A)(iii) classify the breaches pursuant to the classes provided in the ECB Fine Guide. In setting the base amount of the fine (1)(B), the ECB has then established a (1)(B)(i) penalty grid for average supervised entities in each group for each category of severity, when the ECB envisage to impose the type fine that are based on a percentage of total annual turnover. Otherwise, when the ECB is able to determine the profits gained or losses avoided (benefit derived) due to breach, the ECB may decide to impose a maximum fine up to twice the amount of the benefit, also depending on the severity of the breach (1)(B)(ii). However, in setting the base amount for this fine ((1)(B)(ii)), the ECB will then ensure that it at least be equal to the determined benefit.[1975] Once the ECB has conducted these two initial elements of the first step and decided on the base amount of the fine, the ECB will then be able to continue with the second

[1968] Ibid, para. 138.
[1969] SSMR, Article 18(3). In respect of the dissuasiveness requirement, the ECB Fine Guide, point 7, expressly refers to the requirements of both specific and general deterrence, including the requirement to ensure that the severity of the fines are dissuasive even for larger institutions. See Article 65 and Recitals 36-37 CRD.
[1970] ECB Fine Guide, point 6.
[1971] Ibid, point. 35.
[1972] Ibid, point. 8.
[1973] Ibid, point 10.
[1974] However, while the rules on the method for setting the appropriate level of severity of the fine is laid down in the ECB Fine Guide, the same types of rules applicable for the SRB and ESMA are laid down in EU regulations (SRMR, CRAR, EMIR).
[1975] ECB Fine Guide, point 27. Accordingly, the base amount will be set equal to a disgorged amount. See above Section III(1)(A)(I), and the principles that governs disgorgement.

step (2) whereby the base amount will be (2)(A) adjusted by an increase or reduction on the basis of any relevant aggravating and mitigating circumstances. Finally, the ECB will then (2)(B) look into whether multiple breaches have been derived from the same set of facts in order to ensure overall proportionality in the final fine to be imposed. The ECB considers all these elements of the two-steps standard approach to provide a good indication for the exact level of severity of the ECB fines to be imposed, but that they do not provide a basis for the application of an automatic arithmetical calculation method.[1976] In particular, a need to impose effective, proportionate and dissuasive penalties may justify a departure from the standard approach on the basis of the particularities of the circumstances given in the specific case.[1977]

The first step (1) seek to determine the base amount of the fine on the basis of an assessment of the severity of the breach (1)(A). In order to determine the impact of the breach (1)(A)(i) and the degree of misconduct (1)(A)(ii), the ECB has established three categories of severity: 1. Low; 2. Medium; and 3. High. The ECB will then classify the impact of the breach and the degree of misconduct into one of the these three severity categories.

In respect of (1)(A)(i), the ECB will classify the impact of the breach by taking into account (a) the effect that the breach has on the prudential situation of the supervised entity and its effective supervision; (b) the duration of the breach; (c) the extent of the damage caused to third parties; and (d) the actual and potential consequences of the breach on the reputation of and confidence in the banking sector.[1978] With respect to (a), the ECB Fine Guide clarifies that this factor will be determined on the basis of the extent of the deviation from the legal requirements in that way that the more important the legal requirement is for the safety and soundness of the supervised entity, the smaller the degree of deviation is necessary in order classify the breach as high.[1979] With respect to (b), the guiding rule of the assessment assumes that the longer the duration of the breach is, the greater will its impact also be.[1980]

In respect of (1)(A)(ii), the ECB will classify the degree of the misconduct by taking into account whether the supervised entity has committed the breach intentionally or negligently as well as other circumstances relevant for determining its responsibility.[1981] To this end, the assessment will consider whether the supervised entity fails to comply with its special duty of care, including whether a diligent and normally informed supervised entity would have

[1976] Ibid, point 9.
[1977] Ibid, points. 33-35.
[1978] Ibid, point. 12.
[1979] ECB Fine Guide, point. 13.
[1980] Ibid.
[1981] See Chapter 6, Section II(2)(B).

breached the prudential requirement(s) it is subject to. If the supervised entity normally observes its special duty of care, then it points towards a low degree of misconduct, unless there are other circumstances pointing towards a more serious misconduct.[1982] In this respect, the degree of misconduct will be considered higher in those situations where the supervised entity (a) could not have been unaware that its conduct would potentially result in a breach of the prudential requirements; (b) the breached was committed because of deficiencies in its internal controls (which the ECB Fine Guide nevertheless points out as being deficiencies that can be addressed by a separate administrative penalty),[1983] or (c) the breach is a result of a gross misinterpretation of a legal requirement.[1984] Finally, the ECB clarifies that the highest degree of misconduct usually can be assumed in those situations where the supervised entity (aa) knew that its conduct almost inevitably would result in a breach of the prudential requirements; (bb) the supervised entity prevented or otherwise hindered the ECB from obtaining a comprehensive picture of its prudential situation; or (cc) the supervised entity sought to conceal a breach of its prudential requirements or otherwise to deceive the ECB.[1985]

Finally, in respect of (1)(A)(iii), the ECB will on the basis of the assessments carried out in (1)(A)(i)-(ii) classify the breaches committed into five categories of severity: 1. Minor; 2. Moderate; 3. Severe; 4. Very severe; and 5. Extremely severe.[1986] A breach will then be considered '1. Minor', where the impact of the breach and the degree of misconduct both are determined as 'low'; '2. Moderate' where both are medium; '3. Severe' where one of the two qualifies as 'high'; '4. Very severe' where both are 'high'. The fifth and most severe category of '5. Extremely severe' is being reserved for those types of breaches, which either have or potentially could have systematic consequences.[1987]

As the severity of the breach now has been determined, the ECB is ready to move on to the second element of the first step (1)(B) in order to set the base amount of the fine to be imposed. It follows that for the breaches classified as '4. Very severe' or below, the base amount of the fine will be determined either with reference to (1)(B)(i) the penalty grid for average supervised entities in each group for each category of severity, or with reference to (1)(B)(ii) when it is possible to determine the amount of the profits gained or losses avoided because of committed breach. For those cases where the breaches classifies as '5. Extremely

[1982] ECB Fine Guide, points 14-15.
[1983] Ibid, point 16.
[1984] Ibid.
[1985] Ibid, point 17.
[1986] Ibid, point 11.
[1987] ECB Fine Guide, point 18.

severe', the ECB will more freely set the base amount of the fine as a percentage of the total annual turnover (having a legal maximum on 10 %)[1988] of the supervised entity.[1989]

The reference to (1)(B)(i) and the penalty grid for average supervised entities in each group for each category of severity entails that the supervised entities falls into five groups established as depending on their size in terms of total assets. Group 1 covers supervised entities with total assets of higher than EUR 500 billions; Group 2 of total assets between higher than EUR 100 to 500; Group 3 between higher than EUR 20 to 100; Group 4 between higher than EUR 3 to 20; and Group 5 below or equal to EUR 3 billions.[1990] Having determined into which of the groups the supervised entity belongs to, the ECB will then set the base amount in accordance with the penalty grid provided in Table 2 of the ECB Fine Guide for the breaches that classifies between '1. Minor' to '4. Very severe'.[1991] For example, if the supervised entity is a Group 1 entity with total assets of more than EUR 500 billions and it has committed a breach classifies as '4. Very severe', the base amount is EUR 100 million.[1992] However, the base amount of the fine must also proportionate. To ensure a proportionate outcome, the ECB will therefore adjust the base amount in the penalty grid proportionately to the differences between the size of the relevant entity and the sizes of (x) the average supervised entity in its group and (y) the average entity in the group above or below.[1993] It entails that where the relevant entity is larger than the average size of its group, the relevant entity will be compared with average for its group and the average for the group above, and where smaller the comparison will be between the average for its group and the average of the group below.[1994]

In the respect of this second option (1)(B)(ii), the ECB Fine Guide first of all emphasises that the choice between the two options of (1)(B)(i)-(ii) depends upon whether it is possible to determine a profit gained or loss avoided due to breach, but also on the compliance with the effectiveness, proportionality and dissuasive requirements, and particularly the proportionality requirements as the ECB Fine Guide specifies that the second option (1)(B)(ii) only may "be used if the proportionality of the overall penalty is ensured."[1995] However, when the ECB has decided to set the base amount of the fine by reference to (1)(B)(ii), the ECB Fine

[1988] SSMR, Article 18(1) in conjunction with SSMFR, Article 128.
[1989] ECB Fine Guide, points 20 and 26.
[1990] Ibid, points 21-22. See further Table 1.
[1991] Ibid, points 23-25. See further Table 2.
[1992] Pursuant to the ECB Fine Guide, point 23, the penalty grid ensures that the fine is effective and dissuasive.
[1993] ECB Fine Guide, point 24.
[1994] Ibid. ECB Fine Guide, point 25, also clarifies those exceptional cases: "base amounts for supervised entities that are above the average size in group 1 or below the average size in group 5 are calculated proportionately to the difference between their size and the average size of the supervised entities in their group."
[1995] ECB Fine Guide, point 19, in conjunction with fn9.

Guide further provides that the base amount may "be calculated by increasing the profits gained or losses avoided by up to two-thirds, depending on the severity of the breach."[1996] This reference to the severity of the breach makes it likely to be understood as a reference to one of the five classes of breaches above ranging from '1. Minor' to '5. Extremely severe'. Nevertheless, "in setting the base amount, the ECB will ensure that the penalty is at least equal to the profits or losses avoided and that it is proportionate, effective and dissuasive."[1997] How this phrase actually should be understood is unclear.[1998] Nonetheless, the base amount will have to be adjusted by the second of the two-step approach before the fine becomes final.

The second step of the two-step approach (2) allows the ECB to increase or reduce the base amount of the fine determined in accordance with step one (1) by first (2)(A) taking into account all the relevant aggravating and mitigating circumstances, and then second (2)(B) to look into whether multiple breaches have been derived from the same set of facts. Each of the elements (A)-(B) of the second step allows the ECB to make necessary adjustments on the basis of an overall assessment, which takes into account all the relevant circumstances of the particular case.[1999] However, the ECB Fine Guide is unfortunately neither thorough nor transparent on how the two elements of the second step will be applied.

In respect of (2)(A), the ECB Fine Guide does not reveal from where the aggravating and mitigating circumstances have their legal basis, and which types of aggravating and mitigating circumstances that are applicable and may be relevant.[2000] Only few very brief examples on aggravating and mitigating circumstances are given. An example on aggravating circumstances may be "delays or a reluctance to cooperate with the ECB's exercise of its investigatory powers," or conversely, and a mitigating circumstance may be, "where the supervised entity cooperates with the ECB in a timely manner before, during and after investigatory measures [or where it] takes steps to effectively remedy the breach on its own initiative."[2001] In respect of (2)(B), the final fine might still contain proportionality concerns. Therefore, where there are multiple breaches derived from the same facts, "the ECB may adjust the base amount if it believes that a penalty corresponding to the sum of the individual penalties for the various breaches would not be proportionate given the circumstances of the case."[2002] However, if the

[1996] Ibid, point 27.
[1997] Ibid.
[1998] It is not obvious how the penalty that is equal to the profits gained or losses avoided at the same time can be in compliance with the dissuasive requirement. On the other hand, the purpose here is only for setting the base amount of the fine.
[1999] ECB Fine Guide, point 28-29.
[2000] For instance, from Article 2(3) ECBSR I or Article 70 CRD?
[2001] ECB Fine Guide, point 30.
[2002] Ibid, point. 31.

final total fine (penalty) to be imposed consists of multiple aggregated fines, how does this affect the standard approach laid down in the ECB Fine Guide? It somehow implies, but remains unclear in the guidelines, that the ECB determines one fine for each breach committed, and then add them all together for a total fine to be imposed.

Finally, the ECB Fine Guide reveals its final considerations. There is a legal maximum restricting the final fine to be imposed of 10 percent of the total annual turnover of the entity concerned in the preceding business year or twice the amount of profits gained or losses avoided as a result of the breach.[2003] The ECB also considers it as part of the proportionality assessment to look at the appropriateness of the fine and its potential impact on the financial situation of the supervised entity in order to ensure that the fine does not cause insolvency, serious financial distress or represent a disproportionate percentage of its total annual turnover.[2004] The ECB also considers itself empowered, "in certain cases, to impose a symbolic administrative pecuniary penalty. The justification for imposing such a penalty will be indicated in its decision."[2005] Although, the legal basis and the nature and justification for such symbolic type of sanction is not clear, the ECB nevertheless enjoys a wide margin of discretion.

(c) Day-fines (periodic penalty payments)

In EU financial law, there is legal bases for the periodic penalty payment in Articles 4a(1)(b) ECBSR I;[2006] 39 SRMR; 36b CRAR; and 25k and 66 EMIR.[2007] Hence, it is only a sanctioning power that is found in the EU sanction regimes and available to the European sanctioning authorities to be imposed primarily against legal persons, although the SRB and ESMA also may use periodic penalty payments against infringements committed by certain natural persons.[2008] Periodic penalty payments is a sanctioning power pursuant to Article 1(7) ECBSR I as it defines the concept of 'sanctions' to mean both 'fines' and 'periodic penalty payments'. While a 'fine' is defined as: "a single amount of money which an undertaking is obliged to pay as a sanction,"[2009] the concept of 'periodic penalty payments' is defined as meaning:

[2003] Ibid, point 32. See further above, Section III(1)(A)(II)(1)-(2).
[2004] Ibid, point 33.
[2005] Ibid, point 34.
[2006] In conjunction with Article 18(7) SSMR and Article 120(b) SSMFR.
[2007] Compare to Article 24 of Regulation (EC) 1/2003. On periodic penalty payments, see D'Ambrosio R, "The Legal Review of SSM Administrative Sanctions," Chapter 19 in Zilioli C and Wojcik (eds), 'Judicial Review in the European Banking Union' (Edward Elgar Publishing 2021).
[2008] Articles 39(1)(a)-(d) SRMR; 36b(1)(b)-(d) and 36b(2)-(3) CRAR; and 25k(1)(b) and 25k(3), and 66(1)(b) and 66(3) EMIR.
[2009] ECBSR I, Article 1(5).

> "(6) amounts of money which, in the case of a continued infringement, an undertaking is obliged to pay either as a punishment, or with a view to forcing the persons concerned to comply with the ECB supervisory regulations and decisions. Periodic penalty payments shall be calculated for each complete day of continued infringement:
>
> (a) following notification of the undertaking of a decision requiring the termination of such an infringement in accordance with the procedure laid down in the second subparagraph of Article 3(1); or
>
> (b) when the continued infringement falls under the scope of Article 18(7) [SSMR] in accordance with the procedure laid down in Article 4b of this Regulation;"[2010]

The two definitions on 'fine' and 'periodic penalty payments' makes it first of all evident that they both are pecuniary sanctions as they imposes an obligation to pay amount(s) of money as a sanction for the commission of one or more infringements.

Second, a comparison between the fine and periodic penalty payment entails that their conceptual design hardly reveals any differences. While the fine results in a single amount of money to be paid by the offender, the periodic penalty payment is an amount of money "imposed on a daily basis until the [offender] complies with the relevant decisions;"[2011] or "for each day of delay;"[2012] or, as the given definition prescribes: "for each complete day of continued infringement"[2013] for the purpose of punishment and/or to enforce compliance. Hence, the periodic penalty payment is a 'daily fine' that continues to run so long as the offender is in breach. Furthermore, if this daily and "running fine" is not paid each single day in which the offender is in breach, the fines imposed for each single day the offender is in breach will accumulate into a total and final amount, which evidently will result in 'a single amount of money which an undertaking is obliged to pay as a sanction'. Thus, in effect, a fine and a periodic penalty payment provides for the same type of punitive pecuniary sanction.

Third, what makes a periodic penalty payment different from a fine is not the nature of the legal power, but rather the nature and types of the violations for which they are imposed. While the SRB and ESMA fines are imposed for an infringement ("single breach") of certain types of infringements enumerated on a list,[2014] then SRB and ESMA "shall, by decision, impose periodic penalty payments in order to compel"[2015] compliance and terminate an ongoing breach. The type of violation is typically in the form of a breach of a SRB or ESMA decision

[2010] ECBSR I, Article 1(6). Because a periodic penalty payment does not aim at compelling compliance with the obligation to pay a fine already imposed, but to compel compliance with the initial decision to provide for the requested information, the periodic penalty payment does not qualify as a coercive sanction to the fine. Compare with Chapter 3, Section II(2)(G).
[2011] Articles 39(2) SRMR and 36b(2) CRAR.
[2012] EMIR, Articles 25k(2) and 66(2).
[2013] ECBSR I, Article 1(6).
[2014] Section III(1)(A)(II)(4)(a).
[2015] Articles 39(1) SRMR, 36b(1) CRAR, and 25k(1) and 66(1) EMIR.

on the exercise of their investigatory powers,[2016] as well in respect of ESMA in the exercise of the supervisory measures, which requires the offender to terminate an continuing infringement.[2017] In this way, a fine is imposed for the commission of single breach of certain listed infringements, while the periodic penalty payments is imposed for the daily continuation and repetition of ongoing breaches of a certain specific type of breach already addressed in a supervisory decision. This distinction also holds true for the periodic penalty payment available to the ECB because both the ECBSR I and SSMFR considers the periodic penalty payment applicable for continuing breaches of ECB regulations or supervisory decisions.[2018]

Fifth, as the aim of the periodic penalty payment is to target continuing breaches, it is also evident as well as made explicit by the provisions that one of its purposes is to compel compliance with the (supervisory) decisions made by the SRB, ESMA or ECB, and in case of the ECB, its regulations.[2019] However, the definition provided by Article 1(6) ECBSR I also made it explicit that the periodic penalty payment may be imposed as a 'punishment'. This is also evident by taking into regard its essential nature, which is as argued, in effect, a fine, and thus also imposed for the purpose to punish. Therefore, it can be more generally said that the periodic penalty payment is a punitive pecuniary sanction which continues to punish and compel the offender as long as it runs, that is, a 'day fine' until termination of the breach.

Finally, sixth, that periodic penalty payments essentially are daily fines also becomes more evident by the rules setting the amount. The amount of a periodic penalty payment is a based on a percentage of the average daily turnover in the preceding business year with respect to legal persons, and the average daily income in the preceding calendar year with respect to natural persons. In respect of legal persons, the same concept used for fines, the total annual turnover in the preceding business year, is used for calculating the average daily turnover (divided by 365).[2020] The punitive percentage that is provided then varies between: up till 5 %;[2021] fixed at 3 %;[2022] or fixed at 0,1%.[2023] With respect to natural persons, the punitive percentage of the periodic penalty payments are generally fixed at 2 % of the daily income.[2024] The periodic

[2016] Or, moreover, the powers to request all necessary information; to supply complete information; to submit to an investigation; and to submit to an on-site inspection. See further Articles 34-36 and 39(1) SRMR; 23c-d and 36b(1)(b)-(d) CRAR; and 25f-h and 25k(1)(b)-(c), and 61-63 and 66(1)(b) EMIR.
[2017] Articles 24(1)(d) and 36b(1)(a) CRAR; and 25k(1)(a) and 25q(1)(a), and 66(1)(a) and 73(1)(a) EMIR.
[2018] Articles 1(6) ECBSR I, and 129(1) SSMFR.
[2019] Articles 1(6) ECBSR I; 120(b) SSMFR; 39(1) SRMR; 36b(1) CRAR; and 25k(1) and 66(1) EMIR. However, all sanctions aim to compel compliance either through force or threat. See Chapter 1, Section II.
[2020] ECBSR I, Article 4a(2)(a)-(b).
[2021] ECBSR I, Article 4a(1)(b).
[2022] Articles 38b(3) CRAR; and 25k(3) and 66(3) EMIR.
[2023] SRMR, Article 39(3).
[2024] Articles 36b(3) CRAR; and 25k(3) and 66(3) EMIR.

penalty payment is then calculated for each day the breach is not terminated,[2025] but in all contexts, the imposition of periodic penalty payment is generally restricted by a limitation period fixed up to six months, running from the date stipulated in the sanctioning decision.[2026]

B. Conclusions and assessment

In the light of the Engel-test and the constitutional conception of sanctions discussed in Chapter 3, it is necessary to make an initial distinction on the basis of the second Engel-criterion and the first Öztürk-criterion between pecuniary sanctions or measures imposed on the basis on violations of law provisions that are governed by criminal norms and disciplinary norms. In this way, we will have to bringing in the conclusions in Chapter 6, Section II(3), made in accordance with the discussion in Chapter 6, Section II(1)(A) and (2)(A). Hence, it follows that mainly those sanctions or measures that are imposed on the basis of infringements of the general prohibition against market abuse and Article 9 CRD will be satisfying the second Engel and first Öztürk-criteria, and to the extent that they are deemed punitive and deterrent (dissuasive), they will also be satisfying the second Engel-criterion and second Öztürk-criterion and therefore classify as criminal sanctions. On this background, we may proceed:

Disgorgement cannot qualify as a criminal sanction, because it is restricted to the determined profit gained or loss avoided due to infringements committed and does not reach beyond the level of restoration, and thus neither punitive nor deterrent in its nature or purpose.[2027] However, any amount imposed as disgorgement above this level of restoration would convert the disgorgement into a fine because it would then contain a surcharge. In this way, there is close connection in the design of disgorgement and the second type of fine (II)(2) as they both depends upon determined benefit. Because the second type of fine contains a surcharge, it is also evident that it is a punitive and deterrent sanction. Disgorgement may thus also be viewed as a redundant sanction where the second type of fine (II)(2) is available, because by its very definition it contains a surcharge to the disgorged amount. Therefrom it also follows that disgorgement, as essentially a non-punitive and non-deterrent reparatory sanction,

[2025] Articles 1(6) ECBSR I; 129(2), second sentence, SSMFR; 39(2), second sentence, SRMR; 36b(2), second sentence, CRAR; and 25k(2), second sentence, and Article 66(2), second sentence, EMIR.
[2026] Articles 4a(1)(b) ECBSR I; 129(3), second sentence, SSMFR; Article 39(4), SRMR; 36b(4) CRAR; and 25k(4) and 66(4), EMIR. In SSMFR, Article 129(3), third sentence, it is specified that the earliest date stipulated in the decision shall be the date on which the person concerned is notified in writing of the ECB's reasons for imposing a periodic penalty payment.
[2027] Veil (n 2) 170. Veil writes that: "[criminal] sanctions consists of imprisonment, fines and the disgorgement of the profits the offender obtained through the offence," cf. p. 170, paragraph 1. This view implies that disgorgement is ordered for the commission of a criminal offence by the criminal courts. See the criminal classification factors in Chapter 3, Section II(2)(C).

cannot meaningfully can be required to be dissuasive, because the offender risk no more than the potential gains while remaining the chance to be undetected, unpunished or under-punished, for instance, if the gain was not assessed accurately.[2028] Hence, it is rather an effective reparatory pecuniary sanction that will be proportionate so long it does not reach beyond the level of legal restoration and only provides for a repayment of the illegal benefits derived. In this way, there is conceptual differences between the disgorgement power and a forfeiture.[2029]

All of the other types of fines (II)(1) and (II)(3)-(4)(a)-(c) do not equally reveal a surcharge as in the second type of fine (II)(2). However, according to the Engel-test, and what I claim to be the constitutional conception of sanctions, where violations are not resulting in any profit gained or loss avoided, then *any* amount imposed for the commission of the violation will be punitive and deterrent in nature and purpose. For that very reason, they all essentially qualify as a fines, according to their archetype, and may meaningful be required to be dissuasive. The way in which they are calculated and the sanctioning factors that they are required to be taken into account in setting their appropriate level of severity do not make them deviate from their archetype, because they remain embedded in their essential nature and purpose. For that reason, they also qualify as punitive sanctions, because they result in a deprivation of property (own funds), irrespective of whether they are imposed on natural or legal persons. Thus, to ensure that they will lead to deprivation of property, the fines imposed by the SRB and ESMA (4)(a) and their imposition of a periodic penalty payment (4)(c) are required to be "enforceable."[2030] The same requirement also apply for the fines (4)(b) and periodic penalty payments (4)(c) imposed by the ECB in accordance with the ECBSR I.[2031] Elsewhere, neither at the NFSRs nor the EFSR in respect of the ECB sanction regime, there are no express legal basis for requiring fines and periodic penalty payments to be enforceable. However, such express legal basis would also be redundant, because by the effectiveness requirement, in conjunction with the dissuasiveness requirement, fines are required to be enforceable. By their very definitions, fines cannot compel compliance and be dissuasive, if they do not act as a source of force or threat. When fines are enforced, at least the proceeds from the fines and the periodic penalty payments (4)(a)-(4)(c) shall, respectively, belong as property to the ECB; in

[2028] Ventoruzzo and Mock (n 153) 487. In addition, Cools argued that "[in] the UK, disgorgement is part of the pecuniary sanction, whereas in other jurisdictions it is a distinct measure," cf. p. 487, fn57, at B.30.16.
[2029] Chapter 3, Section III(1)(A)(II)(2)(b).
[2030] Articles 41(3) SRMR; 36d(3) CRAR; and 25m(4) and 68(4) EMIR.
[2031] ECBSR I, Recital 9, which requires that "decisions under the [ECBSR I] imposing pecuniary obligations are to be enforceable in accordance with the Article [299 TFEU]." See also Article 280 TFEU.

respect of the SRB, it shall be allocated to the Single Resolution Fund; and in respect of ESMA, it shall be allocated to the general budget of the European Union.[2032]

As all of the fines (II)(1)-(4), including the fines labelled as 'periodic penalty payments' (II)(4)(c), are punitive and deterrent in their nature and purpose, they also *qualify* as 'criminal pecuniary sanctions' in accordance with the constitutional conception on sanctions. Although the fines and periodic penalty payments imposed by the SRB and ESMA "shall be of an administrative nature,"[2033] such a requirement is illusive to their inherent criminal nature and purpose. However, whether they deserve the *classification* as a 'criminal sanction' does not automatically follow from the sanctions' criminal nature and purpose, because the classification depends upon whether they are imposed for violations of legal provisions that are governed by criminal norms or disciplinary norms in accordance with the second Engel-criterion and first Öztürk-criterion; and when they are imposed for the commission of a disciplinary offence, the question is whether the sanctions, a priori, by their maximum level of severity will satisfy the third Engel-criterion. The case-law reveals that ECtHR is hesitant to classify fines imposed for the commission of a disciplinary offence, i.e. 'disciplinary fines', as criminal sanctions.

When the fines (II)(1)-(4) are imposed for the commission of a criminal offence, which is the case when the offender has violated the general prohibitions against market abuse and Article 9 CRD, then the case law of the ECtHR has already settled that even very small fines will result in a criminal classification, wherefore the criminal guarantees must be afforded to the offender. This apply with full certainty in respect of natural persons from which the case-law of the ECtHR mostly is derived. In such situations, the classification of the sanctions will stay true to their criminal qualification. The same result is also the main rule in respect of legal persons, because the ECtHR does not seem to distinguish under the Engel-test between fines imposed on natural and legal persons. However, to my knowledge, there has not been any case before the ECtHR or CJEU, which has sought to directly challenge whether small fines imposed on a legal person for the commission of a criminal offence should not deserve a criminal classification. On the other hand, as such fines will satisfy the second Engel and first and second Öztürk-criteria, the challenge seems unlikely to succeed.

When the fines (II)(1)-(4) are imposed for the commission of a disciplinary offence, which will be in the majority of the cases because EU financial law primarily and overwhelmingly are governed by disciplinary norms, the so-called disciplinary fines must be provided

[2032] Articles 2(8) ECBSR I, 41(4) SRMR; 36d(4) CRAR; and 25m(5) and 68(5) EMIR.
[2033] Articles 41(2) SRMR; 36d(2) CRAR; and 25m(2) and 68(2) EMIR.

with such a maximum level of severity that they by the virtue of the third Engel-criterion will deserve a criminal classification, and thereby stay true to their criminal qualification.

In respect of natural persons, it should be re-called that disciplinary fines lower then EUR 43,750 (only a indicative amount) has generally not been considered severe enough to satisfy the third Engel-criterion, and therefore also not activated the criminal-head guarantees under the case-law of the ECtHR.[2034] However, the a priori maximum level of severity of which the natural persons risks to incur a priori according to the fines provided by EU financial law is, at least, in respect of the second type of fine (II)(2) three times the amount of the benefit under MAR and BR and, in accordance with the main rule, two times the amount of the benefit determined as the profit gained or loss avoided. This minimum maximum level of severity applies independently on whether the fine is imposed on a natural or legal persons and whether it is imposed for a criminal offence or disciplinary offence. In respect of the third type of fine (II)(3), the picture is similar as natural persons risks fines up to EUR 5 000 000 according to the main rule irrespective of whether imposed for a criminal or disciplinary offence. Even under the exceptions, where MAR provides for EUR 1 000 000 for the infringements of Articles 16-17; PR for EUR 700 000 for all types of infringements; and BR for EUR 100 000 for infringements of Article 11(1)(d) or 11(4) BR, all fines are substantially higher than EUR 43,750. ESMA may also impose periodic penalty payments up to 2 % of the average daily turnover (II)(4)(c), which perhaps in practice will be the least severe of the fines, but as it contains no upper limit it may potentially result in a very high fine. On a standalone basis, it seems very difficult not to reclassify all these types of disciplinary fines as criminal sanctions.

The same exercise should be conducted in respect of legal persons, where, nonetheless the second type of fine (II)(2) exemplified above for natural persons also apply for legal persons. The first type of fine (II)(1) whereby a legal person for the commission of the criminal offence of market abuse risks to be fined up to 15 % of the total annual turnover, and 10 % in accordance with the main rule for all other disciplinary offences. In respect of the third type of fine (II)(3) the legal person risks EUR 15 000 000 for market abuse and EUR 5 000 000 as the main rule for all other disciplinary offences. In respect of (II)(4)(a), the fines are restrict to 1 % of the annual turnover (SRMR), or 20 % of the annual turnover (CRAR and EMIR) in the preceding business year, unless any of the entities have directly or indirectly benefitted financially from the infringement, whereby the fine at least should be equal to the financial benefit,

[2034] Chapter 3, Sections III(1)(A)(II)(2).

which makes the potential of this fine unlimited. For the fines in (4)(c), the punitive percentage varies between: up till 5 %; fixed at 3 %; or fixed at 0,1%. It is clear that the fines under the SRMR are envisaged to be least severe and deterrent, which seems justified by the fact that such entities are already in a very vulnerable situation and likely to fail. However, in all situations the legal entities risks very substantial fines and albeit the percentages to some extent carries an inherent restriction, the total annual turnover of the entities that are subject to those fines are typically also characterised as 'significant' supervised entities, wherefore they have a potential for resulting in very high and substantial amounts. As for the natural persons, it is very difficult to not consider these fines deserving a criminal classification.

There are other arguments supporting a conclusion that fines imposed on both natural and legal persons should be classified as criminal sanctions. First, because the EU Member States are allowed under the NFSRs not to adopt the rules on administrative sanctions where the infringements already are subject to criminal sanctions under national law, the EU administrative sanctions are characterised as being functionally interchangeable with criminal sanctions, irrespective of whether the qualify as pecuniary or non-pecuniary sanctions.[2035] Second, as will follow from the discussion of the EU criminal sanctions, then all sanctions irrespective of whether they classify as administrative or criminal sanctions are required to be effective, proportionate and dissuasive. Third, within the NFSRs, and because the relevant EU legislative acts generally provides for minimum requirements, the EU Member States may even adopt higher severity levels for the administrative fines.[2036] Fourth, in the Case T-576/18 – Crédit Agricole v ECB, where the ECB imposed an administrative pecuniary penalty of EUR 4 300 000 on Credit Agricole on the basis of Article 18(1) SSMR, the CJEU stated in relation to Article 49(1) EUCFR that "the principle of the retroactive application of the less severe penalty may be relied upon not only against decisions imposing criminal penalties in the strict sense, but also administrative penalties."[2037] Such a comparison between 'criminal penalties in the strict sense' and 'administrative penalties' in order to trigger the leniency principle in Article 49 EUCFR implies the view that the administrative pecuniary penalties in Article 18 SSMR share their nature and purpose with the criminal penalties. Fifth, in the same case, the CJEU also stated that the principles regarding the rights of defence under EU competition law

[2035] Lackhoff (n 2) 212. See also Articles 65(1) CRD; 110(1) BRRD; 58(2) AMLD IV; 30(1) MAR; 42(3) BR; 70(1) MiFID II; 38(1) PR; 99(1) UCITS; and 18(1) IFD.
[2036] Articles 59(4) AMLD IV; 30(3) MAR; 42(4) BR; 70(7) MiFID II; 38(3) PR; and 99(7) UCITS.
[2037] T-576/18 – Crédit Agricole v ECB, para. 71. To that effect, see also Case C-45/06 – Campina v. Hauptzollamt Frankfurt, ECLI:EU:C:2007:154, para. 32-33; Case C-420/06 – Rüdiger Jager v. Amt für Landwirtschaft Bützow, ECLI:EU:C:2008:152, para. 60; and Case T-151/16 – NC v Commission, EU:T:2017:437, para. 54. However, the CJEU did not apply the Engel-test in any of the cases referred to.

enforcement proceedings in respect of Articles 101-102 TFEU "apply, by analogy, to observance of the rights of the defence in a procedure carried out by the ECB in respect of a requirement under relevant directly applicable acts of Union law, in terms of Article 18 SSMR."[2038] The validity of such an analogy-inference, establishing a principle of equivalence in the protection of the rights of defence between enforcement proceedings under EU competition law and enforcement proceedings under the ECB sanction regime presumes a view that considers the severity at stake in respect of the administrative pecuniary penalties pursuant to Article 18(1) SSMR to deserve an equivalent protection. The fines imposed in EU competition law for the enforcement of Articles 101-102 TFEU are "contrary to the terms of Article 23, paragraph 5 Regulation 1/2003 on Competition law which states that "Decisions taken pursuant to paragraph 1 and 2 shall not be of a criminal nature,""[2039] generally acknowledged to be criminal in nature.[2040] Sixth, Article 23(4) of Regulation 1/2003, fifth subparagraph, provides that "[the financial liability of each undertaking in respect of the payment of the fine shall not exceed 10 % of its total annual turnover in the proceeding business year."[2041] Hence, the fines under EU competition law and EU banking law are equally severe in terms of their maximum level of severity restriction. Seventh, as this type of fine, restricted to 10 % of the total annual turnover provided in EU competition law and EU banking law, are considered and applied as a criminal sanction, the same type of fine based on 10-15 % of the total annual turnover to be implemented or applied under the NFSR also deserves a criminal classification.

Finally, a concern should be raised with respect to the scope of the ECB's pecuniary sanctioning powers in relation to the ECB Fine Guide. The level of severity of the fines that *actually* will be imposed by the ECB seems to anticipate by the virtue of the ECB Fine Guide that the amount of the fines will be restricted by a number of sanctioning factors which will influence the end-result in a restricted way so that the severity level of the ECB fines will be limited according to weight of these sanctioning factors. The ECB thereby meets the

[2038] Case T-576/18 – Crédit Agricole v ECB, para. 109.
[2039] Andre Klip, *European Criminal Law* (3 edition, Intersentia 2016) 2.
[2040] ibid 2–3; Lamandini, Ramos Muñoz and Solana (n 1) 96–97; Paul Craig, *EU Administrative Law* (3 edition, Oxford University Press 2018) 667; Michael J Frese, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing 2014) 108–110. Klip at pp. 2-3 advances the argument by emphasising that: (i) the CJEU itself regards all the principles under the ECHR as being relevant to competition law, such as, for instance, Article 7, cf. Case C-3/06 P – Group Danone, ECLI:EU:C:2007:88, para. 88; (ii) despite that the CJEU has avoided to directly state that EU competition law is criminal law, the CJEU applies principles relevant to criminal proceedings from the ECHR to competition law and treats it in practice as criminal law; (iii) Advocate General Kokott in the Opinion delivered on 18 April 2013 to Case C-501/11 P – Schindler v. Commission, ECLI:EU:C:2013:248, point 25, has argued that: "It is recognised that competition law is similar to criminal law, but it is not part of the core area of criminal law;" and (iv) Advocate General Léger in the Opinion delivered on 3 February 1998, Case C-185/95 P – Baustahlgewebe Gmbh v. Commission, ECLI:EU:C:1998:37, point 31, has argued that: "It cannot be disputed (...) that, in light of the case-law of the European Court of Human Rights and the Opinions of the European Commission of Human Rights, the present case involves a 'criminal charge'."
[2041] Article 23(4) of Regulation 1/2003, fifth subparagraph.

requirement of EU law, including the CJEU's case law, under an isolated view on the ECB sanction regime with respect to the proportionality and dissuasiveness requirements. However, the ECB Fine Guide is not applicable under the NFSR in respect of the fines to be imposed against the less significant credit institutions. At the national level, the imposition of fines against the less significant credit institutions may thus result in fines that by their actual amount imposed may be even more severe in comparison to the ECB fines imposed on the significant credit institutions. This is further amplified by the possibility that the less significant credit institutions may be subject to criminal fines instead of administrative fines. In this way, the ECB sanction regime may potentially result in a de facto discrimination of the less significant CRD-institutions because the fines imposed under NFSR may be disproportionately more severe than the ECB fines imposed on significant credit institutions. Moreover, the NFSR may provide for more dissuasive fines and deterrent sanction regimes in comparison to the ECB sanction regime.

2. Administrative non-pecuniary sanctions, and other measures and powers

We now proceed primarily with a discussion of the 'administrative non-pecuniary sanctions'. As the observations on the legislative categories of legal powers showed above,[2042] the legal provisions of EU financial law provides for 'administrative sanctions' and other 'administrative measures' in the form of: (1) withdrawals and suspensions of authorisations and registrations;[2043] (2) suspension of voting rights;[2044] (3) cease-and-desist orders ('CDOs');[2045] (4) bans;[2046] and (5) public statements and public warnings,[2047] but without providing the necessary criteria that makes us able to distinguish which of the two categories of legal powers that these five more specific types of legal powers belong to. Thus, to undertake this task we need to apply the Engel-test and constitutional conception of sanctions from Chapter 3 to determine which of the five types of legal powers that qualify as 'sanctions'. When this is not the case, the legal power in question seems to be reserved for the category of 'administrative measures', which thereby presents itself as a 'default category' of legal powers. However, because we

[2042] Section II(1).
[2043] Articles 14(5) SSMR; 18, 64(1) and 67(2)(c) CRD; 59(2)(c) AMLD IV; 30(2)(d) MAR; 42(2)(d) BR; 70(6)(c) MiFID II; 99(6)(c) UCITS; 46(2)(k) AIFMD; 20 and 24(1)(a) CRAR; and 25p, 25q(1)(d), 71 and 73(1)(d) EMIR.
[2044] CRD, Article 66(2)(f). See also TD, Article 28b(2).
[2045] Articles 66(2)(b) and 67(2)(b) CRD; 111(2)(b) BRRD; 59(2)(b) AMLD IV; 30(2)(a) MAR; 42(2)(a) BR; 70(6)(b) MiFID II; 38(2)(b) PR; 99(6)(b) UCITS; and 18(2)(b) IFD.
[2046] Articles 67(2)(d) CRD; 111(2)(c) BRRD; 59(2)(d) AMLD IV; 30(2)(e)-(f) MAR; 42(2)(e) BR; 70(6)(d) MiFID II; 99(6) UCITS; and 18(2)(c) IFD.
[2047] Articles 66(2)(a) and 67(2)(a) CRD; 111(2)(a) BRRD; 59(2)(a) AMLD IV; 30(2)(c) MAR; 42(2)(c) BR; 70(6)(a) MiFID II; 38(2)(a) PR; 99(6)(a) UCITS; and 18(2)(a) IFD.

have already established that EU financial law contains another category of legal powers referred to as 'supervisory powers', the question becomes whether the 'administrative measures' distinguish themselves from the supervisory powers, and when they do, why and how so. We thus also need to compare the legal categories of administrative measures with supervisory powers. Because EU financial law primarily is disciplinary law, we will according to this main rule take the perspective that a disciplinary offence rather than a criminal offence has been committed. In the conclusion we then draw some more general conclusions and a final assessment.

A. The types of non-pecuniary sanctions, measures and powers

(I) Withdrawals, suspensions and removals

(1) Withdrawal of authorisations

The relevant supervisory and/or sanctioning authorities may withdraw authorisations, registrations or recognitions that have been granted to the undertakings that are subject to the legal provisions of EU financial law.[2048] Under the AMLD IV, MAR, BR, MiFID II, and UCITS, the authorities may also suspend the authorisations.[2049] In EU banking law, the legal person must obtain an authorisation before commencing the activities as a credit institution.[2050] The authorisation as a credit institution and the withdrawal of the authorisation is the exclusive tasks of the ECB in relation to all credit institutions irrespective of whether they qualify as significant or less significant credit institutions.[2051] The authorisation grants the legal persons the right to take up the business of a credit institution.[2052] However, the very core of the right entails that the legal person may carry out the business of taking deposits or other repayable funds from the public and grant credits from its own account.[2053] When the ECB is withdrawing an authorisation of a credit institution, the power is categorised and exercised as a supervisory

[2048] Articles 14(5) SSMR; 18 and 66(2)(c) CRD; and 59(2)(c) AMLD IV; 30(2)(d); MAR; 42(2)(d) BR; 8, 43, 62 and 70(6)(c) MiFID II; 98(2)(k) and 99(6)(c) UCITS; Article 46(2)(k) AIFMD; 20 and 24(1)(a) CRAR; and 20, 25q(1)(d), 71, and 73(1)(d) EMIR. Withdrawals and suspensions of authorisations are not provided in SRMR, BRRD, PR and IFD.
[2049] Articles 59(2)(c) AMLD IV; 30(2)(d) MAR; 42(2)(d) BR; 70(6)(c) MiFID II; and 99(6)(c) UCITS.
[2050] CRD, Article 8(1).
[2051] SSMR, Article 4(1)(a). More generally on the authorisation and withdrawal of authorisation as a credit institution, see, in particular: Klaus Lackhoff, *Single Supervisory Mechanism: European Banking Supervision by the SSM: A Practitioner's Guide* (CH Beck; Hart; Nomos 2017) 159–171.
[2052] SSMR, Articles 4(1)(a) and 14(1), and Recitals 20-21.
[2053] Articles 4(1)(a) CRR; 3(1)(1) and 9(1) CRD; and 2(3) SSMR.

power.[2054] In the CRD and AMLD IV, the withdrawal-power is at the same time labelled as a supervisory power, an administrative penalty/sanction and an administrative measure.[2055]

In EU securities law, the MiFID II also requires that the provision of investment services and/or the performance of investment activities as a regular occupation or business on a professional basis to be subject to prior authorisation.[2056] The concept of 'investment services and activities' means any of the enlisted services and activities in Annex I, Section A, relating to any of the instruments listed in Annex I, Section C, of MiFID II.[2057] Some of these services and activities overlaps with the banking activities listed in Annex I to the CRD and subject to mutual recognition among the EU Member States. Elsewhere, the MiFID II also provides for the authorisation as regulated market;[2058] and data reporting service providers,[2059] which grants the more specific rights associated with the authorisation, including the right to operate and/or manage a multilateral system as a market operator and provide data reporting services. The same principle applies elsewhere under EU securities laws, in respect of the NFSRs, because the authorisation, registration or recognition functions as a requirement for obtaining the civil right to perform certain more specific forms of activities.[2060] A similar disciplinary regime is also established within the EFSR by ESMA's sanction regime, because the registration as a credit rating agency grants the right to perform credit rating activities, including the right to review and issue credit ratings;[2061] the registration as a trade repository grants the right to centrally collects and maintains the records of derivatives;[2062] and the authorisation as a central counterparty ('CCP') grants the right to provide clearing services."[2063] Under the NFSRs, the withdrawal-power may at the same time be considered a supervisory power, administrative

[2054] Article 14(5)-(6) SSMR is provided among Articles 14-18 SSMR under Chapter 3, Section 2 titled: 'Specific supervisory powers."
[2055] Compare Articles 64(1) and 66(2)(c) CRD, and 59(2)(c) AMLD IV.
[2056] MiFID II, Article 5(1).
[2057] The authorisation may cover one or more of the ancillary services in Section B of Annex I to MiFID II, cf. Article 6(1).
[2058] MiFID II, Article 44(1) as defined in Article 4(1)(21). See further that provision.
[2059] MiFID II, Article 59(1) as defined in Article 4(1)(63) meaning an APA, a CTP or an ARM. The provision of data reporting services are described in Annex I, Section D, of the MiFID II.
[2060] Accordingly, the BR requires natural or legal persons that they have obtained the authorisation or registration as an administrator of benchmarks, when they provides or are intended to provide the indices to be used as benchmarks, cf. Article 34(1) BR. An 'administrator' means "a natural or legal person that has control over the provision of a benchmark," cf. Article 3(1)(6), and the 'use of a benchmark' means "(a) issuance of a financial instrument which references an index or a combination of indices," cf. Article 3(1)(7) BR, and further that provision. In respect of UCITS, it is require that the access to the business of management companies shall be subject to the prior authorisation, cf. Article 6(1), and the activity of management of UCITS include the functions provided in Annex II to the UCITS, cf. Article 6(2). In respect of investment companies, see Article 27 UCITS. For the AIFMD, see Article 6 and Annex I of the AIFMD.
[2061] CRAR, Articles 3(1)(b) and (o), and 14.
[2062] EMIR, Articles 2(2) and 55.
[2063] EMIR, Articles 2(1), 2(3) and 14.

non-pecuniary sanction and an administrative measure, while under ESMA's sanction regime the withdrawal-power is considered a supervisory measure.[2064]

As argued in Chapter 6, the withdrawal-power is in EU financial law subject to very similar violation-regimes.[2065] Generally, it may be exercised when the entity:

(i) does not make use of or expressly renounces the authorisation;[2066]
(ii) has obtained the authorisation through false statements or irregular means;[2067]
(iii) no longer fulfils the conditions under which authorisation was granted;[2068]
(iv) a (serious) breach of the provisions typically referred to in the violation-regimes;[2069]
(v) no longer satisfy the prudential requirements in the CRR/CRD, or imposed on them;[2070] and
(vi) falls within the cases where national law provides for withdrawal of authorisation.[2071]

By disregarding the latter (vi), the pertinent question under the Engel-test is when the withdrawal-power will result in a deprivation of civil rights? In respect of (i), the entity has expressly renounced its authorisation, perhaps for reasons of not intending to make use of it, and thus voluntarily given up of its authorisation. Because a punishment has to be something imposed against the will of the offender,[2072] a deprivation does not exist when the entity voluntarily has given up its authorisation. Where the entity has not made use of the authorisation, this might be viewed as equivalent to a voluntary renunciation of the authorisation, but not necessarily as the entity may still intend to make use of it by selling the authorisation or merge with another company that intends to make use of it. In this regard, the withdrawal appears as a deprivation. However, such situations falls into the third condition (III), whereby the entity is required to satisfy the conditions under which the authorisation was granted on an ongoing basis, because the acquisitor of the authorisation is not the particular entity that initially was assessed to qualify for the authorisation. Similarly in respect of mergers, because the merger may have resulted in a new company, or company structure, which does not satisfy the conditions for being granted the authorisation. In all of the situations, the key rationale is that when the entity does not satisfy the requirements for obtaining the authorisation on an ongoing basis, the entity does not hold a right and are no longer qualified to pursue the activities subject to

[2064] Articles 30(2)(d) MAR; 42(2)(d) BR; 8, 43, 62 and 70(6)(c) MiFID II; 98(2)(k) and 99(6)(c) UCITS; Article 46(2)(k) AIFMD; 20 and 24(1)(a) CRAR; and 20, 25q(1)(d), 71, and 73(1)(d) EMIR.
[2065] Chapter 6, Section II(2)(A). See Articles 14(5) SSMR; 18 and 67(2)(c) CRD; 35 and 42(2)(d) BR; 8, 43, and 62 MiFID II; 7(5) and 29(4) UCITS; 11 AFIMD; 20 CRAR; and 20, 25p, 25q(1)(d), 71, and 73(1)(d) EMIR.
[2066] Articles 18(a) CRD; 35(1)(a) BR; 8(a), 43(a) and 62(a) MIFID II; 7(5)(a) and 29(4)(a) UCITS; 11(a) AIFMD; 20(1)(a) CRAR; and 20(1)(a), 25q(1)(a) and 71(1)(a) EMIR. See also Article 18(aa) CRD.
[2067] Articles 18(b) CRD; 35(1)(b) BR; 8(b), 43(b) and 62(b) MiFID II; 7(5)(b) and 29(4)(b) UCITS; 11(b) AIFMD; 20(1)(b) CRAR; and 20(1)(b), 25q(1)(b) and 71(1)(b) EMIR.
[2068] Articles 18(c) CRD; 35(1)(c) BR; 8(c), 43(c) and 62(c) MiFID II; 7(5)(c) and 29(4)(c) UCITS; 11(c) AIFMD; 20(1)(c) CRAR; and 20(1)(c), 25q(1)(c) and 71(1)(c) EMIR.
[2069] Articles 18(f) CRD; 35(1)(d) BR; 8(d), 43(d), 62(d) MiFID II; 7(5)(e), 29(4)(d) UCITS; 11(e) AIFMD; 24(1)(a) CRAR; and 20(1)(d), 25p(1)(c), 25q(1)(a), and 73(1)(d) EMIR.
[2070] Articles 18(d) CRD; 8(c) MiFID II; 7(5)(d) UCITS; and 11(d) AIFMD.
[2071] Articles 18(e) CRD; 8(e) and 43(e) MiFID II; 7(5)(f) and 29(4)(e) UCITS; and Article 11(f) AIFMD.
[2072] Chapter 2, Section II(1)(A)(I). In particular, see the view of Thomas Aquinas.

the authorisation. Thus, a right that the entity do not hold, and should not be granted, such a right cannot be subject to a deprivation. The same rationale also explains the fifth condition (v), because compliance with the prudential requirements laid down in the CRR are made conditional, on an ongoing basis, for maintaining the right to hold the authorisation as a credit institution. It also explains the second condition (ii), because if the supervisory authority would have been correctly, not falsely, informed, no authorisation would have been granted. Therefore, in all these cases, the authority intervenes in order to prevent an un-authorised legal entity to (continue to) pursue activities that requires qualification for the authorisation. Thus, in none of these situations, the withdrawal-power qualify as disciplinary sanction, because the legal entity is not subject to a deprivation. It also not qualifies as a reparatory sanction, because the legal position of legal entity in question has not been restored into compliance with the CRR-requirements, for instance. Rather, the withdrawal-power seems to qualify as that species of preventive measures referred to as 'precautionary powers',[2073] because it rather aims to prevent dangerous situations to occur and to hinder that fundamental safety and soundness concerns related to one legal entity will jeopardise the stability of the entire financial sector.

When the withdrawal-power is exercised under the fourth condition (iv), the withdrawal-power is exercised against an entity, which generally satisfies the conditions for the authorisation, but which has breached at least one of the provisions found in the violation-regimes. In this way, the entity has been subject to deprivation, because the entity have been prohibited permanently from exercising the activities that were subject to authorisation. In this respect, the withdrawal-power qualify as a disciplinary sanction, and may meaningfully be required to be dissuasive. Thus, it is also a punitive sanction, because it does not aim to repair for the breach committed or restore compliance with any requirement. Rather, it excludes the entity from continuing to perform the business activities tied in with the authorisation in the future, wherefore the entity also most likely will be required to change its purpose in the company' articles of association. It is also acknowledged as a very severe sanction by the ECtHR, because an entity might risk to lose its very existence. However, the strict proportionality requirement restricts the scope of the withdrawal-power, because a legal entity authorised both as a credit institution and to perform investment services should not be deprived of its authorisation as a credit institution, when the legal entity has committed a serious infringement of the MiFID II requirements. Even so, the withdrawal power is still a very severe sanction, wherefore

[2073] Chapter 3, Section III(1)(D) and Chapter 7, Sections II(2)(B)(II) and II(2)(C).

EMIR also considers the withdrawal of the registration of trade repositors "as a last resort"[2074] supervisory measure.[2075] This is not prescribed anywhere else under EU financial law, but it must be considered to result from the proportionality requirement.[2076]

These general principles and conclusions lay down the main-rules of the supervisory and sanctioning framework for the exercise of the withdrawal-power. It can be exercised both as a precautionary supervisory power and a disciplinary sanction for (very serious) breaches committed.[2077] However, the violation-regimes that are attached to the withdrawal-power complicates the legal categorisation of the withdrawal power even further. First, in respect of EU banking law, and depending on the nature of the breaches committed, the breaches may form part of the prudential assessment which may provide for prudential reasons for why the credit institution should have its authorisation withdrawn. For instance, when the breaches provides evidence for that the credit institution no longer fulfils the conditions under which the authorisation was granted or no longer meets the CRR-requirements. In such situations, the withdrawal-power can still be exercised by the ECB as a supervisory power.

Where the NCAs has detected a number of (serious) breaches, including breaches of the AMLD IV framework by a credit institution, the NCAs may exercise the withdrawal-power on the basis of Article 18(f) CRD, which refers to the CRD's violation-regime provided in Article 67(1) CRD.[2078] In these situations, the credit institution will still fulfil the prudential CRR-requirements, but is sanctioned by NCAs with the withdrawal-power due to the serious nature of the breaches it has committed. However, as the ECB has the exclusive power to withdraw the authorisation of all credit institutions, the NCAs cannot act on Article 18(f) CRD on an independent basis. The NCAs will have to send a proposal to the ECB to withdraw the authorisation of the credit institution in question. In these situations, the ECB's exercise of the withdrawal-power remains as an exercise of a supervisory power, thus converting and requalifying the withdrawal-power from a disciplinary sanction into a supervisory power. This was exactly the situation in the Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and

[2074] EMIR, Article 73(1)(d).
[2075] However, as argued, it qualifies as a disciplinary sanction.
[2076] Lackhoff (n 2) 168–169. Lackhoff writes in respect of the justification of withdrawal, that "[the] threshold is in particular in terms of proportionality rather high as the withdrawal is only available as ultima ratio," cf. p. 168, para 730. Lackhoff also not considers the withdrawal-power to be proportional, if corrective supervisory measures are readily available, cf. p. 169, para. 732, fn769.
[2077] Lamandini, Ramos Muñoz and Solana (n 1) 97. They argue more generally that "the prospect that a single set of measures can receive different treatments, and be subject to different guarantees, depending on the use of it that is intended used by administrative authorities (and whether it is possible to prove such intention) is a bit disquieting." This indeed holds true for the withdrawal-power.
[2078] However, Article 18(f) CRD does not even require a 'serious' breach to withdraw the authorisation. This calls for serious concerns in respect of the application of the proportionality principle.

Versobank v ECB.[2079] The ECB exercised the withdrawal-power as a supervisory power after a proposal from the NCAs acting on a legal basis in Article 18(f) CRD,[2080] and thus exercising the withdrawal-power as a disciplinary sanction. This "legal-transformation" of the withdrawal-power seems to be necessary, when we re-call that the ECB does not have the sanctioning power to impose non-pecuniary sanctions on legal persons.[2081] However, the question is whether the withdrawal-power will maintain its true nature as a disciplinary sanction under the Engel-test, despite of this legal conversion, in particular, if any of the procedural safeguards that protects the legal defendants have been subverted? – If the credit institution continues to satisfy the prudential CRR-requirements, but has committed a serious breach that justifies the withdrawal of the authorisation as a credit institution, then the ECB has in reality sanctioned the institution by depriving the legal person of its right to operate as a credit institution.

The problems for the qualification of the withdrawal-power does not stop there. When the ECB has withdrawn the authorisations of credit institutions, the case of the ECB v Trasta Komercbanka have already revealed that in some EU Member States it will lead to the *automatic liquidation of the legal person* who formerly held the authorisation as a credit institution.[2082] This was also the situation in Ukrselhosprom and Versobank-case, because after the ECB had withdrawn the authorisation, "liquidation proceedings were opened with respect to that applicant and liquidators were appointed."[2083] The problem is not one of direct effect of EU law, but of national law. It arises, when the ECB withdraws the authorisation of a credit institution, and national law directly requires that the national courts, by court orders, automatically opens liquidation proceedings that leads to the (judicial) winding-up of the legal person once their authorisation has been withdrawn. In the Trasta-case, the national courts had no discretion but to open the liquidation proceedings.[2084] Such situations may qualify as being fully identical to a judicial winding-up order, which the EU legislators already has acknowledged to be (the most severe of the) criminal sanctions against legal persons in the AMLD-CRIM and MAD-CRIM.[2085] This brings along its own conclusion that the ECB in reality imposed a criminal sanction in the Trasta and Versobank cases. It is not intended that the ECB should have such criminal sanctioning powers, certainly not without subjecting the credit

[2079] Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB, paras. 1-40.
[2080] Ibid, paras. 24 and 28-29. However, the entire case makes it evident that the credit institution should be subject to an withdrawal of authorisation, but on the basis of prudential reasons, and not punitive ones.
[2081] SSMFR, Article 134(1).
[2082] Joined Cases of C-663/17 P, C-665-17 P and C-669/17 P – ECB and Others v Trasta Komercbanka and Others, ECLI:EU:C:2019:923.
[2083] Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB, para. 15.
[2084] Ibid, para. 18.
[2085] Articles 8(e) AMLD-CRIM and 9(d) MAD-CRIM.

institution in question to the stronger procedural safeguards that belongs to criminal proceedings from the ECtHR and EUCFR. However, the argument pursuant to the Engel-test depends upon whether the national liquidation order is a direct legal effect of the withdrawal when it is exercised as a sanctioning power, and whether a court order for liquidation is identical to a judicial winding-up order. Therefore, the withdrawal-power is further discussed in Section III(2)(B) and IV(2)(C).

(2) Removal of members from the management body

The relevant supervisory authorities have the supervisory power to remove a natural person functioning as a member of the management body, primarily of investment firms, market operator, credit institutions, financial holding companies, and mixed financial holding companies.[2086] The removal-power has to be viewed in light of the general governance requirements for the management body, whereby the members of the management body at all times are required to be of sufficiently good repute and to possess sufficient knowledge, skills and experience to perform their duties.[2087] More generally, the members of the management body has to be fit-and-proper *at all times*. While the general rules laying down the fit-and-proper requirements for the management body are provided by Articles 91 CRD and 9 MiFID II, the latter referring across to the requirements laid down in the former, the more specifically rules specifying the requirements for suitability of members of the management body are laid down in the guidelines jointly adopted by ESMA and EBA in respect of their regulatory functions under the ESA regulations, referred to as 'EBA/GL/2017/12' and 'EBA/ESMA Suitability Guidelines' in the following.[2088] In addition, the ECB has adopted its own guidelines in its: "Guide to fit and proper assessments," referred to as 'ECB Suitability Guidelines," [2089] which nevertheless aims to follow the EBA/ESMA Suitability Guidelines to the extent possible.[2090]

As the mangers at all times are required to be fit-and-proper, the managers must meet the suitability requirements on an ongoing basis. Accordingly, the ECB or NCAs also have an ongoing duty to conduct a review of the managers' suitability and, in particular, where they

[2086] Articles 16(2)(m) SSMR; 91 CRD; 27(1)(d) BRRD and 69(2)(u) MiFID II.
[2087] Articles 91(1) CRD.
[2088] Joint ESMA and EBA Guidelines on the assessment of the suitability of the members of the management body and the key function holders under Directive 2013/36/EU and Directive 2014/65/EU." EBA/GL/2017/12. 21 March 2018. Available at: https://www.eba.europa.eu/regulation-and-policy/internal-governance/joint-esma-and-eba-guidelines-on-the-assessment-of-the-suitability-of-members-of-the-management-body.
[2089] European Central Bank, Guide to fit and proper assessments. Revised December 2021. Link: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fit_and_proper_guide_update202112~d66f230eca.en.pdf.
[2090] ECB Suitability Guidelines, p. 4.

have reasonable grounds so suspect that money laundering or terrorist financing is being committed or attempted, or there is an increased risk thereof in connection with an entity subject to supervision.[2091] Otherwise, the emergency of new material facts may lead to the reassessment of the managers,[2092] including, in the view of the ECB, for instance:

> (i) supervisory measures with material findings that contained a direct connection with the individual concerned, for instance, under in on-site inspections;
>
> (ii) criminal and administrative proceedings related to material facts for which a direct responsibility has been established, or where the facts are sufficiently well-established although an appeal may be pending;
>
> (iii) in respect of anti-money laundering, the outcome of on-site inspections and measures applied by relevant authorities, or the existence of anti-money laundering-related court or administrative authorities' decisions will always lead a reassessment; and
>
> (iv) a final court and/or administrative decisions where there are no appeal, and settlements where there are related anti-money laundering issues, should also lead to a reassessment.[2093]

The ECB Suitability Guidelines has elaborated more on the concept of (new) 'material facts' in relation to these four (i)-(iv) situations, indicating that in their relation to the laws on banking, securities and financial services, including the areas of anti-money laundering, corruption, and market abuse are likely to be considered *material*.[2094] This entails that the imposition of supervisory powers, administrative sanctions and criminal sanctions in separate proceeding will most likely establish an obligation to initiate new proceedings to exercise the removal-power either by the ECB or NCAs. On this background, the question thus becomes whether the exercise of the removal-power qualifies as a sanction?

Just like the legal framework categorise the removal-power as a supervisory power, the ECB does also not consider the removal-power to qualify as a sanction because, just like the application of supervisory powers, it is exercised on the basis of a "prudential assessment" and does "not necessarily require an actual breach of prudential requirements."[2095] However, on the

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[2091] Articles 91(1) CRD, second subparagraph; 94 SSMFR; and 9(1) MiFID II.
[2092] EBA/ESMA Suitability Guidelines, pp. 39-41; and ECB Suitability Guidelines, Section 5.2, pp. 56-65.
[2093] ECB Suitability Guidelines, p. 61.
[2094] ECB Suitability Guidelines, p. 62. More precisely: "Ongoing criminal or administrative proceedings and enforcement of supervisory measures under the laws governing banking, financial services, securities markets, insurance activities, including, e.g. laws on AML/CFT, corruption (in criminal proceedings), market manipulation, or insider dealing among others are likely to be material. Other criminal or administrative proceedings that are either not connected or less connected to the role and responsibilities of the individual(s) concerned do not in principle initiate a reassessment unless warranted owing to specific circumstances. Final court and/or administrative decisions and settlements, including relating to AML issues, bear maximum evidential value and so lead to a reassessment."
[2095] ECB Suitability Guidelines, p. 56-57. More precisely: "Reassessments are distinguished from the application of administrative sanctions or measures, such as administrative pecuniary penalties or a temporary ban on exercising functions, against a member of the management body who, according to the conditions set out in national law, is responsible for breaches of prudential requirements (Article 65(2) of the CRD in conjunction with Article 67(2)(d) and (f) of the CRD). Unlike such administrative sanctions or measures, reassessments at the initiative of the competent authority involve a prudential assessment based on available evidence, and do not necessarily require an actual breach of prudential requirements."

other hand, the removal-power bears close resemblance to the withdrawal-power in the way that the removal-power may be applied in situations similar to the ones referred to in (iii) and (iv) above in respect of the withdrawal-power. Accordingly, it is necessary to distinguish between (aa) situations where the person no longer satisfied the suitability requirements, and (bb) situations where the person has been removed because of a breach of requirements that *also* makes the person unsuitable to occupy a manager-position. The most regular situation (aa) establishes the main rule by which the manager at all times has to be deemed suitable and thereby to satisfy the suitability requirements on an ongoing basis. Accordingly, so long as the natural person satisfies the suitability requirements the person also has a corresponding right to function as a manager in the entity concerned. Reversely, where the person no longer satisfies the same requirements, the person is also no longer entitled to function as a manager. In accordance with the rationale following from the ECtHR's case-law, a right which the person does not qualify for can also not be deprived from that person, wherefore the removal-power cannot qualify as a disciplinary sanction in situations under (aa), and thus remains true as a supervisory power because of its preventive and reparatory nature.[2096] According to the autonomous concept of reparatory sanctions, the removal-power has thus been exercised on the credit institution for the purpose of restoring compliance, because credit institutions are required to be managed only by natural persons who are deemed fit, proper, and suitable. Albeit the removal-power by the removal of a natural person from the management body may have severe personal consequence for the natural person in question, the supervisory power as a reparatory sanction still maintains its ex parte and impersonal nature. Therefore, it is a restoration of the credit institution into compliance and not a punishment of the individual.

In situations under (bb), the main rule maintain quite some force as the case-law of the ECtHR does not seem fully settled on this matter.[2097] What the case-law of the ECtHR have settled is that (i) 'temporary disqualifications from holding managerial positions and to establish new limited liability companies' and (ii) 'temporary suspensions and withdrawals of a licence as a doctor to perform duty services at a hospital' do not classify as criminal sanctions. However, on the other hand, the ECtHR have at the same time deemed (i)-(ii) to qualify,

[2096] The same rationale explains the refusal-power contained in Article 32(1)(k) PR, whereby the NCAs may refuse to approve of any prospectus drawn up by a certain issuer, offeror or person asking for admission to trading on a regulated market for a maximum of five years, where that issuer, offeror or person asking for admission to trading on a regulated market has repeatedly and severely infringed the PR. Hence, the issuer, offeror or person, based on assessment similar to a fit-and-proper assessment that takes into account previous infringements and sanctions, no longer have a right to have a prospectus assessed and approved by the NCAs for five years, wherefore the refusal-power qualifies as a supervisory power.
[2097] Chapter 3, Section III(1)(B)(I).

essentially, both as preventive measures and disciplinary sanctions.[2098] In addition, the ECtHR seems with more certainty to have settled that dismissals, removals from office, disciplinary leave without pay, and the like, qualify as disciplinary sanctions, when they are imposed for a breach of requirements.[2099] Therefore, it may be possible to conclude that as the ECB sanction regime does not grant the ECB sanctioning powers in terms of natural persons, then in situations where the person in question has been sanctioned for breach of requirements under the NFSRs, the ECB may subsequently require the removal of the manager on the basis of unsuitability. The sanction imposed on the natural person under the NFSRs will thus more or less automatically has as a direct legal effect that the member of the management is removed effectively. In this way, the removal of the natural person qualify as a secondary sanction imposed in addition, and more or less automatically, to the primary sanction imposed under the NFSR, and the primary sanction imposed under the NFSR brings with it the legal basis for the additional sanction to be *executed* by the ECB under its sanction regime. In this way, the ECB effectively enforce national non-pecuniary sanctions against natural persons, and at the same time impose a reparatory sanction on the credit institution by exercising the removal-power and thereby repairing and restoring the credit institution into compliance.

(3) Suspensions

In accordance with the proportionality requirement, rather than to permanently prohibit the entity from exercising the activities subject to authorisation by exercising the withdrawal-power, the sanctioning authority may for the infringements contained in the violation-regimes of the AMLD IV, MAR, BR, MiFID II, and UCITS, instead choose to suspend the concerned entity's authorisation.[2100] Just like the withdrawal-power, the suspension-power essentially results in a deprivation and prohibition, although in a temporary form. The suspension-power temporarily deprives the entity of its authorisation and thereby temporarily prohibits the entity to continue with the activities subject to the authorisation. Therefore, the suspension of the authorisation is a disciplinary sanction. Because of its temporary form it is also less severe than the withdrawal-power and thereby often also more of a proportionate sanction.

The CRD provides for the suspension of voting rights of a shareholder or shareholders when the shareholder or shareholders are held responsible for one of the breaches referred to

[2098] Ibid, and particularly: Storbråten v. Norway, cf. pp. 19-20; Mjelde v. Norway, pp. 16-17; and Harvig v. Norway, cf. p. 13.
[2099] Ibid, and see, in particularly: Ramos Nunes de Carvalho e Sá v. Portugal, and the cases referred to therein.
[2100] Articles 59(2)(c) AMLD IV; 30(2)(d) MAR; 42(2)(d) BR; 70(6)(c) MiFID II; and 99(6)(c) UCITS.

in the CRD's violation-regime.[2101] A similar power is found under the TD.[2102] Veil has pointed out in respect of EU securities law and the NFSR that "the loss of voting rights attached to shares is a common sanction in the Member States."[2103] In comparison with the suspension of the authorisation, there are no obvious reasons for considering the suspension of the shareholder(s) voting right(s) any different. It qualifies as a disciplinary sanction because it effectively deprives and prohibits the shareholders of their right to vote on the general assembly of the company concerned due to the infringements committed by the shareholders.

EU financial law elsewhere provides the national supervisors with a number of supervisory powers to fulfil their obligations and to exercise their functions. A number of these supervisory powers have already been discussed in Section II(2)(B), while others have been argued to appear as sanctions. In contrast to the two disciplinary sanctions just discussed, a few of the supervisory powers should be considered. First, the NCAs may directly or indirectly either suspend or require the suspension of trading in a financial instrument;[2104] or require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public.[2105] These suspensions imply a temporary prohibition so that it is no longer permitted to trade in the financial instrument of issue, repurchase or redeem units. However, the suspensions have an ex parte nature and purpose as they do not aim to target any particular addressee and right-holder for the commission of an infringement, only the trading, issue, repurchase or redemption. Albeit no legal provision expressly lays down the conditions under which these supervisory powers may be exercised, wherefore it is unclear for which reasons the NCAs may be triggered to intervene,[2106] the purpose of the intervention is overwhelmingly preventive, and perhaps even precautionary. Hence, they are not sanctions.

Second, and in comparison, the CRAR grants ESMA with the supervisory measure to suspend the use, for regulatory purposes, of the credit ratings issued by the credit rating agency with effect throughout the Union, when ESMA finds that the credit rating agency has committed one of the infringements in the CRAR's violation-regime and until the infringement has been brought to an end.[2107] It is not clear what is meant by 'regulatory purposes'.[2108] The

[2101] CRD, Article 66(2)(f).
[2102] TD, Article 28b(2).
[2103] Veil (n 2) 170.
[2104] Articles 23(2)(j) MAR and 69(2)(m) MiFID II.
[2105] Articles 98(2)(j) UCITS and 46(2)(j) AIFMD.
[2106] In comparison, Article 32(1)(m) PR provides that the NCA must have the power to suspend or require the relevant regulated market, MTF or OTF to suspend the securities from trading where it considers that the issuer's situation is such that trading would be detrimental to investors' interests.
[2107] CRAR, Article 24(1)(c).
[2108] The concept seems rather redundant as it is already follows from the concept of 'supervisory measure'.

question nevertheless is whether this supervisory measure qualify as a sanction and can be used for punitive purposes? – The suspension may target the *use of all* of the credit ratings issued by the credit rating agency throughout the EU. Because it has a link to and is triggered by the commission of an infringement, the supervisory measure does not have an ex part nature and purpose similar to ones just discussed. In this way, it also distinguishes itself from ESMA's precautionary powers provided under MiFIR, whereby ESMA may prohibit or restrict in the EU the marketing, distribution or sale certain financial instruments or a financial activity or practice, when these products and activities are deemed a threat to the orderly functioning and integrity of the financial markets, stability of the financial system and investor protection.[2109] The suspension also contains structures that bears resemblance with the periodic penalty payment as the suspension continues to run until the infringement has been brought to an end, wherefore it is repressive in its aim to compel compliance. It does also not aim at restoring compliance through the imposition of remedies, because the suspension of the use of all of its credit ratings issued also concern credit ratings that do not directly link with the particular infringement committed. In this way, the suspension deprives the credit rating agency of its rights to have its credit ratings used throughout the EU and contains a general prohibition in the way that none of its credit rating issued may be used before the ongoing infringement ceases. Hence, the supervisory measure overwhelmingly appears as a disciplinary sanction.

Third, pursuant to Article 24(1)(b), where ESMA finds that a credit rating agency has committed one of the infringements listed in its violation-regime, ESMA may also temporarily prohibit the credit rating agency from issuing credit ratings with effect throughout the Union, until the infringement has been brought to an end. In comparison with ESMA's suspension power, this supervisory measure also has a repressive aim, but unlike the suspension power, the prohibition-power is not linked to all credit ratings issued, only to the right to issue credit ratings in the future. In this way, it is overwhelmingly preventive, because it bears close resemblance with the refusal-power[2110] and removal-power discussed above. The right to issue credit ratings, similarly to the right to have a prospectus assessed and approved by the NCAs and the right to be a member of the management body, is depending upon the ongoing assessment of whether the natural or legal person qualifies for having these rights. Accordingly, the exercise of ESMA's prohibition-power entails that for the credit rating agency to have a right

[2109] MiFIR, Article 40.
[2110] Article 32(1)(k) PR.

to issue credit ratings in the future, any ongoing infringement must be brought to an end. Therefore, there is no deprivation, and the supervisory measure is preventive and reparatory.

(II) Bans, prohibitions and cease-and-desists orders

(1) Bans

In EU financial law provides for different types of bans with varying levels of severity.[2111] The first type of ban (i)(a) provides for "a temporary ban against a member of the [...] management body or any other natural person, who is held responsible, from exercising functions in [the legal persons covered by the relevant legislative acts of EU financial law]."[2112] MAR provides for a second type of ban (ii): "a temporary ban of a person discharging managerial responsibilities within an investment firm or another natural person who is held responsible for the infringement, from dealing on own account;"[2113] and MiFID II for the third type of ban (iii): "a temporary ban on any investment firm being a member of or participant in regulated markets or MTFs or any client of OTFs."[2114] As an alternative to the first type of ban (1)(b), there are nevertheless legal bases within MAR, MiFID II and UCITS to instead impose a 'permanent ban' for "repeated serious infringements,"[2115] including repeated infringements of the prohibitions against market abuse. More generally, the gravity of the violation determines the temporal length of the ban, and the length of the ban determines and increases its severity.

In the case law of the ECtHR bans are rarely disputed but seems to be acknowledged to qualify as a sanction, primarily as a disciplinary sanction.[2116] First of all, the three bans (i)-(iii) are imposed against a natural person held responsible for the breach. Second, the bans temporarily deprives the natural person of a right and thereby prohibits the natural person: (i) from exercising managerial functions in *any* of the legal persons covered by legislative act which had its provisions breached; or (ii) from dealing on own account. The third ban (iii) targets a legal person, whereby it deprives and prohibits an investment firm from being a member of or participant in regulated markets or MTFs or a client of OTFs. Third, none of these bans pursue the purpose of ensuring or restoring compliance because they do not share the

[2111] Articles 67(2)(d) CRD; 111(2)(c) BRRD; and 59(2)(d) AMLD IV; 30(2)(e)-(g) MAR; 42(2)(e) BR; 70(6)(d)-(e), MiFID II; 99(6)(d) UCITS; and 18(2)(c) IFD.
[2112] Articles 67(2)(d) CRD; 111(2)(c) BRRD; and 59(2)(d) AMLD IV; 30(2)(e) MAR; 42(2)(e) BR; 70(6)(d), MiFID II; 99(6)(d) UCITS; and 18(2)(c) IFD.
[2113] MAR, Article 30(2)(g).
[2114] MiFID II, Article 70(6)(e).
[2115] Articles 30(2)(f) MAR; 70(6)(d) MiFID II; and 99(6)(d) UCITS.
[2116] Chapter 3, Section III(1)(B)(I).

characteristics with preventive and restorative remedies or corrective measures. The bans are rather punishing for the breach committed. Fourth, because the bans shares these three functions: (1) imposed for a breach; (2) essentially and effectively deprives a right and generally prohibits an exercise of certain actions or functions; and (3) its purpose is punitive rather than remedial or corrective, the bans also resembles the withdrawal-power and suspension-power, when these were deemed to qualify as disciplinary sanctions. Fifth, although bans result in a deprivation of a civil right, and thus classifies as a disciplinary sanction, then bans, even permanent ones, may be imposed for the commission of a criminal offence, where the natural person has violated the general prohibition against market abuse. In such situations, where a standalone disciplinary sanction is imposed for a criminal offence, it is questionable whether the ban may be re-classified as a criminal sanction. No such case has been before the ECtHR. Grande Stevens v. Italy nevertheless points in that direction, so that bans will classify as a criminal sanction when it is imposed for the violation of laws governed by general and criminal norms. However, the Grande Stevens case carries an inherent restriction to that principle, because the criminal classification in that case was primarily a result of the punitive and deterrent nature of the fines, in addition to which the bans were imposed in an interplay-combination.[2117] Fifth, when a ban is imposed on a manager of an CRD-institution or MiFID-firm, the ban will most likely, and more or less automatically, trigger the subsequent exercise of the manager removal-power according to the principles discussed above.

(2) Prohibitions

When a natural or legal person are subject to prohibitions, the previous sections have strongly indicated that the person in question then also should be considered subject to a disciplinary sanction. Nevertheless, it is not the case. Neither is it the main rule. In accordance with the main rule, a number of prohibitions have also been discussed above in Section II(2)(B). Other prohibitions which appears to be sanctions have been left for discussion in this section.

First, in EU banking law the ECB and NCAs may restrict or prohibit distributions, or interest payments, by the institution to shareholders, members or holders of additional tier 1 instruments, where the prohibition does not constitute an event of default of the institution.[2118] In comparison, the ECB and NCAs also have the supervisory power to require the institutions

[2117] Grande Stevens and Others v. Italy, para. 26.
[2118] Articles 16(2)(i) SSMR; and 104(1)(i) CRD. The CRD includes also the distributions of interest payments.

to use net profits to strengthen own funds.[2119] Both supervisory powers are considered as 'capital conservation measures',[2120] and their exercise do not technically require a breach of any prudential requirements, but rather that the own funds and liquidity held by the institution do not ensure a sound management and coverage of its risks.[2121] Accordingly, the restriction and prohibition are exercised on the basis of a prudential assessment, which determines whether the financial situation of the credit institution remains sound and holds sufficient own funds and liquidity to cover its risks. If the prudential assessment carries a negative result, there is also no corresponding right to receive distributions or interest payments as a shareholder, a member or holder of additional tier 1 instruments. When there is no right to receive distributions or interest payments, there can also not be any right that is subject to a deprivation, and thus it cannot qualify as a disciplinary sanction. Therefore, the capital conservation measures are clearly preventive and reparatory, which by virtue of the prudential assessment bears close resemblance with the suitability assessment applicable for the removal-power.

Second, at the national level, the NCAs have the supervisory power to either impose, require, or request, "a temporary prohibition on the exercise of professional activity."[2122] There are no legal provisions that expressly prescribes on which conditions the temporary prohibition should be applied and thereby considered to be appropriate. At the same time, the scope of the power may prohibit both a certain type of professional activity or all professional activities in their entirety *("company freeze-order")*. Accordingly, the exercise of this power may in its most severe form and scope impose a general prohibition on the natural or legal person, whereby it also deprives them temporarily of their right to pursue its ongoing professional activities. In comparison with the withdrawal-power, the scope of this power is even broader, because where the withdrawal-power only deprives the legal person of its right to continue to conduct the professional activities subject to the banking authorisation, and thereby are restricted thereto (albeit still broad), the temporary prohibition of professional activities is not subject to such a strict restriction and may thus at the same time, for instance, prohibit the continuation of banking activities and investment services and activities. Moreover, the prohibition may require the temporary closure of its entire portfolio of professional activities, and thus target the whole company, including its banking and investment activities and all of its others ongoing business activities. Nonetheless, if the natural or legal person on a voluntary

[2119] Articles 16(2)(h) SSMR; and 104(1)(h) CRD.
[2120] Gortsos/Art. 16 SSMR, Section A(II) and B(II)(3).
[2121] Articles 16(1)(b)-(c) SSMR; and 97, 98(4)-(5), 101(4), 102(1)(b), and 104(1) CRD.
[2122] Articles 23(2)(l) MAR (impose); 41(1)(i) BR (impose); Article 69(2)(f) MiFID II (require); 98(2)(g) UCITS (request); and 46(2)(g) AIMFD (request).

basis responds positively to the NCAs request, there are no problems in respect of its qualification, but when the prohibition is imposed or required, thereby against the will of the natural or legal person, the supervisory power qualifies as a main rule as a disciplinary sanction. However, because its nature and level of severity is very similar and comparable to the criminal non-pecuniary sanctions provided against legal persons in the AMLD-CRIM and MAD-CRIM, the discussion and classification of this supervisory power will continue in Section IV.

(3) Cease and desists order

A number of provisions provide legal basis for so-called 'cease-and-desist orders',[2123] a CDO, which may generally be considered defined as "an order requiring the natural or legal person responsible to cease the conduct and to desist from a repetition of that conduct."[2124] The CDO is imposed for the infringement of one or more of the infringements contained in the violation-regimes of the relevant EU legislative acts, and it may according to the provisions qualify as an administrative non-pecuniary sanction or measure. On the one hand, the CDO appears redundant as it requires the obvious that the addressee shall cease and desist from committing an ongoing infringement. On the other hand, the CDO is by the reference to 'order' a clear expression of an effective exercise of force and power through an administrative decision taken either by the supervisory and/or sanctioning authority. However, because no natural or legal person, and thus no addressee subject to the CDO, has any right to contravene the law, the CDO does not result in a deprivation. Rather than an administrative sanction or measure, the CDO qualifies as a supervisory power, because it is preventive and reparatory.

The nature of the CDO makes it relevant to consider whether the power to require a person subject to supervision to cease and desist from illegal behaviour not just express a very natural and logical power that should be attributed to any supervisory authority in performing their task and functions as it would be a natural duty of a responsible authority to call out any illegal behaviour detected through the exercise of their investigatory powers. Accordingly, but as to be distinguished from the CDO, the NCAs also have the supervisory power to: "require the temporary cessation of any practice [MiFID II: or conduct] that the supervisor considers contrary to the provisions of the relevant legislative acts [MAR, BR, MiFID II, UCITS,

[2123] Articles 66(2)(b) and 67(2)(b) CRD; 111(2)(b) BRRD; 59(2)(b) AMLD IV; 30(2)(a) MAR; 42(2)(a) BR; 70(6)(b) MiFID II; 38(2)(b) PR; 99(6)(c) UCITS; and 18(2)(b) IFD.
[2124] Articles 66(2)(b) and 67(2)(b) CRD.

AIFMD]."[2125] Similarly, ESMA has the supervisory measure to: "require the [supervised entities] to bring the infringement to an end."[2126] In these contexts, the cessation-power obviously qualifies as an intervention-power requiring the particular entity to cease from illegal behaviour, but thereby also implicitly requiring the entity to desist from continuing with the illegal behaviour. Therefore, in effect, there is no real difference between the CDO and the cessation-power, except, perhaps, that a CDO is based on an administrative "order." However, because the cessation-power is categorised as a supervisory power it may perhaps be useful to apply it for the purpose of imposing additional remedies or corrective measures for the purpose of restoring compliance with the legal requirements that have been breached.[2127] On the other hand, because the CDO according to EU financial law is legally designated as an 'administrative sanction or measure', and thereby also required to be dissuasive, the CDO may, perhaps, instead be applied for the purpose of imposing additional administrative pecuniary and non-pecuniary sanction and measure. That would not be a function of the other supervisory powers or supervisory measures. Nevertheless, as a standalone non-pecuniary administrative sanction or measure, the CDO would in the majority of cases not be (sufficiently) dissuasive.

(III) Disclosure sanctions and measures

(1) Public statement and public warnings

The CRD, BRRD, AMLD IV, MiFID II, PR, UCITS, and IFD contains legal bases for the power to issue public statements, while MAR and BR contains legal bases for the power to issue public warnings.[2128] Irrespective of their label, public statement and warnings must be effective, proportionate and dissuasive, and although their wording are very similar, some important exceptions apply. Hence, a few observations are necessary. First, the definition of a public statement is inconsistent. The CRD, AMLD IV, UCITS, and IFD considers the concept of a 'public statement' to *identify* both the natural or legal person responsible for the breach and the nature of the breach. On the other hand, the BRRD, MiFID II and PR only requires the 'public statement' to *indicate* the natural and legal person responsible for the infringement

[2125] Articles 23(2)(k) MAR; 41(1)(h) BR; 69(2)(k) MiFID II; 98(2)(e) UCITS; 46(2)(e) AIFMD. In particular, in Article 69(2)(k) MiFID II it is prescribed: "require the temporary or permanent cessation of any practice or conduct that the competent authority considers to be contrary to the provisions of [MiFIR] and the provisions adopted in the implementation of [MiFID II] and prevent repetition of that practice or conduct." In particular, the MiFID-power
[2126] Articles 24(1)(d) CRAR; and 25q(a) and 73(1)(a) EMIR.
[2127] Articles 69(2)(l) MiFID II; 98(2)(i) UCITS; and 46(2)(i) AIFMD. See also Section II(2)(B)(II) above.
[2128] Articles 66(2)(a) and 67(2)(a) CRD; 111(2)(a) BRRD; 59(2)(a) AMLD IV; 70(6)(a) MiFID II; 38(2)(a) PR; 99(6)(c) UCITS; 18(2)(a) IFD; 30(2)(c) MAR; and 42(2)(c) BR.

(breach) and the nature of the infringement. In comparison, MAR and BR considers a 'public warning' to *indicate* the responsible natural and legal person as well as the nature of the infringements. This inconsistency gives rise to the obvious question of whether the correct interpretation and meaning should be 'indication' or 'identification'? – This question matters as an 'indication' of the offender may be deemed much less dissuasive in comparison with an 'identification' of the offender. First, to a very far extent, the rules on the publication of sanctions and measures seems to solve the consistency problem, because the rules require an identification of the offender as well as the type and nature of the infringement.[2129] Second, because the public statements and warnings are required to be dissuasive, the term 'indication' also has the logic against it. To disclose to the public that there has been a breach, including its nature and type, without at the same time making the identity of the offender clear to the public seems to run counter on the dissuasiveness requirement and the rules on the publication of sanctions, which are designed to enhance the deterrent effective of sanctions. Therefore, the public statements and warnings should be read as to require the identification of the offender.

On this background it may be asked whether there are any conceptual differences between public statements and warnings? – Much seems to depend on the terms of 'statement' and 'warning', which also must be distinguished from the 'public notices' and 'other disclosure measures' discussed in the following section. Where the former at least must be required to express an statement and inform the public on a very objective basis about the identity of the offender and the type and nature of the breach, the latter must at least also be considered to contain a requirement to warn about something. However, what is that something? And is it a warning to the offender or to the public, or both? – On the basis of the wording of the legal provisions, it does not seem possible to derive a clear answer. Neither does it seem possible with full certainty to determine whether a public statement and public warning (as standalone) qualifies as a sanction or measure. Because they do not deprive a right or impose any general prohibition on the offender within the meaning that these concepts and criteria have been used so far. Hence, they do not appear to be disciplinary sanctions. Neither reparatory sanctions as they do not intervene in a similar fashion as the supervisory powers and impose remedies or corrective measures for the purpose of restoring compliance. Therefore, they may be reserved for the legal category referred to as 'administrative measures'.

[2129] Chapter 6, Section IV. See also MiFID II, Article 70(6)(a), and PR, Article 38(2)(a), which expressly refers to the rules on the publication of sanctions, cf. Articles 71 MiFID II, and 42 PR.

On the other hand, they makes use of the stigmatising and deterrent effect from the publication of the sanctions, whereby the offender may suffer reputational damages. In addition, they also makes use of the market and pricing mechanisms, when the offender are having financial instruments traded on the secondary markets, whereby the offender may suffer a decrease in its market value. They are both thus having similar pecuniary effects as fines, which are inherently punitive and deterrent, because the market sanctions, in particular, are extremely effective in depriving and enforcing *market value* from the offender, and the reputational sanctions in depriving *market share*. This points towards acknowledging the public statement and public warning as (reputational and/or market) sanctions. However, the economic reality underlying the phenomena and concepts of reputational and market sanctions have never directly been assessed by the ECtHR under the Engel-test. Therefore, it remains uncertain whether the public statement and public warning in reality qualify as standalone sanctions.

(2) Public notices and other disclosure measures

Under the CRAR, EMIR and MiFIR, ESMA may as a supervisory measure "issue public notices."[2130] Under MiFID II and MiFIR, the NCAs may also issue public notices.[2131] Under MiFIR, it follows that ESMA and the NCAs shall issue public notices when they have taken the decision to exercise the precautionary product and activity intervention powers.[2132] In relation to the CRAR and EMIR, the power to issue public notices function in a similar way, because ESMA uses the supervisory measure to disclose to the public that ESMA has adopted decisions to impose fines and other supervisory measures on the offender.[2133] These public notices identifies the offender, the nature of the infringement, and the supervisory measures taken. They are now separated from the decisions published by ESMA, which to a much larger degree specifies the details of the facts findings and shows the analysis carried out by ESMA

[2130] Articles 24(1)(e) CRAR; 25q(1)(c) and 71(1)(c) EMIR; and 40(5) MiFIR. EBA may also pursuant to Article 41(5) MiFIR.
[2131] Articles 69(2)(q) MiFID II; and 42(5) MiFIR.
[2132] Accordingly, ESMA shall publish on its website notice of any decision to take any action that exercises the product or activity intervention powers. Furthermore, "[the] notice shall specify details of the prohibition or restriction and specify a time after the publication of the notice from which the measures will take effect. A prohibition or restriction shall only apply to action taken after the measures take effect," cf. Article 40(5) MiFIR.
[2133] Public notices disclosed by ESMA until 31 December 2021: (18) ESMA41-356-234 of 21 September 2021; (17) ESMA41-356-224 of 8 July 2021; (16) ESMA41-356-168 of 23 March 2021; (15) ESMA41-356-234 of 21 September 2021; (14) ESMA41-356-224 of 8 July 2021; (13) ESMA41-356-82 of 28 May 2020; (12) ESMA41-356-39 of 15 July 2019; (11) ESMA41-356-22 of 28 March 2019; (10) ESMA41-139-1232 of 11 July 2019; (9) ESMA41-139-1233 of 11 July 2019: (8) ESMA41-139-1234 of 11 July 2019; (7) ESMA41-139-1235 of 11 July 2019; (6) ESMA41-137-1144 of 23 July 2018; (5) ESMA71-99-478 of 1 June 2017; (4) ESMA/2016/1159 of 21 July 2016; (3) ESMA/2016/408 of 23 March 2016; (2) ESMA/2015/1048 of 24 June 2015; and (1) ESMA/2014/544 of 20 May 2014. Link: https://www.esma.europa.eu/supervision/enforcement/enforcement-actions.

for the adoption of the decisions imposing fines and other supervisory measures.[2134] The public notices thus functions as a summary of the decisions taken by ESMA in a press release form. Whether the NCAs follows the example of ESMA in respect of public notices is not clear, but the intention seems to be that 'public notices' should be understood similar to press releases.

Elsewhere, the NCAs may also take other disclosure measures, for instance: (i) under MAR and BR, to take all necessary measures to ensure that the public is correctly informed, inter alia, by correcting false or misleading disclosed information, including by requiring an issuer or other person who has published or disseminated false or misleading information to publish a 'corrective statement';[2135] (ii) to make public the fact that an issuer, an offeror or a person asking for admission to trading on a regulated market is failing to comply with its obligations;[2136] or (iii) to disclose, or to require the issuer to disclose, all material information which may have an effect on the assessment of the securities offered to the public or admitted to trading on a regulated market in order to ensure investor protection or the smooth operation of the market.[2137] While the second type of disclosure (ii) seems to function as a public statement or public warning, the first (i) and third (iii) types of disclosures aim to ensure that the markets are correctly informed with all material information, thereby promoting information transparency and the orderly functioning of the financial markets. With the possible exception of (ii), the disclosure measures intervene into the markets, and thus qualify as supervisory powers in their preventive and reparatory functions and purposes.

B. The types of non-pecuniary sanctions, measures and powers

The discussions assessed and concluded on a standalone basis whether the specific legal powers in question imposed for a disciplinary offence qualified as a disciplinary sanction, a reparatory sanction similar to the supervisory powers, or administrative measure. Accordingly, the main rule is that the withdrawals, suspensions, bans, and prohibitions qualify as disciplinary sanctions; the removal-power is a reparatory sanction to the legal person where the member was part of the management body and in some cases a secondary or ancillary sanction on the member for a primary sanction imposed under the NFSRs; the CDOs qualify as a reparatory sanction that as an enforcement power allows for the imposition of additional sanctions; and,

[2134] See further Chapter 6, Section IV.
[2135] Articles 23(2)(m) MAR; and 41(1)(j) BR;
[2136] Articles 32(1)(i) PR.
[2137] Articles 32(1)(l) PR.

finally, the public statements and public warnings as administrative measures. Sanctions without any punitive element cannot qualify or classify as criminal sanctions, wherefore none of the reparatory sanctions are criminal sanctions. However, in accordance with the constitutional conception of sanctions, the punitive sanctions were the ones that resulted in a deprivation of a right, and the disciplinary sanctions deprives civil rights. When disciplinary sanctions are imposed for a violation of laws governed by disciplinary norms, the ECtHR has settled that the sanctions are disciplinary in nature. However, MAR allows for the imposition of the withdrawal-power, suspension-power, and ban in situations where a natural or legal person has committed market abuse, which Chapter 6 argued to be governed by criminal norms. Such situations, where a violation of a criminal nature is imposed a sanction that brings along only civil consequences have not been assessed on a standalone basis before the ECtHR. The question therefore becomes whether the ECtHR on the basis of the second Engel-criterion and the two Öztürk-criteria in the future will deny the powers to withdraw, suspend, ban and prohibit, despite their deprivation of civil rights, to be punitive and deterrent? – The presence of other criminal classification factors in the sanction regime in question may also incline the ECtHR to consider these sanctions in reality to qualify and classify as criminal sanctions.[2138]

The discussion of this question is reassumed in Section IV(2)(C). However, that discussion depends on a further characterisation of the withdrawal-power, which is the purpose here. In the Trasta-case, the ECB and EU Commission shared a number of views on the nature and consequences of the withdrawal-power, which may be contrasted with the views held by the applicants and the CJEU. These views are general as they reflect on the essential nature and consequences of the withdrawal-power, and on the abstract level, they are equally relevant and applicable irrespective of whether the withdrawal-power is imposed as a sanction or exercised as a precautionary supervisory power. In the particular case, after the ECB had exercised its withdrawal-power under Article 14(5) SSMR and withdrawn the authorisation from Trasta Komercbank ('TK', a Latvian credit institution), the Riga City Court had adopted a decision ordering liquidation proceedings to be opened for TK and appointed a liquidator. The appointment of the liquidator resulted in a replacement of the management of TK, which lost their decision-making powers and their power to represent TK.[2139] In this respect, the CJEU observed that the task given to the liquidator was not the same task usually given the managing director of a legal person because the appointment of the liquidator was: "to collect debts, sell

[2138] Chapter 3, Section II(2).
[2139] Ibid, paras. 16-18.

assets and satisfy the claims of creditors in order to bring about *the total cessation of that person's activity*."[2140] TK and its shareholders argued that the exercised of the withdrawal-power:

> (1) Deprived the shareholders of the possibility to decide to establish a branch of TK in another EU Member State *on the basis of the Latvian banking licence*;[2141]
>
> (2) Deprived them of the possibility of deciding on the voluntary liquidation of their company and appointing the liquidator themselves, because under Latvian law, "the liquidation of [TK] is an *automatic consequence of the withdrawal of its authorisation* and that *neither the FCMF nor the Latvian court which ordered that liquidation had discretion* in the matter;"[2142]
>
> (3) Deprived essentially the right of the shareholders "to receive dividends from a company 'which is no longer authorised to carry on its business activities' [as such rights] 'necessarily becomes illusory';"[2143] and
>
> (4) Deprived the right of the shareholders' to vote on their shares and the right to participate in the management of the company as the effect of the withdrawal-power was to "*prohibit [TK] from achieving its objects*."[2144]

On the other hand, to be contrasted therewith, the ECB and EU Commission argued with respect of the consequences of the withdrawal-power:

> (5) The shareholders of TK are not directly and personally affected by the withdrawal-decision as it "does *not adversely affect the essence* of [the shareholders'] rights."[2145] Instead, only TK as a legal person could be considered directly affected as it had its authorisation withdrawn.
>
> (6) The shareholders "do not have any rights in the undertaking's [TK's] assets," wherefore it is necessary to distinguish between "the *economic interest of the company* and the *interests of the shareholders*."[2146] Although it holds true that the exercise of the withdrawal-power has an economic impact on its shareholders, it does affect the legal situation of the shareholders.
>
> (7) The exercise of the withdrawal-power does not prevent it from achieving its object and having an economic activity, in particular, it does not prevent TK "from carrying on a different economic activity, *if necessary after amending its articles of association*."[2147]
>
> (8) The withdrawal-power did not affect the structure of TK and its internal administration. However, "[these] might perhaps have been affected by the decision to order the liquidation of TK, but that decision was adopted on the basis of Latvian law and not EU law, which does *not require the liquidation of a credit institution* whose authorisation has been withdrawn."[2148]

Because of the nature and questions of the case, the CJEU did not have to consider whether the withdrawal power qualified as a supervisory power or (disciplinary) sanction, but

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[2140] Ibid, para. 72. Italics added. This is also in line with the definition of 'winding-up' in Articles 2(1)(54) SRMR and 3(1)(42) BRRD, which generally considers the concept to mean "the realisation of assets of an entity."
[2141] Ibid. para. 98. Italics added.
[2142] Ibid. para. 99. Italics added.
[2143] Ibid. para. 106. Emphases maintained.
[2144] Ibid. para. 106. Italics added.
[2145] Ibid, para. 91. Italics added.
[2146] Ibid. para. 92. Italics added.
[2147] Ibid. para. 93. Italics added.
[2148] Ibid. para. 94. Italics added. The ECB and EU Commission, de facto, held the view following from the Article 2(1)(47) SRMR on the definition of 'normal insolvency proceedings', which "means collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable to institutions under national law and either specific to those institutions or generally applicable to any natural or legal person."

the CJEU did mostly confirm the views of the ECB and EU Commission. In particular, the CJEU confirmed the fifth view ((5)).[2149] The CJEU also rejected the third and fourth view ((3)-(4)) as a consequence of the withdrawal-power exercised by the ECB. Rather, "the right of shareholders to receive dividends and to participate in the management of [TK], as a company constituted under Latvian law, has not been affected by the [withdrawal]-power."[2150] The CJEU then confirmed the fifth till eight views ((5)-(8)):

> "It is true that, *following* the withdrawal of its authorisation, [TK] is no longer in a position to continue its activity as a credit institution and, consequently, its ability to distribute dividends to its shareholders is questionable. However, the negative effect of that withdrawal is economic in nature; the right of shareholders to receive dividends, just like their right to participate in the management of that company, if necessary by changing its object, has in no way been affected by the decision at issue."[2151]

Moreover, from the exercise of the withdrawal-power it becomes necessary to distinguish between (i) direct legal effects; and more or less indirect (ii) economic effects thereof. On the basis of that distinction, the CJEU could more generally held that "the liquidation of [TK] does not constitute implementation of the [withdrawal-decision], which is 'purely automatic and results from EU rules alone'," because the "EU rules make no provision for the liquidation of a credit institution whose authorisation has been withdrawn" as the "liquidation decision was taken by a Latvian court, on the basis of Latvian law, that is, on the basis of 'other intermediate rules' [...]."[2152] Therefore, when the withdrawal-power is exercised as a sanctioning power, the direct legal effects of the withdrawal is a deprivation of a right of the legal person to exercise the activities that are linked-in with the authorisation pursuant to Article 4(1)(1) CRR, wherefore the withdrawal also prohibits the legal person from continuing to exercise these activities. However, whether the authorisation grants any rights to exercise *additional* activities beyond the core of the CRR-rights attached to the authorisation as a credit institution and whether the application of the withdrawal-power will result in an *automatic liquidation*, remains with the scope of national law to decide. Accordingly, the automatic liquidation of the legal person following its withdrawal of authorisation may be a part of the sanction-package provided under the NFSR. Effectively, when a liquidation order follows as an automatic consequence of the withdrawal-power, the sanction seems fully identical with a 'judicial winding-up;' whereby the debts will collected, the assets sold, the claims of the

[2149] In para. 104, the CJEU stated that: "it should be noted that the decision at issue withdrew Trasta Komercbanka's authorisation as a credit institution and, consequently, directly affected the legal situation of that company, which, once the decision was adopted, was no longer authorised to continue its activity as a credit institution. That authorisation had been issued to Trasta Komercbanka itself and not to its shareholders *ad personam*," cf. ibid, italics maintained.
[2150] Ibid. para. 110.
[2151] Ibid. para. 111. Italics added.
[2152] Ibid. para. 114. Emphasis maintained.

creditors satisfied "in order to bring about *the total cessation of that person's activity*." Finally, these views, and the concept of 'direct legal effects' or 'implementation' (i) will prove important for assessing the criminal sanctions imposed on legal persons in Section IV(2)(C).

3. Conclusions and assessments

Finally, it becomes necessary to fully take into account the third Engel-criterion by which not only the severity of the individual (standalone) sanctions should be taken into account, but also the maximum severity of all the sanctions which an offender risks to incur. First, it should be noted that an infringement of the provisions under EU financial law may be subject not only to a punitive sanction for the breach committed, but also to an exercise of the supervisory powers for the purpose of restoring compliance with EU financial law as it is not precluded that the same sanctioning decision may contain both remedial and corrective measures in combination with one or more punitive sanctions. However, this does not seem to be a part of the ECB's or ESMA's enforcement practices, just as the enforcement practices under the NFSRs is not clear to us here. In respect of the Engel-test, such enforcement practices do not seem to have been fully questioned before the ECtHR, but if an offender will be subject to both supervisory and sanctioning powers, it is clear that it will raise the level of severity for what is at stake for the offender, just like the imposition of more than one punitive sanctions will. This may be evidenced by Grande Stevens and Others v. Italy, where the CONSOB, the Italian administrative market authority, for the administrative infringement of the market abuse rules (market manipulation), imposed on Mr Grande Stevens a primary sanction: a fine at EUR 3,000,000, and as a secondary sanction: a four month ban from administering, managing or supervising listed companies.[2153] According to the principles of that case, a natural and legal person must be afforded the criminal guarantees, when a natural or legal person have committed a violation of one the general prohibitions against market abuse (criminal offence), and when they risk not only punitive and deterrent pecuniary sanctions in form of fines, but also a ban, as well others of the sanctions. This conclusion seems already settled in the case-law of the ECtHR.[2154]

The assessment therefore needs to focus more on the majority of situations, where the natural or legal person has violated a rule governed by disciplinary norms. The starting point is here that the natural or legal person only will be subject to disciplinary sanctions, and that

[2153] Grande Stevens and Others v. Italy, para. 26.
[2154] Georgouleas and Nestoras v. Greece.

the sanction regime will primarily protect the interest of the banking and securities sectors. However, the entire purpose of the Engel-test is to bring that into question. For that reason, a number of arguments that gives some criminal colour to the EU financial sanctions must be emphasised. First, irrespective of whether the natural or legal person has violated a rule governed by disciplinary norms or criminal norms, the severity level of the fines provided are almost equally severe, although EU financial law provides for more severe fines when a legal person commit market abuse: (i) EUR 15 000 000 where the main rule is EUR 5 000 000; and (ii) three times the profit gained or loss avoided where the main rule is two times; and (iii) 15 % of the total annual turnover, where the main rule is 10 %, the maximum severity of the fines potentially at stake are very high. In respect of natural persons, they are also subject to same maximum severity as in (ii), while in respect of (i), the main rule is, irrespective of whether the violation consist of an infringement of a rule governed by disciplinary or criminal norms, EUR 5 000 000. These severity levels of fines may therefore result in a sanction more punitive and deterrent than the fine imposed on Mr Grande Stevens for a criminal offence.

Second, to a very far extent, the ECtHR's conclusion in Dubus S.A. v. France seems also to hold in this context as well. For a violation of the provisions relating to the minimum capital prescribed for investment firms, a violation of provisions that qualify as governed by disciplinary norms,[2155] the legal person risked, a priori, to be imposed: (i) a reprimand; (ii) a fine up to its level of its minimum capital; and (iii) a de-listing or removal from the register of approved companies. The applicant had argued that the consequences, which the legal person a priori risked from the imposition of such sanctions, were equal to the death penalty for the legal person. Aligned therewith, the ECtHR considered these sanctions as having significant financial consequences for the legal person in question and found Article 6 applicable under its criminal-head.[2156] Although, the nature of this fine (ii) is not fully identical to the fines now provided under EU financial law, the case-law of the CJEU already implies that the EU financial fines classify as criminal sanctions. On a similar note, the de-listing and removal from register of approved companies (iii) is comparable in its nature, purpose and (perhaps) severity of the withdrawal-power. Therefore, in light of the Dubus case, it seems very difficult to maintain that the EU financial sanctions entirely classifies as disciplinary sanctions.

[2155] Although, this was no expressly recognised by the ECtHR as the ECtHR did not fully assess the facts of the case in accordance with the first Öztürk-criterion. See paras. 33-38. See also Chapter 6, Section II.
[2156] Dubus S.A. v. France, para. 37.

Third, other reasons may also point to their criminal classification. The second sentence of Articles 23e(8) CRAR and 64(8) EMIR provides that ESMA shall refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical fact or facts which are substantially the same has already acquired the force of res judicata as the result of criminal proceedings under national law. The second sentence calls for the observation of the double jeopardy clause and non bis in idem principle which contains a prohibition against double prosecution for the same offence once the first set of (criminal) proceedings has been concluded by a final decision. However, the non bis in idem principle only precludes double prosecution for the same offence when the offender in both sets of proceedings risks to be imposed criminal sanctions. The wording of Articles 23e(8) CRAR and 64(8) EMIR therefore already implies that the fines or periodic penalty payments to be imposed by ESMA qualify as criminal sanctions since Article 50 EUCFR and P7-4 to the ECHR otherwise would not become applicable. On the other hand, Articles 23e(8) CRAR and 64(8) EMIR are allowed to provide for a more extensive protection than guaranteed by the Article 50 and P7-4 so that the double prosecution on the basis of the same or identical facts still may be prohibited according to Articles 23e(8) CRAR and 64(8) EMIR, for instance, where the offender in two separate (national – European) proceedings do not risk to incur criminal sanctions.

Fourth, and re-emphasised: (i) the EU Member States are allowed under their NFSRs not to adopt the rules on administrative sanctions where the infringements already are subject to criminal sanctions under national law,[2157] often referred to as 'gold plating',[2158] wherefore the EU administrative sanctions are characterised as being functionally interchangeable with criminal sanctions irrespective of whether the qualify as pecuniary or non-pecuniary sanctions;[2159] (ii) all classes of sanctions are required to be effective, proportionate and dissuasive; (iii) the EU Member States may even for their NFSR adopt higher severity levels for the administrative fines;[2160] and, in addition, but which does not necessarily point with a criminal colour, (iv) the EU Member States may empower the national sanctioning authorities to impose additional types of (administrative) sanctions to those already provided by EU financial law.[2161]

[2157] Articles 65(1) and Recital 42 CRD; 110(1) and Recital 128 BRRD; 58(2) and Recital 59 AMLD IV; 30(1) MAR; 42(1) and 42(3) BR; 70(1) MiFID II; 38(1) PR; 99(1) UCITS; 18(1) and 21 IFD; and 48(1) AIFMD. The EU Member States have a duty to communicate the relevant national criminal law provisions to the EU Commission.
[2158] Recital 128 of the BRRD illustrates 'gold plating' well. See further that Recital.
[2159] Lackhoff (n 2) 212.
[2160] Articles 59(4) AMLD IV; 30(3) MAR; 42(4) BR; 70(7) MiFID II; 38(3) PR; and 99(7) UCITS.
[2161] Articles 59(4) AMLD IV; 30(3) MAR; 42(4) BR; 70(7) MiFID II; 38(3) PR; and 99(7) UCITS.

IV. EU CRIMINAL SANCTIONS

We now turn to the discussion of the sanctions provided in AMLD-CRIM, MAD-CRIM, and CFD. We should also already note that in respect of the Engel-test, we are now in a situation where the first Engel-criterion will determine that the natural or legal person as offenders must be protected by the criminal guarantees provided in Articles 6-7 and 4-P7 ECHR and Articles 47-50 EUCFR, because the EU legislators considers the violations and sanctions provided within the ALMD-CRIM, MAD-CRIM, and CFD as criminal offences and criminal sanctions. At the same time, we are also now in a quite unique position as the Engel-test and the constitutional conception of sanctions allows to discuss what justifies that these particular sanctions are to be classified as criminal sanctions and which implications follows therefrom. When the constitutional conception of sanctions, including criminal sanctions, is regarded as *'autonomous'*, then it entails fundamentally that the standards and principles that makes up the constitutional conception of sanctions can determine for themselves which types of legal powers that qualifies a sanction, and which sanctions that classifies as a criminal sanction. Moreover, the question we will discuss is what this blueprint provided by Engel-test and the constitutional conception of sanctions have to say about the purpose (i), nature (ii), and severity (iii) of the sanctions which the EU legislators have classified as criminal sanctions. The blueprint nevertheless also allows us to first take a broader and more historical view on what essentially is a criminal sanction by shortly making some observations in respect of the abolished and prohibited types of sanctions provided in the ECtHR and ECHR (Section IV(1)). Second, we will then discuss the sanctions in the AMLD-CRIM, MAD-CRIM, and CFD on their own merit, as well on the basis of the Engel-test and constitutional conception of sanctions, but also by bringing in the observations made in the discussions from the previous sections and compare some of the criminal sanctions with the administrative sanctions and discuss which implications that follows therefrom (Section IV(2)). Finally, we will conclude and provide an overall assessment (Section IV(3)).

1. Criminal sanctions in the ECHR and EUCFR

The Engel-test and Constitutional conception of sanctions provides for a right-based theory and blueprint on legal sanctions, including criminal sanctions. As it was concluded and discussed in a number of places in Chapter 3, the classification of sanctions is primarily determined on the basis of which types of rights that either have been or risks to be deprived with

only some few exceptions or modifications. The ECHR and EUCFR provides a catalogue of human rights and fundamental rights, some of which are corresponding and others which primarily are to be found in the EUCFR. The ECHR and EUCFR also generally abolishes and prohibits certain types of sanctions. For example, because everyone has a right to life, no one shall be condemned to the death penalty or executed.[2162] The death penalty is therefore abolished.[2163] As human dignity is inviolable, it must therefore also be respected and protected.[2164] In the EUCFR, the ECHR, and the Protocols to the ECHR, the human dignity is respected and protected by prohibiting, for instance: the torture and inhuman or degrading treatment or punishment;[2165] slavery and forced labour;[2166] imprisonment for debt;[2167] and the expulsion of nationals.[2168] This entails that no legislative provision under national or EU law imposes such consequences on natural persons for the violations of national and EU laws and it prohibits the EU Member States and EU legislators to adopt legislation containing such severe and draconian sanctions. These sanctions can thus be viewed as abolished and prohibited types of historical *criminal* sanctions. Because these criminal sanctions are abolished and prohibited, the case-law of the ECtHR within Articles 6-7 and 4-P7 does also not concern such issues. This allows us to make a more general point in respect of Articles 6-7 and 4-P7 and the scope of the Engel-test, that is, that Articles 6-7 and 4-P7 and the Engel-test does not protect any of these human and fundamental rights relating to human dignity in any strictly manner, because that protection is provided by the specific provisions in the ECHR and EUCFR governing the very essence and scope of these rights *(lex specialis)*. One will thus have to consult the case-law of the ECtHR and CJEU on these corresponding rights. Instead, the Engel-test, as applied under the corresponding rights of Articles 6-7 and 4-P7 and Articles 47-50 EUCHR, determines and stipulates when the level of procedural protection and safeguards that are attributed to criminal proceedings must be afforded to the offender / defendant.[2169] Nevertheless, because there is an obligation to read and interpret the provisions of the ECHR in a consistent and coherent manner, as in respect of the right to liberty of Article 5 and 6 ECHR, it would also only be right and reasonable to consider the criminal guarantees applicable *if* any offender should risk the imposition of the death penalty or any other rights relating to human dignity. In this way, and as a matter of principle, there is a mirror-image between the rights generally protected by the

[2162] EUCFR, Article 2; ECHR, Article 2; P6-1 to the ECHR; and Explanations relating to the Charter, p. 1.
[2163] P6-1.
[2164] EUCFR, Article 1.
[2165] EUCFR, Article 4; ECHR, Article 3.
[2166] EUCFR, Article 5; ECHR, Article 4.
[2167] P4-1 ECHR: "No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation."
[2168] P4-3 ECHR; EUCFR, Article 19.
[2169] Chapter 3, Section II(1).

ECHR and EUCFR and the criminal procedural guarantees to be offered to the offender, which further entails that deprivation of any of these human and fundamental rights, the right to life, bodily safety and dignity, should be classified as archetypical criminal sanctions.

This allows us to bring in another observation made in Chapter 3, which raises a more general question with respect to the scope of the Engel-test and EU substantive criminal law. In Chapter 3, the discussions observed a tendency within the ECtHR's case law in respect of deprivations of liberty rights on the one side and deprivations of civil rights and political rights on the other side. The tendency showed that the ECtHR seems to adhere to whether the consequences that follows from the deprivations of civil rights (having a rather specific target and scope for one's profession or occupation typically) also contains consequences for the offender's liberty rights (having a rather general target and scope for one's ordinary liberty rights). The same tendency was also observed in respect of political and electoral rights, because the ECtHR distinguished between the active right to cast a vote at an election and the passive right to run and stand for election, where only the former reaches into to general realm of the ordinary life of everyone.[2170] These observations raises the more fundamental question of when exactly a right defines and qualifies as a civil right, political right and liberty right as only the deprivations of liberty rights are attributed to the class of criminal sanctions.

This observation and tendency seems to bear consequences for the EU legal order and the *human and fundamental rights* found within the EUCFR and the constitutional rights and *freedoms* granted to natural and legal persons found with the TFEU as it relates to Articles 6 TEU and 52(3) EUCFR and the duty to read and interpret the human and fundamental rights within the ECHR and EUCFR as corresponding. More precisely, and of relevance for our purposes pursued here, is a *liberty right* in the ECHR not also a *fundamental* right within the EUCFR and a *freedom* within the EUCFR and TFEU? – A number of provisions in the EUCFR protects very different types of rights, for example: the right to respect for his or her private and family life, home and communications (Article 7); freedom of expression and information (Article 11); freedom of assembly and association (Article 12); and right to education (Article 12). Similarly, in the TFEU, a number of provisions protects the freedom of movement of citizens, of goods, workers, services and capital, and the freedom of establishment (TFEU, Title II and IV). If the Engel-test and constitutional conception of criminal sanctions should offer any procedural protection in these regards, the legal position, as it currently stands, under

[2170] Chapter 3, Section III(1)(D).

the Engel-test and the constitutional conception of sanctions would require that these rights and freedoms are to be qualified as liberty rights or at least that their consequences will bring implications and encroach into the general realm of ordinary life and liberty of natural and legal persons. The purposes pursued in this Chapter dictates that we must leave the discussion here, but the observations will turn out to be important for the following discussions.

2. EU criminal and financial sanctions

Below this upper limit of abolished and prohibited sanctions, the EU Member States may nevertheless be creative in the design of their national sanction regimes, including in their choice of criminal sanctions for violations of financial law.[2171]As just discussed, with respect to criminal sanctions, the freedom of choice in respect of what the EU Member States may considered as appropriate sanctions is not unrestricted. The upper restrictions discussed above is just one example. Others follows from the more specific CJEU-case-law under the Treaties. Already in 1989, the CJEU held that where EU law did not provide any specific penalty for an infringement, Article 5 EEC Treaty (/TEU, Article 4(3)) required the EU Member States to take all measures necessary to guarantee the application and effectiveness of EU law:[2172] Furthermore:

> "[24] For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that the infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event make the penalty effective, proportionate and dissuasiveness.
>
> [25] Moreover, the national authorities must proceed, with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws."[2173]

As discussed in Chapter 3, these principles still applies and the CJEU regards it as settled case-law.[2174] The same principles also apply where EU law lays down particular sanctions for certain violations, although EU law does not exhaustively list and prescribe the penalties

[2171] On criminal sanctions more generally, see Chapter 7 of Klip A, 'European Criminal Law: An Integrative Approach' (4th Edition, Intersentia 2021).
[2172] Case 68/88 – Commission v Greece, ECLI:EU:C:1989:339, para. 23.
[2173] Ibid, paras. 24-25.
[2174] Chapter 3, Section III(2)(B)(II), and Case C-326/88 – Hansen, ECLI:EU:C:1990:291, para. 17; Case C-7/90 – Vandevenne, ECLI:EU:C:1991:363, paras. 11-12; Case C-210/91 – Commission v Greece, ECLI:EU:C:1992:525, para. 19; Case C-382/92 – Commission v UK, ECLI:EU:C:1994:233, para. 55; Case C-383/92 – Commission v UK, ECLI:EU:C:1994:234, para. 40; Case C-352/92 – Milchwerke Köln/Wuppertal v Hauptzollamt Köln-Rheinau, ECLI:EU:C:1994:294, para. 23; Case C-36/94 – Siesse, ECLI:EU:C:1995:351, para. 20; Case C-177/95 – Ebony Maritime and Loten Navigation, ECLI:EU:C:1997:89, para. 35; Case C-213/99 – de Andrade, ECLI:EU:C:2000:678, para. 19; Case C-354/99 – EC Commission v Ireland, ECLI:EU:C:2001:550, para. 46; Case C-230/01 – Penycoed, ECLI:EU:C:2004:20, para. 36; Case C-167/01 – Inspire Art, ECLI:EU:C:2003:512, para. 62; Joined Cases C-387/02, C-391/02, C-403/02 – Berlusconi and Others, ECLI:EU:C:2005:270, paras. 36, 53, and 65; Case C-367/09 – Belgisch Interventie- en Restitutiebureau v SGS Belgium NV, ECLI:EU:C:2010:648, para. 41; and Case C-263/11 – Aināŗs Rēdlihs v Valsts ieņēmumu dienests, ECLI:EU:C:2012:497, para. 44.

that a EU Member State may impose.[2175] Hence, these principles entail that the national sanction regimes protects the effectiveness of EU law from a procedural, substantive, and practical enforcement perspective at a similar level as the EU Member States protects the effectiveness of national law. Klip has referred to this governing principle as an "assimilation-principle."[2176] In particular, where the violations of national and EU law (norms) are of a similar nature and importance, the assimilation principle thus requires that the national sanction regimes provides for sanctions that in terms of effectiveness, proportionality and dissuasiveness are similar irrespective of where the laws and their violations derives from purely national or EU norms.[2177] With the adoption of the AMLD-CRIM, MAD-CRIM, and CFD, these principles are now less important as AMLD-CRIM and MAD-CRIM are criminalising money laundering and market abuse and makes them qualify as criminal offences,[2178] and they provides for a number of different types of effective, proportionate and dissuasive sanctions to be available to the judicial authorities and courts and to be imposed for these two types of criminal offences.[2179]

As discussed in Chapter 5, the necessity for making use of criminal law instruments that threatens with criminal sanctions have been acknowledged by the EU Commission in the reviews of the NFSRs after the GFC from 2007-09. Because the review revealed a lack of harmonisation on criminal sanctions, the conclusions recognised that the absence of common criminal sanction regimes across the EU will create opportunities for offenders of market abuse to take advantage of lighter sanction regimes ("sanction shopping").[2180] This led to a revision of MAD I, and the adoption of MAD-CRIM and MAR, where the former now states clearly that the "imposition of criminal sanctions for market abuse will have an increased deterrent effect on potential offenders."[2181] Criminal law is also universally regarded as the "*ultimum remedium*."[2182] This is clearly manifested in the MAD-CRIM. It describes a very common and acknowledged view on criminal sanctions that they are considered as the most severe class of

[2175] Case C-186/98 – Nunes and de Matos, ECLI:EU:C:1999:376, paras. 12-14; Craig (n 320) 682.
[2176] Andre Klip, *European Criminal Law: An Integrative Approach* (4th edition, Intersentia Ltd 2021) 80.
[2177] Steve Peers and others, *The EU Charter of Fundamental Rights: A Commentary* (1st edition, Hart/Beck 2014) 1366. In this context, Mitsilegas has noted: "[the] requirements for penalties to be effective, proportionate and dissuasive has since been reproduced verbatim in secondary EU law, including third pillar law, and is a key component of criminalisation at EU level."
[2178] The criminalisation of money laundering also follows from FATF Recommendation 3.
[2179] AMLD-CRIM, Articles 5(1) and 8(1); and MAD-CRIM, Articles 7(1) and 9(1). Although the CFD does not expressly provide that the sanctions it provides for must be effective, proportionate and dissuasive, then the sanctions only applies to the criminal offences covered by Article 3 CFD, and such sanctions are by the virtue of the CJEU's case law also required to be effective, proportionate and dissuasive.
[2180] Thus in family with concepts and problems on "forum shopping" and "regulatory arbitrage." Pursuant to MAR, Recital 4, the market abuse regime acknowledges the "need to establish a more uniform and stronger framework in to preserve market integrity, to avoid potential regulatory arbitrage, to ensure accountability in the event of attempted manipulation, and to provide more legal certainty and less regulatory complexity for market participants," cf. Recital 4 MAR.
[2181] MAD-CRIM, Recital 7.
[2182] Klip (n 456) 236.

sanctions, "which demonstrate a stronger form of social disapproval compared to administrative penalties."[2183] In this way, the MAD-CRIM speaks more generally on the purpose and severity of criminal sanctions as its reflections concern criminal sanctions in general.

As discussed in Chapter 6, Section II(1)(A), the ALMD-CRIM and MAD-CRIM provides violation-regimes of which the following violations classify as criminal offences: (i) insider dealing, recommending or inducing another person to engage in insider dealing; (ii) unlawful disclosure of inside information; (iii) market manipulation; (iv) money laundering; (v) self-laundering; (vi) inciting, aiding and abetting, and attempting to commit one the criminal offences referred to in (i)-(vi).[2184] The EU Member States have an obligation to ensure that these criminal offences are punishable by effective, proportionate and dissuasive sanctions.[2185] On this background, we may employ the Engel-test, bearing in mind that these criminal offences are governed by general and criminal norms and therefore satisfies the first Öztürk-criterion under the second Engel-criterion. In addition, we may also include certain considerations from the FATF Recommendations to discuss the nature and purpose of these sanctions.

A. Deprivation of liberty

In order to ensure that the criminal sanctions on natural persons are effective and dissuasive, the EU Member States have an obligation to ensure that a minimum level for the maximum term of imprisonment is provided under their NFSRs.[2186] This obligation entails that the criminal offences of insider dealing, market manipulation, money laundering, and self-laundering ((i)-(iii)-(iv)-(v)) must be punishable by a maximum term of imprisonment of at least four years.[2187] However, in respect of unlawful disclosure of inside information (ii), natural persons must instead be subject to a maximum term of imprisonment of at least two years.[2188] These provisions reveal that the EU legislators considers the offences of: (i) insider dealing, recommending or inducing another person to engage in insider dealing; (iii) market manipulation; (iv) money laundering; and (v) self-laundering to be the most serious and reckless offences

[2183] MAD-CRIM, Recital 6.
[2184] Natural persons: MAD-CRIM, Articles 3-6; and AMLD-CRIM, Articles 3(1), 3(5) and 4. Legal persons: MAD-CRIM, Articles 3-6; AMLD-CRIM, Articles 3(1), 3(5) and 4.
[2185] Natural persons: MAD-CRIM, Article 7(1); and AMLD-CRIM, Article 5(1). Legal persons: MAD-CRIM, Article 9(1); AMLD-CRIM, Article 8(1). The concepts and requirements are discussed Chapter 6, Section IV.
[2186] MAD-CRIM, Recital 16.
[2187] MAD-CRIM, Article 7(2); AMLD-CRIM, Article 5(2) and Recital 14. Pursuant to Recital 14 AMLD-CRIM, then "that obligation is without prejudice to the individualisation and application of penalties and the execution of sentences in accordance with the concrete circumstances in each individual case."
[2188] MAD-CRIM, Article 7(3).

under the imprisonment-regime as unlawful disclosure of inside information (ii) is ranked less serious by the maximum of two years imprisonment. With respect to inciting, aiding, abetting or attempting to commit one the criminal offences, neither the MAD-CRIM nor the AMLD-CRIM provides for any specific type of criminal sanctions and thus falls back on the default rule whereby the EU Member States must provide for effective, proportionate and dissuasive criminal sanctions.[2189] Accordingly, imprisonment seems likely to be one of them.

In respect of the Engel-test, imprisonment hardly gives raise to any doubt. As argued in Chapter 3, sanctions that results in a deprivation of liberty is one of the archetypical criminal sanctions. Because deprivation of liberty is the essential nature of custodial and incarcerating sanctions, imprisonment therefore classifies as a criminal sanction.[2190] This would also be the case, where imprisonment is imposed for a violation of a rule that is governed by disciplinary norm. Where imprisonment functions as a coercive sanction, typically by converting the non-payment of fines into imprisonment, the hybrid threat against imprisonment will also trigger the criminal guarantees, if the default-imprisonment is triggered solely by non-payment.[2191]

B. Deprivations of property

(I) Criminal fines

There is no express legal basis in the MAD-CRIM and AMLD-CRIM that obliges the EU Member States to provide for criminal fines against natural persons. However, as expressly provided in the AMLD-CRIM, the EU Member States must ensure that natural persons who have committed the criminal offences of (iv)-(vi) are being subject, where necessary, to additional sanctions or measures,[2192] including the freezing and confiscation of property pursuant to the CFD.[2193] Criminal fines would be an obvious suggestion for an additional sanction.[2194]

In respect of legal persons, the MAD-CRIM and AMLD-CRIM requires that either (i) criminal fines or, as an alternative, (ii) non-criminal fines, must be available under the NFSRs of the EU Member States.[2195] The concept of 'non-criminal fines' might be interpreted as consequence of the MAD-CRIM, AMLD-CRIM and EU criminal law more generally do not

[2189] MAD-CRIM, Article 7(1), and AMLD-CRIM, Article 5(1).
[2190] Chapter 3, Section III(1)(A)(I)(1).
[2191] Chapter 3, Section II(3)(A)(II)(3).
[2192] AMLD-CRIM, Article 5(3).
[2193] AMLD-CRIM, Article 9 and Recital 16.
[2194] Chapter 3, Section III(1)(A)(II)(2), and AMLD-CRIM, Recital 14.
[2195] MAD-CRIM, Article 9; and AMLD-CRIM, Article 8.

provide for corporate criminal liability.[2196] However, the legal provisions in the MAD-CRIM and AMLD-CRIM do not provide for any amounts for fines. Chapter 5, Section II(2)(D) and (E) have already provided a picture for the maximum level of severity of fines at stake both for natural and legal persons. For instance, in respect of Italy, the CESR-review showed that the offender risked fines up to EUR 75 000 000 or even ten times the profit gained.

In respect of the Engel-test, it was argued in Chapter 3 that fines, like imprisonment, represents one of the archetypical criminal sanctions, because fines results in a (pecuniary / monetary) deprivation of property either voluntarily by paying the amount of the fine or involuntarily through enforcement proceedings in the courts or by another enforcement authorities when voluntary payment has not occurred. It was also argued that a fine qualify and classify as a criminal sanction, per se, when imposed on the basis of a criminal offence, because these fines are to be considered as 'criminal fines'.[2197] In addition, it was also argued that fines may classify as disciplinary fines, when they are imposed for a disciplinary offence.[2198] Because market abuse and money laundering are governed by criminal norms and therefore under the Engel-test also to be considered as criminal offences, the fines provided for in the AMLD-CRIM and MAD-CRIM will therefore also qualify and classify as criminal fines, irrespective of whether their legislative formal label are considered them to be 'criminal fines' or 'non-criminal fines'. Therefore, for the purpose of the Engel-test, the distinction between criminal fines and non-criminal fines is deceptive, because the non-criminal fines both qualify and classify as criminal fines (/sanctions). Accordingly, in all situations covered by MAD-CRIM or AMLD-CRIM, the offender the must be afforded the criminal guarantees.

(II) Confiscation and freezing of property

Except where the criminal offences are covered by the list of legal instruments provided in Article 3(1) CFD, then the CFD only applies when other legal instruments provide specifically that the CFD applies to the criminal offences harmonised therein.[2199] Because Article 9 of the AMLD-CRIM makes such a reference to the CFD, the sanctions and measures contained in the CFD also applies in respect of money laundering offences contained in the AMLD-CRIM.[2200]

[2196] Klip (n 456) 278–280. See further Chapter 6, Section II(1)(B)(II).
[2197] Chapter 3, Section III(1)(A)(II)(1)(a)(1)).
[2198] Chapter 3, Section III(1)(A)(II)(1)(a)(2)).
[2199] CFD, Article 3(1), second subparagraph.
[2200] Moreover, Article 9 AMLD-CRIM provides that the EU Member States shall take the necessary measures to ensure, as appropriate, that their competent authorities freeze or confiscate, in accordance with the CFD, the proceeds derived from and

The MAD-CRIM makes no such reference. However, by virtue of Council Framework Decision 2005/212/JHA, the EU Member States shall take the necessary measures to enable it to confiscate, either in whole or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.[2201] As the MAD-CRIM provides for a maximum term of imprisonment of at least two and four years,[2202] the confiscation power must also be provided under the NFSRs for the criminal offences contained in MAD-CRIM. Because the provisions of the CFD aims to amend and expand the provisions Framework Decision 2005/212/JHA, and provides for almost identical definitions and powers as those contained therein, the following discussion will restrict itself to the CFD, unless elsewhere expressly provided.

The CFD establishes the minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters.[2203] The subject matter of the CFD and the scope of its powers it provides for are thus depending on the definitions of three key concepts: (i) property, (ii) freezing and (iii) confiscation. The definitions of these concepts have largely been reproduced in Regulation (EU) 2018/1805.[2204] Because the CFD and Regulation (EU) 2018/1805 puts into "place a comprehensive system for the freezing and confiscation of the instrumentalities and proceeds of crime in the Union,"[2205] the former establishing the minimum rules for the confiscation and freezing orders and the latter an effective system of mutual recognition of these powers among the EU Member States,[2206] these legal definitions should also be read and interpreted as corresponding.

Pursuant to Article 4(1) CFD, the EU Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence. According to the definitions provided in the CFD, it follows that the confiscation order allows for the confiscation of property more generally (i), *including* (i)(a) proceeds from crime, and (i)(b) instrumentalities used in the commission of crimes, as to defined accordingly.[2207] The general concept of 'property' (i) is defined as: "property of any

instrumentalities used or intended to be used in the commission or contribution to the commission of the offences as referred to in the AMLD-CRIM.
[2201] Council Framework Decision 2005/212/JHA, Article 2(1).
[2202] MAD-CRIM, Article 7(1)-(3).
[2203] CFD, Article 1(1).
[2204] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. OJ L 303, 28.11.2018, p. 1–38, Article 2.
[2205] Regulation (EU) 2018/1805, Recital 8.
[2206] Regulation (EU) 2018/1805, Recitals 7-8.
[2207] CFD, Article 4(1); and Regulation (EU) 2018/1805, Article 2(3).

description, whether corporeal or incorporeal, moveable or immovable, and legal documents or instruments evidencing title or interest in such property."[2208] The general concept of property also covers (i)(a) the 'proceeds' derived from crime, which also is given a wide definition: "any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits."[2209] And in addition, the general concept of property also covers the concept of (i)(b) 'instrumentalities', which also is given a wide definition: "any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences."[2210] The definition of property in the AMLD-CRIM carries almost an identical wording, and it would be reasonable to consider them as corresponding.[2211]

While the CFD defines the concept of 'confiscation' (iii) as "a final deprivation of property ordered by a court in relation to a criminal offence,"[2212] Regulation (EU 2018/1805 perhaps more aptly defines the concept as: "a final penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person."[2213] With respect to the concept of 'freezing' or 'freezing order' (ii), the CFD defines it as: "the temporary prohibition of the transfer, destruction, conversion, disposal, or movement of property or temporarily assuming custody or control of property,"[2214] while Regulation (EU) 2018/1805 perhaps also more aptly emphasises its preventive and preliminary purpose: "a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof."[2215] Irrespective thereof, the CFD considers the concepts of a confiscation order and freezing as: "autonomous concepts."[2216] In addition to the confiscation and freezing powers, the EU Member States are not prevented from implementing the CFD by using other instruments that would also be considered as sanctions, or as other types of

[2208] CFD, Article 2(2); and Regulation 2018/1805, Article 2(3). See also Article 1(2) Framework Decision 2005/212/JHA and Article 1(2) 1990 Convention. Among the legal documents or instruments that may evidence title or interests in property are, inter alia, financial instruments, or other "documents that may give rise to creditor claims and are normally found in the possession of the person affected by the relevant procedures," cf. CFD, Recital 12. However, the CFD is "without prejudice to the existing national procedures for keeping legal documents or instruments evidencing or interest in property, as they are applied by the [NCAs] in accordance with national law," ibid.
[2209] CFD, Article 2(1); and Regulation (EU) 2018/1805, Article 2(4). According to Regulation (EU) Article (2)(3)(a), the proceeds of a criminal offence, or its equivalent, may be the full amount of the value or only part of the value of such proceeds.
[2210] CFD, Article 2(3), and Regulation (EU), Article 2(5).
[2211] CFD, Recital 12; and AMLD-CRIM, Article 2(2).
[2212] CFD, Article 2(4). See also Article 1(4) Framework Decision 2005/212/JHA and Article 1(d) 1990 Convention. In comparison to custodial sanctions, which lead to deprivation of liberty, then confiscation orders similarly leads to the final deprivation of property, cf. CFD, Recital 26, first sentence.
[2213] Regulation (EU) 2018/1805, Article 2(2).
[2214] CFD, Article 2(5).
[2215] Regulation (EU) 2018/1805, Article 2(1).
[2216] CFD, Recital 13.

measures, in accordance with national law.[2217] The CFD does not specify the types of national sanctions or measures, which could be appropriate for the implementation of the CFD. However, in light of the purposes pursued by the confiscation and freezing orders and the FATF Recommendations, 'forfeitures' and 'seizure orders' would also be relevant powers.[2218] As the CFD provides the minimum requirements for the conception and application of confiscation and freezing orders, and Regulation (EU) 2018/1805 rather deals with issues related to the mutual recognition and effective execution of these orders, the discussion will primarily proceed in respect of the CFD with a view towards the governing principles of these powers.

While the CFD governs the freezing and confiscation of property through criminal law instruments, EU securities law by the virtue of MAR, BR, MiFID II, UCITS and AIFMD provides the supervisory power by which the NCAs may request and require the freeze and sequestration of assets.[2219] Albeit the CFD requires for the confiscation that the final deprivation of property is to be ordered by the criminal courts, it creates space for preliminary actions to be taken by a different authority in respect of the freezing order, which by its definition also may result in a sequestration of assets. The provisions under EU securities law must thus be read in light of the CFD, whereby the NCAs are not considered competent for ordering the final deprivation of property, including the assets frozen and sequestrated, but nevertheless competent for requesting or requiring the freeze and sequestration of assets. Hence, the NCAs may act as an extended enforcement-arm of the criminal justice system under the NFSRs.

(1) Confiscation of property

The main rule is that the EU Member States have an obligation to take the necessary measures to enable the confiscation, in whole or in part, of instrumentalities and proceeds, or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence.[2220] The property which may be confiscated are thus the instrumentalities and proceeds of crime, or the "property of equivalent value to those instrumentalities and proceeds."[2221] The CFD provides very broad definitions of the concepts of

[2217] CFD, Recital 13.
[2218] See Chapter 4, Section III(4)(B).
[2219] Articles 23(2)(i) MAR; 41(1)(g) BR; 69(2)(e) MiFID II, 98(2)(f) UCITS; and 46(2)(f) AIFMD.
[2220] CFD, Article 4(1).
[2221] CFD, Recital 14. Pursuant to CFD, Recital 17: "When implementing [the CFD] in respect of confiscation of property the value of which corresponds to instrumentalities, the relevant provisions could be applicable where, in view of the particular circumstances of the case at hand, such a measure is proportionate, having regard in particular to the value of the instrumentalities concerned. Member States may also take into account whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible."

'instrumentalities'[2222] and 'proceeds',[2223] and the provisions seems to envisage that the power to confiscate property will be used whenever instrumentalities have been used for the commission of a criminal offence and whenever the crime has resulted in proceeds to the benefit of the offender or a third party. Perhaps for that reason, the CFD provides for a very narrow exemption for the use of the confiscation-power. When implementing the CFD, Recital 18 makes it clear that the EU Member States may provide in their national law that confiscation orders should not be ordered in exceptional circumstances, but only insofar as it would represent undue hardship for the affected person in accordance with national law. In fact, only a very restricted use of this exemption should be allowed so "that confiscation is not to be ordered in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive."[2224] The circumstances surrounding the individual case should nevertheless be decisive.

Confiscation (orders) are subject to a final conviction for a criminal offence of a court.[2225] A final conviction may nevertheless result from criminal proceedings in absentia.[2226] However, in situations where confiscation may not be possible because of illness,[2227] or the absconding of the suspected or accused person,[2228] the EU Member States also have an obligation to enable the confiscation, where criminal proceedings have been initiated regarding a criminal offence, which is liable to give rise to economic benefit directly or indirectly, subject to the condition that such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.[2229] Finally, when confiscation orders have been issued, they must be effectively executed.[2230]

[2222] CFD, Article 2(3), defines the concept of 'instrumentalities' as meaning: "any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences."
[2223] CFD, Article 2(1), defines the concept of 'proceeds' as meaning: "any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits."
[2224] CFD, Recital 18.
[2225] CFD, Article 4(1) and Recital 14. Specific safeguards should be in place in order to ensure as a general rule that reasons are "given for confiscation orders, unless when, in simplified criminal proceedings in minor cases, the affected person has waived his or her right to be given reasons, cf. CFD, Recital 39.
[2226] CFD, Article 4(1) and Recital 15.
[2227] CFD, Recital 16, considers 'illness' as meaning: "the inability of the suspected or accused person to attend the criminal proceedings for an extended period, as a result of which the proceedings cannot continue under normal conditions. Suspected or accused persons may be requested to prove illness, for example by a medical certificate, which the court should be able to disregard if it finds it unsatisfactory. The right of that person to be represented in the proceedings by a lawyer should not be affected."
[2228] In such cases, "the existence of proceedings in absentia in Member States would be sufficient to comply with this obligation. When the suspected or accused person has absconded, the Member States should take all reasonable steps and may require that the person concerned be summoned to or made aware of the confiscation proceedings." cf. CFD, Recital 15.
[2229] CFD, Article 4(2).
[2230] CFD, Article 9. The EU Member States also have an obligation to enable the detection and tracing of property to be frozen and confiscated even after a final conviction for a criminal offence, or following confiscation proceedings in the application of Article 4(2), cf. Article 9. Recital 30 CFD describes the reasons for why effective and full execution of confiscation orders

The CFD aims to harmonise the legal provisions on 'extended confiscation' by setting a single minimum standard.[2231] Accordingly, the EU Member States must enable the confiscation, in whole or in part, of property belonging to a person convicted of a criminal offence, which is liable to give rise to economic benefit, directly or indirectly, for instance where the value of the property is disproportionate to the lawful income of the convicted person.[2232] Extended confiscation are relevant in situations, such as, "where it is appropriate that a criminal conviction be followed by the confiscation not only of the property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes."[2233] In particular, extended confiscation is intended to be applied against natural person working in criminal groups and organisation in order to effectively tackle organised criminal activities.[2234] However, because Article 9 of the AMLD-CRIM provides that the confiscation and freezing of property must be available also in respect of money laundering offences provided by the AMLD-CRIM, the CFD-rules on extended confiscation also applies in respect of money laundering offences committed by a legal person. On the other hand, in respect of both natural and legal persons, extended confiscation is not required to be available for market abuse offences under the NFSRs by virtue of the CFD, the MAD-CRIM or the Framework Decision 2005/212/JHA.[2235]

Orders of extended confiscation are subject to a court decision, where the court determines on the basis of the circumstance of the case, including the specific facts and available evidence, whether the court considers itself satisfied that the property in question is derived from criminal conduct.[2236] However, this does not mean that it must be established that the

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are necessary: "Suspected or accused persons often hide property throughout the entire duration of criminal proceedings. As a result confiscation orders cannot be executed, leaving those subject to confiscation orders to benefit from their property once they have served their sentences. It is therefore necessary to enable the determination of the precise extent of the property to be confiscated even after a final conviction for a criminal offence, in order to permit the full execution of confiscation orders when no property or insufficient property was initially identified and the confiscation order remains unexecuted."

[2231] CFD, Recital 19. The Framework Decision 2005/212/JHA provided three sets of minimum requirements that the EU Member States could choose from in order to apply extended confiscation. However, as a result of the transposition of Framework Decision 2005/212/JHA, the EU Member States had chosen different options that resulted in divergent concepts of extended confiscation in the national jurisdictions.

[2232] CFD, Article 5(1).

[2233] CFD, Recital 19.

[2234] CFD, Article 5(2)(e). Article 5(2)(e) does not impose a similar obligation of the Member States against legal persons as the obligation only follows to the extent that criminal offences are punishable in accordance with the relevant national law by a custodial sentence of a maximum of at least four years. As custodial sanctions are not, and cannot be, prescribed for money laundering offences committed by legal persons, the result seems to provide for an asymmetry in the sanctions available against natural and legal persons as extended confiscation is only prescribed against natural persons.

[2235] CFD, Article 5(2) and Recital 23. However, according to principles of competence governing EU criminal law, the EU Member States are not precluded from applying extended confiscation to other types criminal offences not referred to in Articles 3 and 5(2) CFD, for instance, market abuse offences.

[2236] CFD, Article 5(1). The affected person shall have an effective possible to challenge the circumstances of the case, including the specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct, cf. CFD, Article 8(8).

property to be confiscated is derived from criminal conduct. For instance, the EU Member States may provide that it would "be sufficient for a court to consider on the balance of probabilities, or to reasonably presume that it is substantially more probable, that the property in question has been obtained from criminal conduct than from other activities."[2237] Among those facts giving rise to a conclusion of the court that the property concerned is derived from criminal conduct is the fact the property of the person is disproportionate to the lawful income of that person.[2238] However, the court has to consider the specific circumstances of the case, including the available evidence, before issuing an order for extended confiscation.[2239]

Finally, Recital 30 CFD informs that it is a common and increasingly widespread practice by a suspected or accused person of transferring property to a knowing third party with a view to avoid confiscation.[2240] Before the CFD, the EU legal framework did not contain binding rules on the confiscation of property transferred to third parties. Therefore, the CFD provides that the EU Member States have on obligation to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation.[2241] For instance, the acquisition by a third party refers to situations where property has been acquired, directly or indirectly, through an intermediary by the third party from a suspected or accused person, including as well the situations where the criminal offence has been committed on the behalf and for the benefit of the third party by the suspected and accused person.[2242] However, the confiscation must be conducted on the basis of the concrete facts and circumstances, including that the transfer or acquisition were not conducted as ordinary market transactions, for instance, in exchange for an amount significantly lower than the market value, or carried out as free of charge.[2243] The rules on confiscation against third parties must be applicable to both natural

[2237] CFD, Recital 21. Furthermore, the EU Member States "could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct."
[2238] Ibid.
[2239] CFD, Recital 21. Pursuant to Recital 22, the CFD only lay down minimum rules and does not prevent the EU Member States in their national law to provide for more extensive powers, for example, in to their rules on evidence.
[2240] CFD, Recital 30 describes the reasons for why effective and full execution of confiscation orders, including against third parties, are necessary in order to combat crime: "Suspected or accused persons often hide property throughout the entire duration of criminal proceedings. As a result confiscation orders cannot be executed, leaving those subject to confiscation orders to benefit from their property once they have served their sentences. It is therefore necessary to enable the determination of the precise extent of the property to be confiscated even after a final conviction for a criminal offence, in order to permit the full execution of confiscation orders when no property or insufficient property was initially identified and the confiscation order remains unexecuted."
[2241] CFD, Article 6(1).
[2242] CFD, Recital 24.
[2243] CFD, Article 6(1).

and legal persons.[2244] The EU Member States are nonetheless free under national law to define third party confiscation as subsidiary or alternative to direct confiscation.[2245]

(2) Freezing and seizure of property

While confiscation leads to the final deprivation of property, then freezing orders first and foremost leads to the preservation of the frozen property in order to secure that the property exist and is preserved for the later confiscation. The preservation of property can thus be considered a prerequisite for confiscation and of importance for the ultimate enforcement of a confiscation order.[2246] The EU Member States shall therefore take the necessary measures to enable the freezing of property with a view to subsequent confiscation.[2247] Property in the possession of third parties must also be subject to a freezing order for the purpose of possible subsequent confiscation.[2248] The freezing and confiscation of property is thus closely linked,[2249] but in the context of criminal proceedings, freezing orders may also be issued "with a view to its possible subsequent restitution or safeguard compensation for the damage caused by a criminal offence."[2250] The freezing orders are also without prejudice to the possibility for specific property to be considered evidence throughout the proceedings, provided, however, "that the property ultimately would be available for effective execution of the confiscation order."[2251]

The freezing of property must be ordered by a competent authority and includes an obligation for urgent action to be taken, where it is necessary to preserve property.[2252] It also follows from its definition that the nature of a freezing order is a temporary measure in the sense that it temporarily prohibits against any form of disposal, custody or control over property belonging to the offender or third party.[2253] The freezing order must therefore only remain in force for as long it is necessary to preserve the available of the property for the purpose of

[2244] Ibid. This rules on the confiscation against third parties shall not prejudice the rights of bona fide third parties, cf. CFD, Article 6(2) and Recital 24.
[2245] CFD, Recital 25.
[2246] CFD, Recital 26. However, to prevent the dissipation of property before a freezing order can be issued, the EU Member States must empower the NCAs to take immediate action in order to secure such property.
[2247] CFD, Article 7(1), first sentence.
[2248] CFD, Article 7(2).
[2249] CFD, Recital 27. However, in some legal systems of the EU Member States "freezing for the purposes of confiscation is regarded as a separate procedural measure of a provisional nature, which may be followed by a confiscation order. Without prejudice to the different national legal systems and to Framework Decision 2003/577/JHA, [the CFD] should approximate some aspects of the national systems of freezing for the purposes of confiscation." (Ibid).
[2250] CFD, Recital 29.
[2251] CFD, Recital 28.
[2252] CFD, Article 7(1), second sentence.
[2253] CFD, Article 2(5).

possible subsequent confiscation.[2254] This may require a new review by a court in order to ensure that the purpose of preventing the dissipation of property remains valid.[2255] The freezing orders must be communicated to the affected person as soon as possible after its execution and indicate, at least briefly, the reasons for the order issued.[2256]

The EU Member States must ensure the adequate management of property frozen with a view to possible subsequent confiscation, for instance, by establishing centralised asset management offices or equivalent offices or mechanisms, pending judicial determination, and for the purpose of not to lose the economic value of the frozen property.[2257] The EU Member States must also allow for the possibility to sell or transfer property, where necessary,[2258] and for the purpose of minimising losses in the economic value of frozen property.[2259] However, the frozen property, which are not subsequently confiscated, shall be returned immediately.[2260]

(3) Conclusions and assessment

First of all, the CFD provides two types of sanctions, the freezing of property and the confiscation of property, which are applicable in relation to those criminal offences listed by Article 3 CFD. For the purpose of the Engel-test, the starting point is therefore that the first Öztürk-criterion of the second Engel-criterion is satisfied and the measures are having a criminal colour. Second, the CFD does not provide any express legal basis for the general three requirements to criminal sanctions of being effective, proportionate, and dissuasive. However, as all sanctions provided by EU financial law are required to be effective, proportionate and dissuasive, these requirements will also be applicable for the confiscation and freezing of property to the extent that these qualify as sanctions and/or classify as criminal sanctions.

As argued in Chapter 4, it follows from FATF Recommendation 4 that the countries must enable their relevant sanctioning authority with the power to "freeze or seize and confiscate" property that is laundered, proceeds from the commission of money laundering or

[2254] CFD, Article 8(3).
[2255] CFD, Recital 31.
[2256] CFD, Article 8(2), first and second sentence. The purpose is to allow the affected person to challenge the freezing order, cf. CFD, Recital 34. However, where necessary to avoid jeopardising a criminal investigation, the competent authority may postpone communicating the freezing order to the affected person, cf. CFD, Article 8(2), third sentence, and Recital 33.
[2257] CFD, Article 10(1) and Recital 32.
[2258] CFD, Article 10(2).
[2259] CFD, Recital 32.
[2260] CFD, Article 8(5), first sentence. However, the conditions or procedural rules under which such property is returned shall be determined by national law, cf. CFD, Article 8(5), second sentence. With respect to confiscated property, the EU Member States should consider to take measures that allows confiscated property to be used for public interests or social purposes, cf. CFD, Article 10(3) and Recital 35, for instance by supporting crime prevention projects.

predicate offences, and instrumentalities used in or intended for the use of money laundering or predicate offences.[2261] The CFD and AMLD-CRIM satisfies Recommendation 4 as the CFD defines the freezing of property to include the power to "assume custody or control of property."[2262] Hence, this definition contains the powers to both freeze and seize property. In light of FATF Recommendation 4, and in conjunction with the Glossary to the FATF Recommendations, 'assuming custody or control of property' therefore entails that the national sanctioning authority can take over the possession, administration or management of the seized property. Otherwise both measures essentially contains a prohibition whereby the holder of the property is prohibited from making any transfer, conversion, disposition or movement of the property concerned, and both orders are initiated under a freezing mechanism.[2263] However, although FATF Recommendation 3 imposes an obligation to criminalise money laundering, there is no express obligation to classify the powers to freeze, seize and confiscate property as criminal sanctions. Therefore, the FATF Recommendations does not alter the starting point that these are powers carries a presumption for being classified as criminal sanctions.

In Chapter 3, it was argued that the legal position of the confiscation power depends upon whether the confiscation power is applied as a preventive measure (i); it is imposed on a retributive basis but the legislation restricts the confiscation to the actual enrichment of the offender, hence as a reparatory and preventive sanction (ii); or the legislation allows the confiscation on a retributive basis to go beyond the level of restoration, hence to pursue the purposes of punishment and deterrence (iii).[2264] Only in the latter regard, the confiscation power will result in a deprivation of property and thereby qualify and classify as a criminal sanction. Because the CFD has to be implemented in the national law of the EU Member States, it will not possible to fully determine its classification here, except from pointing to some of the fundamental characteristics within the confiscation and freezing-regime that will need to form part of the assessment for the distinction between the three situations (i)-(iii).

In relation to the main distinction between a preventive confiscation (i) on the one side and retributive confiscations (ii)-(iii) on the other side, we will need to revisit the definitions again. The CFD defined confiscation as: "a final deprivation of property ordered by a court in relation to a criminal offence,"[2265] while regulation (EU) 2018/1805 defined it as: "a final

[2261] Chapter 4, Section III(3)(B).
[2262] CFD, Article 2(5).
[2263] Chapter 4, Section III(3)(B).
[2264] Chapter 3, Section III(1)(A)(II)(2)(a).
[2265] CFD, Article 2(4).

penalty or measure, imposed by a court following proceedings in relation to a criminal offence, resulting in the final deprivation of property of a natural or legal person."[2266] The first observation is that only Regulation (EU) 2018/1805 expressly covers a confiscation as a penalty and measure. However, they share the common phrase of "in relation to a criminal offence." This *relation* to the *criminal offence* can thus both be a retributive relationship and a preventive relationship, whereby the former will allow the confiscation to be imposed as a sanction and the latter will allow the confiscation to be applied as a preventive measure. As discussed in Chapter 3, the latter situation will typically be the case when a previous convicted person will be subject to a new set of proceedings for the purpose of confiscating property (proceeds from crime) obtained due to criminal offences of which the offender already previously has been convicted. These cases does not establish any guilt on the offender as the purpose of the proceedings does not concern any new types of (fresh) violations committed. Such confiscations are often allowed on the basis of circumstantial evidence whereby the court will determine whether the property in the belongings of the offender (and / or relatives) were obtained by legitimate means of honest work or derives from the crimes committed and of which the offender already has been convicted. Thus, it follows that bot the CFD and Regulation (EU) 2018/1805 allows both for preventive confiscations (i) and retributive confiscations (ii)-(iii). However, in both of the situations, it is a requirement that the offender has been appropriately convicted for a criminal offence and that the deprivation is ordered by the criminal courts.[2267] The involvement of the criminal courts is a criminal classification factor.[2268]

The second observation concerns the concepts of 'deprivation' and 'property'. Under the Engel-test, a deprivation of property will only exist when the maximum severity of the deprivation allows the confiscation to go beyond the level of restoration, because there will in reality be no deprivation of any property over which the offender has ownership when the confiscation, just like forfeiture orders and disgorgements, are restricted to the actual enrichment of the offender.[2269] Illicit property in the belongings of the offender is not the offender's

[2266] Regulation (EU) 2018/1805, Article 2(2).
[2267] CFD, Article 4(1).
[2268] Chapter 3, Section II(3)(A)(III)(1). As the ECtHR also may adhere to comparative international criminal law, cf. Chapter 3, Section II(3)(B) it also indicated by FATF Recommendation 4 that confiscation is ordered by the criminal courts.
[2269] Chapter 3, Section III(1)(A)(II)(2)(a). However, this will not necessarily be the case of the forfeiture-power, which just like the disgorgement power seems to be restricted to the reparatory level, cf. Chapter 3, Section III(1)(A)(II)(2)(b). The Glossary to the FATF Recommendation considers the concept of 'confiscation' to include 'forfeiture where applicable'. See Chapter 4, Section III(3)(B)(II). Hence, the concept of confiscation is not identical to the concept of forfeiture, but just as disgorgement-power may be considered to be a constitutive part of a fine based on a certain coefficient multiplied with profit gained or loss avoided, the forfeiture-power may be considered as a constitutive part of the confiscation order. The FATF Recommendations do not provide enough information in order to make a conceptual distinction between the two concepts. It should nevertheless be noted, as emphasised by the FATF Recommendations, that forfeiture orders just like confiscation orders

property and can only be subject to some sort of return or repayment (principle of restitution and restoration). Hence, for the confiscation to be punitive and deterrent, not reparatory and preventive, the confiscation must have a legal basis by which the confiscation is allowed to move beyond the level of restoration.[2270] Accordingly, we will have to assess the definition of property more thoroughly. The concept of property covered (i)(a) proceeds from crime and (i)(b) the instrumentalities used for the commission of crime. There is no problem in respect of the proceeds of crime (i)(a), because in these situations the confiscation will qualify as a preventive and / or reparatory confiscation, similar to a forfeiture and disgorgement, and thereby pursue the purpose of ensuring that the commission of crimes do not pay-off. However, by the instrumentalities (i)(b), the offender risks to be deprived of something more; something over which the offender might have legitimate property rights. An example could be a car or computer-station bought by earnings made from a normal job but used for the purpose of committing a physical crime or online cyber-crime. Therefore, it is only by allowing the confiscation order to confiscate the instrumentalities that the confiscation order will result in any true deprivation of property and punitive and deterrent sanction. Except from the involvement of the criminal courts, this explanation is the real justification for consider the confiscations as criminal sanctions under the Engel-test and the constitutional conception of criminal sanctions.

FATF Recommendation 4 and the related FATF definitions points towards the characteristic features of the freezing and seizure of property, which makes it questionable whether the nature of these powers makes them qualify as legal sanctions and classify as criminal sanctions.[2271] As it was argued in Chapter 4, FATF Recommendation 4 considered the freezing and seizure of property as 'provisional measures', because they are provisional for the purpose of making use of the confiscation power by ensuring that there exist property to be confiscated once the criminal conviction or court decision has determined that the property to be confiscated and/or forfeited, but now frozen and/or seized, have been derived from or used for the commission of a criminal offence. The CJEU has expressed similar views in respect of the freezing of property imposed on a natural person as a result of being enlisted on a terrorist list adopted and contained in a EU regulation. In Case of T-306/01 – Yusuf, and Case T-315/01 – Kadi I, the CJEU stated that the "freezing of funds is a [temporary] precautionary measure which, unlike confiscation, *does not affect the very substance of the right* of persons concerned

usually are linked to criminal conviction or court decision, which forms one of the criminal factors that may give forfeiture orders some criminal colour, cf. Chapter 3, Section II(3)(A)(III)(1).

[2270] Chapter 3, Section III(1)(A)(II)(2)(a).

[2271] Chapter 3, Section III(4)(B).

to property in their financial assets but *only the use thereof*."[2272] In the subsequent appeal case of Kadi I, the CJEU added that the freezing of property is not intended to deprive property but "undeniably entail a restriction of the exercise of Mr Kadi's right to property that must, moreover, be classified as *considerable, having regard to the general application of the freezing measure and the fact that it has been applied to him since 20 October 2001*."[2273] The CJEU upheld the same view in the Joined Cases C-399/06 P and C-403/06 P – Hassan and Ayadi v Council and Commission, and in Case T-85/09 – Kadi II.[2274] Furthermore, in Case T-47/03 – Sison v Council, the CJEU also expressed that such restrictive measures "*do not constitute criminal sanctions and do not, moreover, imply any accusation of a criminal nature*."[2275]

The problem with these cases is first of all that the CJEU did not apply the Engel-test, wherefore the conclusions are not directly applicable here for the purpose of undertaking an assessment pursuant to the Engel-test. On the other hand, the freezing of property has also not been subject to the Engel-test before the ECtHR. The 'seizure of property' nevertheless has, but the ECtHR essentially considered it very similar to what the CJEU held in respect of the freezing order.[2276] Second, whether the application of the Engel-test would have made the CJEU conclude otherwise is nevertheless highly doubtful because the CJEU did not qualify nor classify the freezing of property as a criminal sanction albeit their consequences were considerable and substantial. Third, the CJEU's case-law thus also allows us to reflect more generally on the essential nature of the power to freeze and seize property, and whether they even qualify as sanctions. They are 'temporary measures', because they are applicable until the confiscation proceedings have determined whether the owner should be finally deprived of his property. In that sense they are also 'provisional measures' as they may lead to confiscation, but is awaiting the outcome on the confiscation proceedings. They also qualify as 'precautionary measures', because they aim to ensure that the property concerned later can be confiscated and not effectively eroded by any disposal actions. Essentially, they are thus restrictions in the

[2272] Case T-306/01 – Yusuf, ECLI:EU:T:2005:331, para. 299. Italics and [brackets] added. Case T-315/01 – Kadi I, ECLI:EU:T:2005:332, para. 248. Italics added. para. 358: and Joined Cases C-539/10 P and C-550/10 P – Al-Aqsa, ECLI:EU:C:2012:711, para. 122.
[2273] Joined Cases C-402/05 P and C-415/05 P – Kadi and Al Barakaat International Foundation v Council and Commission, ECLI:EU:C:2008:461, para. 358. The CJEU therefore also considered the freeze of property as a restrictive measure, cf. paras. 331-376, having "negative consequences, even of a substantial nature," cf. para. 366. However, "the competent national authorities may declare the freezing of funds to be inapplicable to the funds necessary to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges," cf. para. 364.
[2274] Joined Cases C-399/06 P and C-403/06 P – Hassan and Ayadi v Council and Commission, ECLI:EU:C:2009:748, para. 92, and Case T-85/09 – Kadi II, ECLI:EU:T:2010:418, para. 192.
[2275] Case T-47/03 – Sison v the Council, ECLI:EU:T:2007:207, para. 101. Italics added.
[2276] Chapter 3, Section III(1)(A)(II)(2)(c). In addition thereto, the seizure of property confer control rights to the competent authority or court acting under the freezing mechanism, which may include taking possession, administration or management of the seized property. FATF Recommendations, p. 121-122. See further, Chapter 4, Section III(3)(B)(II).

way the freezing of property effectively prohibits the use and disposal of the frozen property. Albeit the restriction may be considered to result in a "temporary deprivation of disposal rights," including potentially use and control rights, then there seems to be no case before the ECtHR and CJEU which has ever reflected directly on such 'deprivations of disposal rights' in relation to sanctions, except from the cases on seizure orders referred to above. Perhaps, the reason why is that the freezing and seizure of property do not affect the very substance of the essential right at stake, that is, the ownership-rights to the property concerned. For that very reason, it does also not seem fit to consider such restrictions to qualify as sanctions, because the concept of sanctions is directed towards the essential consequences which entails that the very substance that is fundamental to the right must be at stake. Therefore, rather than a sanction, the freezing and seizure powers qualifies as precautionary powers as it restricts the disposal (-rights) very similar to the interventive and precautionary supervisory powers provided under EU financial law. However, in addition, it has a provisional nature and purpose, as when provisional to confiscations. Nonetheless, if the authority were to sell the property outside the purpose of ensuring the adequate management of the property frozen or seized and without any compensation,[2277] the freezing and seizure powers must be requalified as a confiscation as the transfer of ownership effectively has deprived the owner of her or his property.

C. Non-pecuniary criminal sanctions on natural and legal persons

In addition to the criminal sanctions and measures already discussed, the AMLD-CRIM sanction regime expressly provides that the EU Member States must ensure that natural persons who have committed the criminal offences referred to in (iv)-(vi) above are being subject, where necessary, to additional sanctions or measures.[2278] Due to the impact of money laundering offences committed by public office holders on the public sphere and on the integrity of the public institutions, the EU Member States should consider among the additional sanctions and measures "more severe penalties for public office holders in their national frameworks in accordance with their legal traditions."[2279] Recital 14 AMLD-CRIM considers and provides that such a sanction should be a 'temporary ban on running for elected or public office'.[2280]

[2277] Compare with CFD, Article 10, which allows for the sale or transfer of frozen property for the purpose of ensuring the adequate management of property frozen with a view to the possible subsequent confiscation. The provision seems to envisage that the sale of property may comply with this purpose in order to maintain the value of the property.
[2278] AMLD-CRIM, Article 5(3).
[2279] AMLD-CRIM, Recital 7.
[2280] AMLD-CRIM, Recital 14.

In respect of legal persons, the AMLD-CRIM and MAD-CRIM first of all requires that the EU Member States in their NFSRs either provides for criminal fines or non-criminal fines. These fines appears and present themselves to be primary criminal pecuniary sanctions to be imposed for the criminal market abuse and money laundering, because, in addition thereto, the AMLD-CRIM and MAD-CRIM concurrently provides that the EU Member States in their NFSRs also *"may include"* the following non-pecuniary criminal sanctions:

> (1) exclusion from entitlement to public benefits or aid, which pursuant to the AMLD-CRIM contains a temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions;[2281]
> (2) temporary or permanent disqualification from practice of commercial activities;
> (3) judicial winding-up order;
> (4) placing under judicial supervision; and
> (5) temporary or permanent closure of establishments which have been used for committing the offence.[2282]

Accordingly, we need to assesses the nature, purpose and severity of these sanctions against the natural persons (I) and legal persons (II) in accordance with the Engel-test, and the constitutional conception of sanctions as provided and discussed in Chapter 3. In addition, for the assessment of the none-pecuniary criminal sanctions on legal persons, we will also make comparisons to the 'temporary prohibition on the exercise of professional activity', referred to as the 'company freeze order' (III(2)(A)(II)(2)); the withdrawal-powers (III(2)(A)(I)(1)) including the arguments brought forward by the parties as well as the conclusions made by the CJEU in the Trasta-case ((III(2)(B)), where it proves appropriate.

(I) Temporary ban on natural persons on running for elected or public office

In respect of natural persons, and the temporary ban on running for elected or public office, it was argued in Chapter 3, that temporary bans are typically imposed on professionals exercising their professions either by running some form of associated business to the profession or holding a certain (managerial) position in a company or public office.[2283] In Chapter 3, it was also argued that the ECtHR has taken a clear stance, which entails that political and electoral rights such as the passive right to stand for an election falls outside the protection of Article 6 ECHR.[2284] Such types of sanctions are as a main rule deemed to qualify and classify as

[2281] AMLD-CRIM, Article 8(b) and Recital 14. Recital 14 AMLD-CRIM expressly provides that the EU Member States "should also provide" these additional sanctions or measures, however, the "obligation is without prejudice to the discretion of the judge or the court to decide whether to impose additional sanctions or measures or not, taking into account all the circumstances of the particular case."
[2282] MAD-CRIM, Article 9(a)-(e); and AMLD-CRIM, Article 8(a)-(f).
[2283] Chapter 3, Section III(1)(B)(I).
[2284] Chapter 3, Section III(1)(B)(II).

disciplinary sanctions, because they first and foremost affects the civil rights of the offenders by depriving the offenders on a temporary basis of their right to exercise their profession and/or associated business activities or position temporarily, or the political and electoral right to run and stand for an election, and therefore also temporarily prohibits the offender to continue the operation thereof and / or to stand for election.[2285] Hence, the bans themselves carry a disciplinary nature by bringing along only civil and political consequences.

The ban-sanction here is slightly different, because it is not only linked with consequence of 'running for an *elected* office', but also 'running for a *public* office', which gives raise to the question of whether these two characteristics brings the sanction into the general and public realm, and/or it still maintains a disciplinary character. In Pierre-Bloch v. France, the ECtHR had to assess a very similar type of sanction: a disqualification from standing for election limited to a period of one year from the date of the election and applicable only to the election of the national assembly in question. This case nonetheless differs from the situation here as the offender had violated a rule governed by disciplinary norms, and not as here of criminal norms (money laundering). However, in that case the ECtHR noted that "the disqualification from standing for election is also one of the forms of deprivation of civic rights provided in French criminal law," but in such situations, "the penalty is "ancillary" or "additional" to certain penalties imposed by the criminal courts [by which] its criminal nature derives in that instance from the "principal" penalty to which it attaches."[2286] The ECtHR therefore concluded in accordance with the second and third Engel-criterion that "neither the nature nor the degree of severity of that penalty brings the issue into the "criminal" realm."[2287] The conclusion holds in this situation as well. When assessed as a standalone sanction, the nature of the ban on running for election or public office is a disciplinary sanction, because the rights deprived are essentially either a civil right or a political or electoral (civic) right. Thus, the temporary ban on running for elected or public office represents a legal situation, where a disciplinary sanction that only brings along consequences for (a deprivation of) the exercise of civil and political rights of the offender is attached to an criminal offence. According to the main rule stated above, the defendant will nevertheless be considered charged with a criminal offence, when this AMLD-CRIM-sanction is to be imposed by criminal courts, which is a criminal classification factor. However, because the AMLD-CRIM-ban qualifies as a disciplinary sanction, the principle of the case Pierre-Bloch v. France seems to establish a principle which

[2285] Chapter 3, Section III(2)(B).
[2286] Pierre-Bloch v. France, para. 56. Emphases maintained.
[2287] Pierre-Bloch v. France, para. 57. Emphasis maintained.

suggests that the ban will serve as an ancillary sanction to a primary criminal sanction, such as a fine.[2288] In this way, it is also comparable to Grande Stevens case, where Mr Grande Stevens in addition to the fine at EUR 3,000,000 was imposed an ancillary sanction of a four month ban from administering, managing or supervising listed companies.[2289] This result we need to carry over to the discussion of the other non-pecuniary criminal sanctions on legal persons.

(II) Legal persons

(1) The exclusion from entitlement to public benefits or aid

Considering first (1) the exclusion from entitlement to public benefits or aid, which pursuant to the AMLD-CRIM contains a temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions. In Chapter 3, Section III(3), it was argued that the CJEU in the case of C-489/10 – Bonda, considered the applicant subject to disciplinary sanctions. The case related to EU laws on agricultural subsidiaries, in particular, Regulation (EC) No 1973/2004, which applied "only to economic operators who have recourse to the aid scheme set up by that regulation."[2290] The sanctions, exclusion from and loss of entitlements, had as their "*sole effect* [...] to *deprive* the farmer in question of the prospect to obtaining aid."[2291] Accordingly, the CJEU applied the notion of disciplinary offences and disciplinary sanctions, and contributed to the ECtHR's case law by specifying that the concept of disciplinary sanctions may also result in the deprivation of the prospects to civil-entitlements. Albeit the permanent exclusion may result in a much more severe sanction compared to the Bonda case, the temporal nature of the sanction cannot deprived it of its more fundamental nature, whereby the exclusion prohibits and deprives the offender of the right to any form of access to public benefits or aid. Hence, the non-pecuniary sanction is also having a broader scope than the Bonda-sanction as it is not restricted to a particular aid-scheme for a specific sector, but goes across all economic and public sectors. This makes it much more severe, but the granting of public benefits or aid will typically be subject to an application submitted on a voluntary basis just like in the Bonda case. Therefore, assessed as a standalone sanction, the

[2288] This may also explain the ban imposed on Mr Grande Stevens in the case of Grande Stevens and Others v. Italy. See above, Section III(3). Furthermore, and although we are dealing with an autonomous notion of sanctions, it is necessary to consider whether there is any substantive differences between a temporary 'ban' and a temporary 'disqualification' on standing or running for elected or public office? However, the consequences following from their imposition entails that both sanctions prohibits and thereby excludes the sanctioned person temporarily from either running/standing for electing and/or running for public office. Their underlying rational is therefore the same.
[2289] Grande Stevens and Others v. Italy, para. 26.
[2290] C-489/10 – Bonda, para. 40.
[2291] C-489/10 – Bonda, para. 43. Italics added.

exclusion from entitlement to any public benefits or aid does not qualify as a criminal sanction but as a disciplinary sanction as it only result in a deprivation of civil rights. However, as was the situation in respect of the temporary ban on running for elected or public office on natural persons, the exclusion from entitlement to public benefits or aid of a legal person is thus also another example of a situation, where a criminal offence only results in a temporary or permanent deprivation of (the prospects to) civil rights (aid). Because the sanction is intended to be imposed by the criminal courts, the legal person will nevertheless be considered charged for a criminal offence, triggering the criminal guarantees. According to principle that derives from Pierre-Bloch v. France, this disciplinary sanction thus appears to be an ancillary sanction to envisaged imposition of a primary criminal sanction, such as, a fine.

(2) Disqualifications from practice of commercial activities

The AMLD-CRIM and MAD-CRIM provides for the non-pecuniary criminal sanctions of (2), the temporary or permanent disqualification from practice of commercial activities. The provisions contain two sanctions of a temporary (i) and permanent (ii) disqualification from practice of commercial activities. Like any other of the other non-pecuniary criminal sanctions on legal persons their purpose is to punish the legal person having committed a market abuse or money laundering offence. However, to discuss their nature and severity, we will need to compare them with the other non-pecuniary sanctions provided in EU financial law.

Let us start with (2) the temporary disqualification from practice of commercial activities. This sanction (2)(i)(a) has two sisters: (i)(b) a temporary prohibition on the exercise of professional activity, the 'company freeze order';[2292] and (i)(c) a suspension of the authorisation.[2293] According to the constitutional conception of sanctions, the three sanctions are identical in their essential nature because they all deprives the legal person of its civil right to practice commercial and professional activities, and the activities tied-in with the authorisation. The temporary deprivation results in a temporary prohibition on the legal person to continue to exercise the activities. Accordingly, they therefore qualifies as disciplinary sanctions.

The sanctions are also almost identical in their severity. The temporary disqualification (i)(a) deprives and prohibits the legal person to pursue any commercial activity whatsoever. The temporary prohibition (i)(b) are equally severe in its maximum severity because there are

[2292] Section III(2)(A)(II)(2).
[2293] Section III(2)(A)(I)(3).

hardly no substantive difference between 'professional' and 'commercial' in relation to 'activities' and 'activity'. The term 'commercial' seems a bit broader than 'professional' activities, but for legal persons all commercial activities are often tied-in with the professional activities and therefore indistinguishable from commercial activities. The suspension of the authorisation (i)(c) are perhaps the least severe because the scope of the suspension depends upon the scope of the activities which the legal person is authorised to pursue. The strict and narrow proportionality requirement does not alter this legal position because the assessment has to be conducted on the basis of the maximum severity of these non-pecuniary sanctions.

The sanctions can also be imposed for the same violations. The AMLD-CRIM and MAD-CRIM allows the imposition of the temporary disqualification (i)(a) on a legal person for money laundering and market abuse violation. MAR also allows the temporary prohibition (i)(b) to be imposed on any type of legal (and natural) person for market abuse violations.[2294] MAR further allows for the imposition of a suspension of the authorisation of an investment firm for market abuse violations.[2295] Furthermore, the temporary prohibition is categorised as a 'supervisory power' and the suspension of the authorisation as an 'administrative sanction or measure'. They may therefore also be similar, if not fully identical, to (5), the temporary closure of establishments which have been used for committing the offence. Because all these sanctions are so severe, they do not appear to be ancillary sanctions to primary fine. Otherwise, it will only further increase their level of severity pursuant to the third Engel-criterion.

Identical sufferings for identical violations should also be treated equally in the legal and criminal justice system. Therefore, when the AMLD-CRIM and MAD-CRIM places the temporary disqualification within criminal law acts as non-pecuniary sanctions against legal persons it will also follow either by analogy, or at least according to the third Engel-criterion, that almost identical sanctions for almost identical violations covered within the scope of administrative law acts deserves the same care for legal and criminal justice from a constitutional-, ECHR- and EUCFR-perspective. Therefore, not only (2)(i)(a) and (5) classifies as non-pecuniary *criminal sanctions*, but also the temporary prohibition (i)(b) and suspension (i)(c).

The AMLD-CRIM and MAD-CRIM also provided for (2) the permanent disqualification from practice of commercial activities. This sanction (2)(ii)(a) has a brother: (ii)(b) the withdrawal of an authorisation. According to the constitutional conception of sanctions, a

[2294] Articles 23(2)(l) MAR (impose), but compare to Articles 41(1)(i) BR (impose); Article 69(2)(f) MiFID II (require); 98(2)(g) UCITS (request); and 46(2)(g) AIMFD (request).
[2295] MAR, Article 30(2)(d).

suspension of the authorisation is just a temporary withdrawal of an authorisation. Therefore, the withdrawal of an authorisation is essentially a permanent deprivation of the legal person's civil right that permanently prohibits the legal person to exercise the activities linked-in with the authorisation.[2296] Therefore, there are as a main rule no real differences in the nature, purpose and severity between the permanent disqualification (ii)(a) and the withdrawal-power (ii)(b) when the scope of the activities that are tied-in with the authorisation is fully identical with the scope of the commercial activities that are practiced by the legal person. On the other hand, some observations may point out some differences between the two.

According to the constitutional conception of sanctions, the nature of the rights deprived seems only to be civil, which makes them disciplinary sanctions. Two elements will strongly indicate otherwise. First, whether a deprivation is of permanent duration is often a severity-element that the ECtHR adheres to when it is assessing the maximum severity of a non-pecuniary sanction. Although, the case-law is not settled in this regard, a permanent deprivation of civil rights might also classify as a criminal sanction as the consequences tends to encroach on the general realm of the ordinary life (of natural persons at least). While a permanent disqualification (ii)(a) deprives the legal person of its rights to practice commercial activities whatsoever, the possibility to continue to practice commercial activities remains open, at least in principle, with respect to the withdrawal-power (ii)(b) due to the principles of the Trasta-case. By necessary amendments to the articles of associations, the legal person may practice other commercial and professional activities than those previously tied-in with the authorisation pursuant to direct legal effect of EU law. Hence, the withdrawal-power carries with it the possibility to make necessary amendments to the legal person for it to continue to practice other than the previous activities tied-in with the authorisation.[2297] The permanent disqualification does not allow the legal person to continue to practice any commercial activities, and no amendments in the articles of association of the legal person can change that. Therefore, the permanent disqualification is more severe than the withdrawal-power in this regard, just as it is similar if not fully identical to the permanent closure of the establishment (5).

Second, from the principles of the Trasta-case, the withdrawal-power may under the NFSRs lead to the liquidation of the legal person previously holding the authorisation. This will not be a direct effect of EU law, but of national law. Due to the direct effect of EU law,

[2296] Chapter 3, Section III(1)(A)(I)(2), III(1)(B), and III(1)(D).
[2297] Effectively, it can thus be argued that the withdrawal-power only has functioned as a suspension-power, because by these necessary amendments, the same legal entity would be able to continue other commercial operations.

the permanent disqualification will not necessarily directly lead to the liquidation of the legal person, but it may nevertheless be provided so under national law. Instead, for the withdrawal-power it can be said by analogy that the legal person has been deprived of its right to life and liberty, because the liquidation of the legal person entails that it will no longer be existing. At least, it will lose its entire holding of property and civil rights (all of its licences that allows it to pursue different commercial activities). In comparison, it can be said for the permanent disqualification that the legal person has been deprived its liberty and civil rights, but the legal person has maintained its right to life and property. In this regard, the withdrawal-power is more severe than the permanent disqualification from practice of commercial activities.

MAR allows for the withdrawal of authorisation as an investment firm for its commission of market abuse violations.[2298] The differences in the legal position between the permanent disqualification and withdrawal-power in respect of their maximum severity cannot justify a different conclusion than the withdrawal-power also is a criminal sanction in this regard.

(3) Judicial winding-up order

Considering (4) the judicial winding-up order, then the SRMR and BRRD defines 'winding-up' as the realisation of assets of an institution or entity.[2299] Most likely, the winding-up of the institution or entity ('legal person') will bring about 'normal insolvency proceedings' as defined in the BRRD, which entails the partial or total divestment of a debtor and the appointment of a liquidator or an administrator normally applicable under national law to the legal person in question.[2300] The winding-up of the legal person was also part of the tasks given to the liquidator as revealed in the Trasta-case, where the CJEU noted in respect of Latvian commercial law "that the sole purpose of the liquidator is to collect debts, sell assets and satisfy the claims of creditors in order to bring about the total cessation of that person's [credit institutions] activity."[2301] Under Latvian law, the liquidation followed as an automatic consequence ordered by the of the withdrawal-power exercised by the ECB. Riga City Court had no choice but to adopt a decision ordering liquidation proceedings to be opened for the legal person and appointed a liquidator. As would be expected under national law of the EU Member States, despite the procedural enforcement steps may vary, the judicial winding-up provided in the

[2298] MAR, Article 30(2)(d).
[2299] Articles 3(1)(42) SRMR and 2(1)(54) BRRD.
[2300] BRRD, Article 2(1)(47).
[2301] Joined Cases of C-663/17 P, C-665-17 P and C-669/17 P – ECB and Others v Trasta Komercbanka and Others, para. 72.

ALMD-CRIM and MAD-CRIM will most likely bring about the same result as ordered by the Latvian court, whereby the judicial winding-up order of the legal person will initiate the national liquidation proceedings and lead to the total cessation of the legal person in question. Therefore, the judicial winding-up order is essentially a liquidation order that results in the deprivation of its entire property and civil rights of the legal person, which is equivalent to its life and liberty, and it is the most severe of all the criminal sanctions, which the legal person risks to be imposed. Hence, it rather qualifies as primary and not an ancillary sanction.

On this background, we need to re-assess the withdrawal-power. MAR allowed for the withdrawal of authorisation as an investment firm for its commission of market abuse violations.[2302] If national law as a direct legal effect of the withdrawal of the authorisation as an investment firm requires the liquidation of the legal person holding the authorisation, the legal person has in reality been subject to a judicial winding-up order. Therefore, when this is the situation, the withdrawal-power will also classify as a criminal sanction.

(4) The placing under judicial supervision and closure of establishments

This brings us to (4) the placing under judicial supervision and (5) temporary or permanent closure of establishments, which have been used for committing the offence. In respect of (4), it is very difficult to read or interpret what is actually at stake for the legal person by placing it under judicial supervision. It seems unlikely that it will result in a deprivation of property, as the judicial supervision does not include a judicial winding-up, albeit it may lead to it. The right to administer its own property and to practice any of its civil rights without being subject to judicial supervision seems to suggest that it is legal person's liberty rights, which actually is at stake, not its property or civil rights. This might be viewed as in line with general incarceration principles. However, it is not clear from the ECtHR's case law, where it has applied the Engel-test, whether and to what extent legal persons can be deprived of liberty rights, in particularly not in a comparison to natural persons. The very short wording of the legal provisions and their description of this legal power only permits speculation in this context.

We therefore moves towards (5) and the temporary or permanent closure of establishments, which have been used for committing the criminal offence. The term 'closure' in its *permanent* form seems to be understood as the total cessation of the legal person's activities, but does it also lead to liquidation like the judicial winding-up order or a permanent

[2302] MAR, Article 30(2)(d).

disqualification / prohibition on practicing commercial and professional activities, and what is the difference? The terminology used for the wording of this sanction nevertheless suggests that the deprivation at stake is the very core and essence of the freedom of establishment pursuant to Article 49 TFEU. This seems to suggest that it is the liberty rights of the legal person, which ultimately is at stake, despite this connection is not entirely clear. It would nevertheless fully accord with the discussion in Section IV(1) whereby a legal person should be afforded the criminal guarantees under Articles 6-7 and 4-P7 ECHR and 47-50 EUCFR, and thus protected by the Engel-test, whenever the legal person risks the imposition of sanctions that deprives it of its right to enjoy very essence of the (liberty) rights that makes up the freedom of establishment, including the more specific rights under this freedom, for instance to establish any secondary subsidiaries or branches, because the wording of the provisions applies to establishment(*s*)[2303] *(plural)*. A permanent 'closure' thus seems to be the very opposite of the very core of the freedom of establishment protected by Article 49 TFEU. In addition, the *temporary* closure of establishments seems just to be another description of the legal effects following from the two twin-sisters and temporary company-freeze orders of the temporary disqualification from practice of commercial activities and the temporary prohibition on exercising professional activities. Accordingly, the legal position of the temporary or permanent closure of establishment, which have been used for committing the market abuse or money laundering offences, will under the Engel-test thus be similar to that of Section IV(2)(C)(II)*(2)-(3)*.

(III) Conclusions

For the criminal offences laid down in the frameworks of ALMD-CRIM and MAD-CRIM ((i)-(vi)),[2304] a number of non-pecuniary criminal sanctions may be provided in the NFSRs. For natural persons a 'temporary ban on running for elected or public office'. For legal persons: (1) exclusion from entitlement to public benefits or aid; (2) temporary or permanent disqualification from practice of commercial activities; (3) judicial winding-up order; (4) placing under judicial supervision; and (5) temporary or permanent closure of establishments which have been used for committing the offence. By providing these sanctions in the ALMD-CRIM and MAD-CRIM, the EU legislators have acknowledged that these classify as criminal sanctions on a standalone basis. According to the Engel-test, the first Engel-criterion will therefore also treat them as criminal sanctions. The second Engel-criterion and first Öztürk-criterion will

[2303] AMLD-CRIM, Article 8(f), and MAD-CRIM, Article 9(e).
[2304] Section IV(2).

consider the non-pecuniary sanctions as imposed for a commission of a criminal offence. They will also be imposed by the judicial authorities / national courts, which is a criminal classification factor that gives additional criminal colour to the sanctions. Hence, as a main rule, all the non-pecuniary sanctions will satisfy the Engel-test and trigger the criminal guarantees.

We then made a comparison to some of the more controversial legal powers provided under EU financial law. Just like the non-pecuniary criminal sanctions on legal persons provided in ALMD-CRIM and MAD-CRIM ((1)-(5)), in particular (2) and (3), MAR allowed for the commission of market abuse violations the imposition on legal persons of: (a) a temporary prohibition on the exercise of professional activity, and (b) a suspension and (c) withdrawal of the authorisation as an investment firm. We concluded that (a) and (b) was so similar, if not fully identical, to (2) the temporary disqualification from practice of commercial activities that these also would classify as criminal sanctions when imposed for a market abuse violation. We concluded that (c) depending on whether the withdrawal-power as a direct legal effect would lead to the liquidation of a legal person was so similar, if not fully identical, to either (2) the permanent disqualification from practice of commercial activities or (3) the judicial winding-up order that in both cases it would also classify as criminal sanction when imposed for a market abuse violation. Irrespective of whether (a) was categorised as a supervisory power, and (b) and (c) as administrative sanctions under EU financial law, they imposed almost the same consequences in terms of their nature, purpose and severity as the sanctions of (2)-(3) for the same types of violations. Thus, they deserve the same criminal procedural protection.

The application of the Engel-test and the constitutional concept of sanctions nevertheless allowed us to seek the justifications for why these sanctions on legal persons should classify as criminal sanctions. The constitutional conception of criminal sanctions only attributes the archetypes of deprivations of life, bodily safety, liberty and property to the class of criminal sanctions, while deprivations of civil and political rights are attributed to the class of disciplinary sanctions. This should entail that the sanctions available to be imposed on legal persons must be governed by at least one of the archetypes attributed to criminal sanctions. However, this was not the case in respect of (1) and (2) as they qualified as disciplinary sanctions with the possible exception of the permanent disqualification from practice of commercial activities to classify as a criminal sanction. The judicial winding-up order (3) deprived the legal person of its entire existence, including it entire property and all of its civil rights (licences) hold, which are equivalent to the life and liberty of a legal person. In respect of (4), placing under judicial supervision, we pointed to general incarcerating-principles as the exercise of any of its

activities as well as new activities, and disposal over its property, is likely to be subject to an approval by the judicial authorities, and such loss of autonomy draws close resemblance with the right to liberty. In respect of (5), the temporary or permanent closure of establishments which have been used for committing the offence, we argued that the wording of 'establishments' points in some rather unclear way to the protection of the freedom of establishment by Article 49 TFEU, which thereby seems to be equated with liberty rights. Moreover, from the perspective of the Engel-test and the constitutional conception of sanctions, when the EU legislators have classified all these types of sanctions as criminal sanctions, that very fact points in itself to a justification that do not consider any of these sanctions as disciplinary sanctions, and therefore also not to be deprivations of civil rights. The question must therefore be asked whether they in fact are governed by the archetype of right to life and liberty of a legal person although the ECtHR and EUCFR *do not grant any* right to the life or liberty to legal persons? However, perhaps that is *exactly why* the legal person also should be afforded the criminal procedural protection by the Engel-test for the purposes of the Articles 6-7 and 4-P7 and 47-50 EUCFR before any legal person risks to suffer any of these deadly, detrimental and irreversible consequences?

A final word should *therefore* be given to the withdrawal-power and the case of Ukrselhosprom and Versobank v ECB ('Versobank-case').[2305] In that case, Versobank (a LSSE) had committed a number of serious and recurring administrative infringements relating to the preventive rules on anti-money laundering ('AML/CFT'). Versobank's AML/CFT-regime was ineffective, because the Estonian NCA had identified recurring breaches with respect to: (i) risks stemming from its business model; and (ii) inadequacy of AML/CFT governance arrangements.[2306] All of these violations qualifies as disciplinary offences. On this background, the NCA carried out a number of on-site inspections and adopted a precept, which was sent to Versobank and required it to immediately restore its legal position into compliance. Following a new on-site inspection, a letter was sent to Versobank informing that it had still not complied with the obligations that followed from the precept. On that basis, the NCA adopted a decision, where it found Versobank in a failing or likely to fail scenario. Later, the NCA conducted new in-depth investigations and found that Versobank had committed material and severe breaches of the AML/CFT legislation similar to those identified in its earlier inspections and further found that Versobank's internal control systems was weak and inadequate. As the ECB has the

[2305] Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB.
[2306] Ibid, para. 4.

exclusive competence to withdraw the authorisations, the NCA accordingly sent a proposal to the ECB suggesting that Versobank should have its authorisation as a credit institution withdrawn. The ECB approved the withdrawal, and Versobank were placed in liquidation, opened by the competent Estonian Court.[2307] Some of the reasons, which justified the ECB-withdrawal were that: (i) Versobank failed to have governance arrangements in place as required by Article 74 CRD as transposed into national law; (ii) Versobank lacked an effective AML/CFT regime to manage the risks stemming from its business, despite that three on-site AML/CFT inspections, several meetings and notices, the precept and a letter concerning non-compliance with the precept; (iii) Versobank failure to implement the precept with the period and to the extent prescribed; and (iv) Versobank's submission of misleading and incorrect documents and information to the NCA and its breach of conditions.[2308] More generally, Versobank had for a long period and continuously committed breaches of the applicable framework, breached the obligations stemming from the precept and with any of the informal requests, wherefore the ECB "could not come to a positive assessment of regarding the future compliance of that applicant with the regulatory requirements imposed on it."[2309] The main legal bases for applying withdrawal-power were Articles 18(f) and 67(1) CRD, as transposed into national law, and the ECB-decision was taken on the bases of Articles 4(1)(a) and 14(5) SSMR, and 83 SSMFR.[2310]

The question is therefore whether the withdrawal-power qualifies and classifies as precautionary power, a disciplinary sanction, or a criminal non-pecuniary sanction? – Although it is not totally clear from the case on which basis the NCA adopted the failing or likely to fail declaration ('FOLTF'-decision), it seems to have been the numerous breaches, including the breaches stemming from the precept, which made the NCA adopt the FOLTF-decision.[2311] Such decision points towards considering the withdrawal-power to be exercised as a precautionary power or, at least the purpose of positive prevention is an constitutive element that forms part of the decision to impose the withdrawal. On the other hand, it is the number of continuous breaches which, pursuant to Article 18(f) CRD, triggered the imposition of the withdrawal-power. In this way, the purpose of retribution is also a (primary) constitutive element. Because the essential nature of the laws violated qualifies a disciplinary laws, the withdrawal-power also qualifies and classifies as a disciplinary sanction pursuant to the Engel-test. In this regard, we need to recall that in respect of natural persons, as offenders, when they have

[2307] Ibid, paras. 15-22.
[2308] Ibid, para. 24.
[2309] Ibid, para. 23.
[2310] Ibid, paras. 17 and 24.
[2311] Ibid, para. 11.

been subject to a revocation of a licence because of her or his law-breaking, the ECtHR has found the natural person subject both to a preventive measure and disciplinary sanction at the same time.[2312] Hence, the purposes of 'prevention' and 'retribution' are not necessarily mutual exclusive and they may both form an essential part, as constitutive elements, of the sanction imposed. However, the complexities of the legal situation do not stop here. In reality, at the national level of the NFSR, it is not the withdrawal-power which is actually at stake for Versobank, but the liquidation and winding-up of the legal person operating under the name of Versobank. The ECB-withdrawal of Versobank's authorisation as a credit institution only functioned as national trigger for under national judicial proceedings to open for liquidation and winding-up proceedings of the legal person. This is not a direct effect of EU law, but a *direct effect* of national law. Hence, what actually was at stake for the legal person operating under the name of Versobank was a deprivation of its entire property and all of its civil rights (licences hold), which are equivalent to life and liberty of a legal person. Therefore, the real sanction imposed was a judicial winding-up order, which the EU legislator in the AMLD-CRIM and MAD-CRIM already has acknowledged is a criminal non-pecuniary sanction.

In addition, some further observations can be made. First, when the withdrawal-power is imposed on the bases of Article 18(f) CRD in conjunction with Article 67(1) CRD, it qualifies as a non-pecuniary (disciplinary) sanction. This appears to be contrary to Articles 122 and 134 SSMFR as the ECB does not have any non-pecuniary sanctioning powers against legal persons and neither any such sanctioning powers against LSSEs.[2313] However, the joint NCA-ECB procedure with respect to the exercise of the withdrawal-power pursuant to Articles 4(1)(a) and 14(5) SSMR and 80-83 SSMFR legitimately circumvents these restrictions in the ECB's scope of sanctioning powers by way of a lex specialis-inference. Accordingly, Articles 122 and 134 SSMFR do not provide for an absolute restriction with respect to the imposition of non-pecuniary sanctions in the form of withdrawals of the authorisation.

Second, the withdrawal of Versobank's authorisation as a credit institution was justified and proportionate to the gravity of the violations committed.[2314] The gravity of the violations committed seems also to have justified and been proportionate with the imposition of liquidation / judicial winding-up of the legal person operating under the name of Versobank, *if* the proportionality assessment had been conducted in respect of this non-pecuniary sanction.

[2312] Chapter 3, Sections III(1)(B)(II) and III(1)(D).
[2313] SSMFR, Articles 122 and 134.
[2314] Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB, paras. 1-40 and 297-346.

Third, the proportionality assessments conducted by the ECB and CJEU contained arguments that made it evident that it was appropriate, necessary and reasonable to apply the withdrawal-power as a last-resort power in order to prevent further serious breaches by Versobank,[2315] because it could lead to the insolvency of Versobank and thus to systemic problems in the other EU Member States and globally,[2316] and damage the public confidence in the Estonian and European financial system,[2317] just as the application of other types of measures to restore legality would not have been appropriate and proportionate under the giving circumstances.[2318] However, the CJEU not only adhered to prevention, it also considered the withdrawal-power to: "penalise [...] a lack of AML/CFT governance arrangements and effective AML/CFT system, failure to comply with an instruction issued by the NCA and the communication of misleading information or documents,"[2319] and to "pursue an objective of deterrence, an objective of 'general prevention' of the recurrence in the financial services market of conduct such as the AML/CFT breaches."[2320] Estonian law also allowed for self-liquidation, which was suggested as an alternative measure to the withdrawal by Versobank, but the ECB and CJEU considered self-liquidation to obfuscate the substantive reasons for which Versobank's authorisation was withdrawn, including the fact that Versobank "had committed serious breaches, justifying that the termination of its activities be forced and not voluntary."[2321] Therefore, *retribution, punishment and deterrence* were inherent purposes justifying the withdrawal.

Finally, with respect to legal certainty, the CJEU stated that the "gravity of conduct does not need to be assessed in relation to the gravity of the conduct of other persons, but only in relation to the legal standards required by the applicable legal provisions, with that gravity being relevant only for determining the appropriate *sanction*."[2322] Therefore, it is not required to make an analytical comparison between the person responsible for an unlawful conduct and other natural or legal persons who have committed other similar unlawful acts. This statement by the CJEU also provides the final evidence and argument for considered the withdrawal-power as a non-pecuniary *sanction* when exercised on the basis of Article 18(f) CRD.

[2315] Ibid, paras. 31 and 317.
[2316] Ibid, para. 31
[2317] Ibid, para. 38.
[2318] Ibid, paras. 31-40. When there is choice between several appropriate measures, and the proportionality requirement imposes an obligation to have recourse to the least onerous, then for other "alternative measures to be considered appropriate, they must be equally effective," cf. para. 320. The ECB did take into account whether other measures would be effective, however, no other measure was deemed appropriate, and therefore the withdrawal was also necessary, cf. para. 321.
[2319] Ibid, para. 154.
[2320] Ibid, para. 328. Emphasis maintained.
[2321] Ibid, para. 328. See also para. 354.
[2322] Ibid, para. 353. Italics added.

Nevertheless, albeit the NCA and ECB are justified in withdrawing Versobank's authorisation as a credit institution, then what is at stake under the Engel-test and the second and third Engel-criteria in particular, is not the withdrawal of the authorisation, but the liquidation and judicial winding-up order of the legal person under national law. The joint NCA-ECB procedures within the SSM-framework with respect to the withdrawal-power can only justify such an outcome, if legal persons also will be afforded the criminal procedural guarantees.

3. Conclusions and assessment

Let us recall from the Dubus case in Section III(3) that the availability of a reprimand; a fine up to its level of its minimum capital; and a de-listing or removal from the register of approved companies, made the ECtHR conclude that the legal person was subject to a criminal charge, despite the applicant had violated provisions governed by disciplinary norms. However, it should be obvious that the severity of the sanctions discussed in Section IV(2), in particular under Section IV(2)(C), which also include the criminal or non-criminal fines, are much more severe than the sanctions in the Dubus case, particularly as the legal person risks to be imposed a judicial winding-up order. To a very far extent, the conclusion pursuant to the Engel-test was therefore given, irrespective of whether these non-pecuniary criminal sanctions would have been imposed by the criminal courts or an administrative authority and even irrespective of whether the sanctions would have been imposed for violations of disciplinary laws.

From the discussion of the CFD, AMLD-CRIM and MAD-CRIM it followed that the criminal sanctions within these EU Directives are governed by the notions of deprivations of life, liberty, property and civil rights, although the deprivation of civil rights as a main rule is attributed to the class of disciplinary sanctions. The arguments were therefore suggesting that when disciplinary sanctions are found among other criminal sanctions that is governed by the archetypes of a deprivation to life, liberty, and property, the disciplinary sanctions are intended to be imposed as secondary ancillary sanctions to primary true criminal sanctions, because the ECtHR has stated that when disciplinary sanction are imposed as an ancillary sanction to primary criminal sanctions, they thereby derive their "criminal nature [...] from the "principal" penalty to which it attaches."[2323] Nonetheless, when the EU legislators is moving disciplinary sanctions up and into to classification-ranks of criminal sanctions it shows to some extent that a legal person should not only be subject to *specific* (civil) consequences for its commission of

[2323] Pierre-Bloch v. France, para. 56.

a criminal offence but also *general* (criminal) consequences. Even though a legal person is not granted a right to life and liberty and thereby not protected by Articles 2 / 2 and 5 / 6 ECHR / ECUFR, it raises the more fundamental question of whether or not these two archetypes are the real and true justification for considering the sanctions in AMLD-CRIM and MAD-CRIM as criminal sanctions. In respect of the right to life, a legal person will be deprived of its existence and struck-off the company register once the winding-up of its assets and liquidation proceeding has become final. This entails that the legal person loses, and risks to lose, its entire property and civil rights (all licenses and authorisations held). That is equivalent to the death penalty of a natural person. Hence, when the legal person risks to lose its entire portfolio of property rights and civil rights, it seems equivalent to the deprivation of the life of a legal person. It may thus also be considered equivalent to a deprivation of liberty of a legal person, because the legal person can no longer *exercise* its ownership-rights and perform any of the commercial and professional activities linked-in with the former licences held, which to some extent also is equivalent to the exercise of ordinary liberty rights generally held and exercised by natural persons. Even if the legal person is not considered threatened by a deprivation of its life, the rather general restrictions on a legal persons right to exercise its property rights and civil rights seems at least to point beyond the specific scope of civil rights and resemble general liberty rights. The real threat of deterrence within the punishments of the AMLD-CRIM (and MAD-CRIM) in respect of (a) exclusion from entitlement to public benefits or aid, which also includes (b) a temporary or permanent exclusion from access to public funding, tender procedures, grants, and concessions, is it not, in reality, a deprivation of liberty rights as the legal person is *generally exclude from access* to any sort of public benefits or aid whatsoever. Is the real threat of deterrence and punishment within (c) temporary or permanent disqualification from the practice of commercial activities; (d) placing under judicial supervision; (e) a judicial winding-up order; temporary or permanent closure of establishments which have been used for committing the offence, in reality not a deprivation of the life and / or liberty of a legal person, and *not what positive EU criminal law expressly stipulates*? – The governing archetypes of criminal sanctions are strong but also *living creatures*, because within the history of the case-law of the ECtHR where it has applied the Engel-test, what appears to be civil rights in one point of time may gradually evolve into liberty rights (like the licence-based right to drive a car), and the living creatures will then also consider them worthy of procedural protection.

However, this also points towards the more fundamental observations made in Section IV(1) in respect of what essentially is a right to liberty as opposed to the more specific civil

rights and political rights. Within the ECtHR's case-law it was observed that the ECtHR gradually is framing and adhering to what is becoming a fundamental principle and distinction within a number of legal areas, that is, whether the sanctions imposed only brings about rather specific consequences to the offender or the consequences are having broader implications for the general and ordinary life and liberty of natural (and legal) persons. Being expelled from an university due to some misbehaviour would be a disciplinary sanction, but a temporary prohibition of 10 years to study at any university within a country smells like a criminal sanction (Articles 2-P1 ECHR and 14 EUCFR). An exclusion from a political party would be a disciplinary sanction, but a temporary prohibition of 10 years to join any political parties within a country smells like a criminal sanction (Articles 11 ECHR and 12 EUCFR). A withdrawal of a licence to perform services held by a natural or legal person would be a disciplinary sanction, but a temporary prohibition (disqualification) of 10 years to perform any commercial and professional activity whatsoever (services) also smells like a criminal sanction ((freedom of establishment (Articles 49-55 TFEU); freedom to provide services (Articles 56-62 TFEU); and freedom to conduct a business (Article 16 EUCFR). Looking ahead, it seems likely that the Engel-test will continue its journey, and the Engel-test and constitutional conception of sanctions to further consolidate. Perhaps, they also should? It would thus move towards further integration of the EU Member States, because what will be held as national substantive criminal law will thereby also be equated with what is EU substantive criminal law.

V. CONCLUSION

The EU legislators are free to design and classify the legal powers and sanctions according to how they deemed most suitable and appropriate. Chapter 7 has not argued otherwise. Accordingly, EU financial law provides for a number of different categories of legal powers, such as: (i) investigatory powers; (ii) supervisory powers; (iii) supervisory measures; (iv) early intervention measures; (v) administrative measures; (vi) administrative sanctions; and (vii) criminal sanctions. Chapter 7 showed that these categories of legal powers were categories that went across the specific EU legislative and legal acts of which Chapter 5 and the first pillar of the concept of sanction regime considered as the most important acts belonging to EU financial law. Chapter 7 has therefore offered a general and rather consolidated perspective of these categories of legal powers to compare the specific legal powers covered by these categories, to point out any inconsistencies and incoherencies issues with respect to their categorisation, and to assess them under the Engel-test and the constitutional conception of sanctions.

In Chapter 3 we defined the constitutional conception of a legal sanction and established on the basis of the ECtHR's case law four types of sanctions or legal powers: (1) punitive sanctions; (2) reparatory sanctions; (3) preventive measures, which contained a subcategory of (3)(a) precautionary measures, and (3)(a) provisional measures. We also found that the purpose of deterrence / negative prevention is reserved for (1) punitive sanctions, while positive prevention is reserved for the sanctions and powers referred to in (2)-(4). We also found that the ECtHR never has concluded that the sanctions were administrative in *nature*, and that the Engle-criteria and constitutional concept of sanctions distinguished between two fundamental legal classes of sanctions: (I) criminal sanctions and (II) disciplinary sanctions.

On this background, we have overwhelmingly found in Chapter 7 that the (ii) supervisory powers, (iii) supervisory measures, and (iv) early intervention measures are governed primarily by the notions of reparatory sanctions (2) and preventive measures (3), but we also found precautionary powers (3)(a) among them, in particular the withdrawal-power and the product, activity and practice intervention powers in the MiFID II and MiFIR framework. In light of Chapter 2, we may thus conclude that EU financial law overwhelmingly are governed by the ideas from the reform, correction and rehabilitation theories.

In respect of (v) administrative measures and (vi) administrative sanctions, then we have overwhelmingly found that these are governed by the notion of punitive sanctions (1), and less of the notion of reparatory sanctions (2). Accordingly, the administrative pecuniary sanctions provided for punitive and deterrent sanctions (1) in the form of fines, and one reparatory pecuniary sanction (2) in the form of disgorgement. Despite, the fines overwhelmingly are imposed for the violations of disciplinary laws, the fines are so severe that in respect of both natural and legal persons, the classify as criminal sanctions, just like when they are imposed for the violations of market abuse and money laundering. The SRB and ESMA fines seems less severe, and may maintain their classification as disciplinary fines. Hence, the administrative pecuniary sanctions provided in EU financial is overwhelmingly characterised by providing for criminal sanctions, which was amplified by taking into account all of the available administrative sanctions, including the administrative non-pecuniary sanctions.

With respect to the administrative non-pecuniary sanctions and measures we overwhelmingly found them to qualify and classify as disciplinary sanctions as they deprived the civil rights of the offenders. This conclusion was also extended to the withdrawal and suspension of the authorisations and the temporary prohibition on the exercise of professional activity and bans. However, when these sanctions are imposed for the violation of market abuse, they

will also classify as criminal sanctions pursuant to the Engel-test. It was argued that the withdrawal-power, when leads to the liquidation of the legal person instead classified as criminal sanction irrespective of whether it has been imposed for a violation of disciplinary law.[2324]

Otherwise, we concluded that the cease-and-desist order (CDO) qualified as a supervisory power because of its reparatory and preventive purpose. Otherwise it may be used as an enforcement power (an administrative measure) to bring about further punitive pecuniary or non-pecuniary sanctions in an interplay-combination, because as a standalone sanction it is not dissuasive. The public statement and public warnings we considered to be reserved for the legal category provided as 'administrative measures', because although they are required to be dissuasive, it was not clear in which way they may be a direct source for punishment as they do not deprive any rights of the offender. Although the aim at compliance, then the nature of the warning and statement also seems to escape the reparatory category. Hence, together with the CDO it was the only legal powers in which we found the administrative label relevant.

However, from the perspective of the Engel-test and the constitutional conception of sanctions, and the logic that governs the categories of sanctions and legal powers that they provide for, we can nevertheless determine which types of sanctions and legal powers that the *'administrative label'* would be reserved for within boundaries of the Engel-test and the constitutional conception of sanctions for *qualification purposes*. The main criterion governing the determination is that the sanction cannot result in a deprivation of life, liberty, property and civil rights, because that would make it qualify as either a criminal sanction or disciplinary sanction. The only type of sanctions that satisfy this criterion are the reparatory sanctions. When imposed on the basis of law provisions that are governed by criminal norms (market abuse), the sanctions cannot be punitive because that would make them qualify as criminal sanctions. Such sanctions would be the disgorgement power or the cease-and-desist order. When imposed on the basis of law provisions that are governed by disciplinary norms, the sanctions can neither be punitive because that would make them qualify as disciplinary sanctions. Such sanctions would be the supervisory powers provided in EU financial law as most of these are reparatory non-pecuniary sanctions applied for the purposes of positive prevention. Accordingly, this brings us to the rather paradoxical conclusion that the only administrative sanctions found in EU financial law are the supervisory powers; with the addition of the disgorgement power and cease-and-desist order. Therefore, pursuant to the Engel-test and the

[2324] See the previous conclusion in Section IV(1)(C)(III).

constitutional conception of sanctions, there are hardly any reality in the administrative label. This is a result of the living and governing archetypes of deprivations of life, liberty, property and civil rights. The administrative label for *classification purposes* is nevertheless most suitable for covering the reparatory sanctions and deprivations of civil rights.

PART III
CONCLUSION

> "Regulators should have, and willingly use, a range of sanctions that are effective, proportionate, and dissuasive. The sanctions should be greater than the costs of the misconduct so that the threat of the penalty removes the incentive for choosing not to comply. Sanctions should reflect the seriousness of the misconduct and aim to deter it. Sanctions that account for wrongful profits, compensate and restore victims and have an appropriate penal element can be expected to enhance deterrence. In addition, deterrence can be enhanced when individuals are held personally accountable for their actions."
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> Credible Deterrence In The Enforcement of Securities Regulation, para. 86, p. 35.
> International Organization of Securities Commissions, June 2015

§ 8. CONCLUSION

In Chapter 8 and the "Conclusion" we will provide an answer to the research questions, and bring forward the main conclusions from the previous Chapters while at the same time concluding on any missing elements and questions that have not been addressed in the Thesis, which we might be able to address here or point to as a task for future research. This is the purpose of Section I, while Section II will conclude the Thesis on the basis of Justice.

I. CONCLUSIONS

The Thesis consisted of three parts. In 'Part I – Theory of Punishment and the Constitutional and International Architecture for Sanctions'; 'Part II – Theory and Reality of Sanctions in the Financial Sectors'; and 'Part III – Conclusions'. Part I was initiated by Chapter 2 on the "Theories of Punishment." Before we provide answers to the four research questions examined in this Thesis, we will bring forward some key conclusions from Chapter 2.

The theories on the justifications of punishment not only provided the arguments for the justifications of punishment, but the theories also structured the ideas on how the concept of punishment should be viewed from a philosophical and theoretical perspective primarily with views towards the essential nature and sources for punishment and the objectives that punishment and sanctions satisfies. The views and principles on the nature, sources and objectives for punishment proved to be essential for the legal discussions on sanctions and punishment, and even played a crucial role for the need to clarify the legal concepts used in the legislation and case-law, but which originated from the philosophical literature. Three main findings should be emphasised as conclusions. First (i), the theories on the justifications of punishment proved to be essential for determining the objectives of punishment within the legal sphere to clarify the concepts and three general requirements to sanctions of: effectiveness, proportionality, and dissuasiveness. While the retribution theory is involved in all three

concepts and requirements, it has primarily influenced the concepts of effectiveness and proportionality. Deterrence theory has a primary influence on the concept of dissuasiveness, but also reflects and shares certain aspects of effectiveness with retributivism. Incapacitation is less directly involved in the conceptualisation of the three requirements, but its ideas strongly influence the concept of criminal sanctions. Reform and rehabilitations theories are the least influential on the concept of punishment and the three concepts, but its ideas are still present and influence what this Thesis has defined to be reparatory and preventive sanctions, including preventive and precautionary measures. Second (ii), the discussions in Chapter 2 required that within the legal sphere we would able to identify what is an *'evil'*, including also sources for imposing pain and suffering on an offender. The answer was given by the legal community to the philosophical community in Chapter 3, which identified an evil as a deprivation of the right to life, bodily safety, liberty, property, civil rights and political rights. Third (iii), the discussions in Chapter 2 required us to distinguish between what is a punishment and what was argued to be an *'institutional concept of punishment'*. The answer was given in Chapter 3 and 5 by the concepts of a 'regime of punishment' and a 'sanction regime' (See Section I(5)).

1. Research Question 1

The main Research Question examined in this Thesis was: *RQ-(I) – "What is a legal sanction, and how should the concept be defined?"* – The answer to that question was given in Chapter 3 discussing 'The Constitutional conception of a Legal sanction and Criminal Sanctions'. It was argued that within the case-law of the ECtHR where it had applied the Engel-test, certain standards and principles provided the architectural foundations for constructing a legal definition of a sanction:

> "A sanction is a legal consequence imposed by a legal authority on natural or legal persons directly for their violation of a law. The legal consequences may result in either: (i) a deprivation of a right, including a right to life, bodily safety, liberty, property, civil rights or political rights, or (ii)(a) a termination of the violation and restoration of the legal position of the offender into compliance with the laws violated; or (ii)(b) a pecuniary restoration of the pre-misconduct legal position of the victims that suffered a loss due the violation of the law."

This Thesis has in Part II, Chapters 5-7, applied this definition as an autonomous or meta-legal concept, and referred to the definition and the principles that followed therefrom as the 'constitutional conception of sanctions'. It includes the 'punitive and deterrent sanctions' by the reference to (i) 'a deprivation of a right', referred to as 'punitive sanctions'. It includes the 'reparatory and preventive sanctions' by reference to: (ii)(a) a termination of the violation and restoration of the legal position of the offender into compliance with the laws violated; or

(ii)(b) a restoration of the pre-misconduct legal position of the victims that suffered a loss due the violation of the law, referred to as 'reparatory sanctions'. The definition stipulates that it is the violation that *sanctions* the imposition of either reparatory sanctions and/or punitive sanctions. The definition of a legal sanction thus relies upon and employs the logical doctrine of retribution. It entails that the legal consequences must be directly imposed on an offender by a sanctioning authority for the offender's commission of a violation. The purpose of retribution therefore also functions as the main requirement for the imposition of sanctions on the offender, because it is the offender's personal liability for the commission of the violation(s) that justifies the imposition of sanctions, irrespective of the classification of the sanctions. Personal liability can be established an a number of ways, including on an objective or subjective basis for the commission of the violation(s) and may also include criteria such as guilt and culpability, including intent and gross or simple negligence. Without personal liability for the violation committed, the detrimental consequence to be suffered by the offender will not result in the legal power qualifying as a sanction. Therefore, the concept and purpose of retribution is crucial for the purpose of distinguishing the concept of a legal sanction from the concept of a *'preventive measure'*, because certain types of legal powers can be applied both as a criminal sanction and a preventive measure. Together with the concept and purpose of retribution, the purposes of punishment and deterrence must be eclipsing to such an extent that the purpose for applying the particular legal power is determined according to doctrine positive prevention. In confiscation proceedings, this entails that the authorities (courts) often relies upon circumstantial evidence and previous criminal convictions for establishing that the wealth and property in the belongings of the previously convicted offender were not obtained legitimately. In administrative and civil proceedings, this entails that a (previously) convicted offender is subject to a suitability assessment which will determine whether the offender, as a holder of a civil right (licence), still satisfies the requirements for being deemed suitable or worthy for holding the civil right. In prison or detention settings, preventive detention may also be ordered against a prisoner due to an assessment of her or his dangerousness rather than for the commission of a violation. Preventive measures are therefore pursuing other purposes than retribution, punishment and deterrence, such as to ensure that crimes do not pay-off (confiscation); that the requirements and certain standards are satisfied and upheld for carrying the right to exercise the activities of a certain profession or function (suitability); and protection of other inmates (preventive detention). Thus, public safety measures, emergency and precautionary measures, and preliminary and provisional measures, serves as the essential nature and purpose of the archetypes that governs the category of legal powers qualifying as preventive measures.

Reparatory sanctions are also imposed on a retributive basis. They also have an autonomous character, because it is one of the archetypes that governs the class of non-criminal sanctions. Therefore, reparatory sanctions do not in reality result in any deprivation of a right. It is the fundamental requirement of *'legal restoration'* into compliance with the applicable laws which will determine whether the sanctions will qualify as punitive sanctions or reparatory sanctions. Only those sanctions that goes beyond the level of legal restoration have a punitive character, and therefore qualifies as a punitive sanction. It is the autonomous notion of 'a deprivation of a right', which provides the essential nature of the punitive and deterrent sanctions, and it is the autonomous notion of 'legal restoration', which provides the essential nature of reparatory and preventive sanctions. By the distinction between deprivation of rights and legal restoration, it also becomes more evident that deprivations of rights are focused and targeted at the natural or legal persons as offenders, while reparatory sanction are rather targeting the legal position *("ex parte")* of offenders and the recovery of the property *("in rem")* of victims. Deprivations of rights are thus more *stigmatising*, while reparatory sanctions are more *intrusive*. Punitive sanctions and reparatory sanctions are together, as available within a sanction regime, removing the incentives of not to comply with the law. As revealed in the cases of securities law and market abuse before the ECtHR and CJEU, the imposition of one or more sanctions, in an interplay or combination of a primary sanction with secondary ancillary sanctions, the sanctioning authorities are capable of both terminating and repairing the violation and to punish and deter the offender. This points to a standard for all sanction regimes.

If the definition did only contain the element of (i) 'a deprivation of a right' and not the elements of (ii)(a) 'a termination and restoration into compliance with the laws violated' or (ii)(b) 'pecuniary reparation', the definition would rather define the concept of a *'penalty'*. Any conception of a legal sanction that allows for so-called: "reparatory penalties" would be quite a misnomer, because it would contain an internal self-contradiction. Within the boundaries of the sources and research questions discussed in this Thesis, a deprivation of a 'right' means that the very essence and core of the right must be at stake and in reality subject to a deprivation. Therefore, deprivations of a right means that the very essence of the right to life; to liberty; to property; and civil and political rights must be at stake. This conclusion mostly derives from cases before the CJEU concerning the power to freeze property, where disposal rights over property are not at the core of property rights, only ownership rights over property is. Albeit the CJEU did not apply the Engel-test in the cases, the principle is reasonable, because the ECtHR has observed in a few cases with respect to the third Engel-criterion whether the

prohibition or withdrawal in reality had permanent effect, or whether there were possibilities to reapply for a licence. Therefore, it also influences the nature and severity assessment.

From the discussions in Chapter 3 and 7, it followed that the qualification of sanctions will not fully determine the legal classification of the legal powers in question, because not all punitive and deterrent sanctions classifies as criminal sanctions. The standards and principles that lays out the sanction theory embedded in the constitutional conception of sanctions nevertheless will. When the offender has been subject to a deprivation of a civil or political right, the ECtHR is reluctant to qualify such deprivations as punitive and deterrent, despite the realities do not preclude that the deprivations to have such nature, purpose and function. This applies for *'disciplinary fines'*, which just like any other type of fine also results in a deprivation of property. It is a disciplinary fine because it is imposed for violations of laws governed by specific norms, thereby signifying a disciplinary offence. The nature of the particular right(s) at stake therefore to a very large extent determines the classification of the sanction. Accordingly, when a sanction deprives the right to life and liberty, the sanction also qualifies and classifies as a criminal sanction. When a sanction deprives property, the sanction qualifies and classifies as a criminal sanction with the reservation for a scope of disciplinary fines. In this way, the deprivations of life, liberty, property, civil and political rights establishes the four main governing archetypes of sanctions from which any punitive type of sanction will derive its essential nature. The stipulated rules apply with full certainty for natural persons, while it still remains a question under the Engel-test to what extent legal persons can be deprived of their life and liberty. The conclusions derived in Chapter 7 was based on the presumption for comparable symmetry and equality and similarity in the legal positions of natural persons and legal persons. An indicative (but not absolute) amount of disciplinary fines on natural persons around EUR 43,750 have not resulted in a reclassification of the disciplinary fine into a true criminal fine. No such indicative amounts is available for legal persons.

2. Research Question 2

As a natural follower of the first and main research question, the second Research Question asked: *RQ-(II) – "Which results can be derived from the application of the Engel-test to EU financial law?"* – The answers were given in Chapter 6 and 7.

In Chapter 6 on "EU Financial Sanction Regimes II – The General Requirements for the Imposition of Sanctions – Assessment II," by reference to Assessment II, we initiated the Engel-test. It was argued in Chapter 3 that any *challenge* before the ECtHR, CJEU or national forum must take into account: (i) the Engel-test and its methodology, and (ii) the constitutional conception of sanctions. With respect to (i) we therefore applied first: (1) the *'legal doctrinal method'* in order to read and interpret the black letters (formal wording) of the law provisions under EU financial law from a stricto sensu point of view, and on that basis, (2): looked behind the appearances of the black letters of the legislative texts in applying the Engel-criteria. The second step was referred to as *'legal essentialism'*. By virtue of the first Öztürk-criterion under the second Engel-criterion, we therefore had to determine whether a natural or legal person as an offender of EU financial law essentially violated law provisions governed by disciplinary or criminal norms. We found, first, that EU financial law as a main rule qualified as disciplinary law, including the law provisions of the AMLD IV. Second, the exceptions to this main rule and conclusion were that the law provisions provided in the AMLD-CRIM, MAD-CRIM, MAR with the general prohibitions against market abuse, and Article 9 CRD with the general prohibition against persons and undertakings other than credit institutions from carrying out the business of taking deposits or other repayable funds from the public, that these provisions were governed by general and criminal norms. The law provisions making up the exception thus satisfied the second Engel-criterion and first Öztürk-criterion, wherefore any punitive and deterrent sanctions imposed for these violations would make the offender charged with a criminal offence without any adherence to the third Engel-criterion. This conclusion were carried over to Chapter 7 as a starting point for the assessment in that Chapter.

In Chapter 7 on "EU Financial Sanction Regimes III – The EU Financial Sanctions – Assessment III," by reference to Assessment III, we then proceeded with the Engel-test and its methodologies (1) and (2) and assessed the EU financial sanctions and other legal powers on the basis of (ii) the constitutional conception of sanctions, i.e. the legal definition above, and the conclusions found in Chapter 3 with respect to the other types of legal powers. Hence, the assessment was carried out by the application of the second Öztürk-criterion under the second Engel-criterion, and the third Engel-criterion. We arrived at the following main conclusions:

First, the legal categories of 'supervisory powers', 'supervisory measures' and 'early intervention measures' mainly provided for reparatory sanctions and precautionary powers. However, the temporary intervention powers provided in Articles 39-42 MiFIR with respects to products, activity and practice and the early intervention measures provided in Articles 27-

28 BRRD qualifies as precautionary powers, because they allowed the authorities to act and intervene on a precautionary basis in order to protect the orderly functioning and integrity of financial markets or the safety and soundness of credit institutions and the stability of the financial system. For similar preventive and precautionary purposes, when the ECB and NCA in joint procedures under the SSM applies the withdrawal-power, the withdrawal-power qualifies as a precautionary measure, except when the withdrawal-power has been imposed for the violations of disciplinary laws under EU financial law pursuant to Article 18(f) CRD. In the latter situations, the withdrawal-power qualifies as a non-pecuniary sanction (see below).

Second, although the ECB sanction regime qualified as a disciplinary sanction regime with the availability of disciplinary fines, it was concluded on the basis of the third Engel-criterion that the maximum severity of the ECB's disciplinary fines re-classified as criminal fines, which would make the legal persons charged with a criminal offence. The conclusion was supported by the a number of reasons, in particular because the maximum fines were almost equally severe as the maximum fines provided under MAR for violations against market abuse, but also equally severe as the maximum fines provided under EU competition law.

Third, the same conclusion was also argued for the NFSRs with respect to their disciplinary sanction regimes and the sanctions made available on both natural persons and legal persons. All the sanctions made available under the NFSRs against natural and legal persons are almost fully identical to sanctions made available in MAR for market abuse and they are almost equally severe as the sanctions for market abuse. Therefore, it was argued that the NFSRs re-classifies as criminal sanction regimes, which will make the natural or legal persons charged with a criminal offence even for the violations of law provisions that are governed by disciplinary norms. In respect of legal persons, the conclusion was supported by the Dubus case, and for natural persons it was supported by Grande Stevens case, because EU financial law provides for such severe fines against natural persons that they go very far beyond the indicative level of disciplinary fines of EUR 43,750. In addition, by the availability of more than one sanctions for one violation, the natural and legal persons also risks the imposition of more than one sanction for one violation committed depending on the sanctioning and sentencing principles applied by the different authorities. By the three general requirements to sanctions, it was argued that the EU financial law implies, but also allows for the imposition of more than one sanction for one violation, just like in the Grande Stevens case.

Fourth, perhaps the most important results followed from the assessments of certain of the non-pecuniary sanctions available on legal persons. In the AMLD-CRIM and MAD-CRIM

frameworks a number of non-pecuniary criminal sanctions are allowed to be imposed against legal persons for the commission of market abuse violations, including a temporary (1)(i) or permanent (2)(i) disqualification from the practice of commercial activities, and (2)(ii) a judicial winding-up order. The EU legislators thus considers these sanctions to qualify and classify as criminal sanctions. For the exact same types of violations against market abuse provided in MAR, a natural and legal person can be imposed: (1)(ii) a temporary prohibition on the exercised of professional activity, which MAR categorises as a supervisory power (Article 23(2)(l)); and, in addition, an investment firm can also be imposed: (1)(iii) a suspension of the authorisation as an investment firm, which MAR categorises as an administrative sanction or measure (Article 30(2)(d)); and (2)(iii) a withdrawal of the authorisation as an investment firm, which MAR also categorises as an administrative sanction or measure (Article 30(2)(d)). Chapter 7 concluded that for the same types of violations almost identical consequences follows from the imposition of temporary versions of: (1)(i)-(iii). Chapter 7 concluded similarly for: (2)(i)-(iii). The legal position of the withdrawal-power (2)(iii) was almost fully identical to the permanent disqualification (2)(i) or the judicial-winding up order (2)(ii), depending on whether the withdrawal-power directly led to liquidation. Just like under the third point, it was therefore concluded that all these sanction also classifies as standalone non-pecuniary criminal sanctions on legal persons, *at least* when they are imposed for the same types of violations.

In addition, we finally argued that the judicial winding-up of a legal person is identical to a liquidation order of a legal person. We concluded that this is the most severe of all sanctions that any legal person can be imposed, because it may deprive the legal person of its entire existence, which is *equivalent* to a deprivation of its entire life, liberty, property, and civil rights. When fines and confiscation orders qualify and classify as criminal sanctions because they result in a deprivation of property, then so much more is at stake when a legal person are subject to all four types of deprivations. The more general conclusion that follows therefrom is that an withdrawal of an authorisation, when it as a direct legal effect leads to the liquidation of a legal person, then irrespective of whether the withdrawal-power has been imposed for the violation of laws governed by disciplinary or criminal norms, not only classifies but also qualifies as a criminal sanction. In these situations it is not the withdrawal-power that is actually imposed or at stake for the legal person but the liquidation order, which is identical to the judicial winding-up order that the EU legislators have placed among the non-pecuniary criminal sanctions in the AMLD-CRIM- and MAD-CRIM-frameworks. This was the legal situation

within the Versobank-case.[2325] At the *national level*, under the NFSR, Versobank was liquidated as a direct legal effect of national laws implementing and *enforcing* EU law, and the ECB's withdrawal of Versobank's authorisation as a credit institution under the SSM joint procedures. Therefore, Versobank was for its violations of disciplinary laws and a legal basis in Article 18(f) CRD subject to the most severe of all criminal sanctions on legal persons.

3. Research Question 3

By the third Research Question we asked: *RQ-(III) – "How should the three legal concepts and requirements for effective, proportionate, and dissuasive sanctions be defined?"* – The answer to the third Research Question was given in Chapter 6.

Just as the international framework on financial sanctions did not provide for any legal definitions on the three concepts and requirements for effective, proportionate, and dissuasive sanctions, we found that EU financial law also did not provide for any general legal definitions with the exception of the proportionality concept. Therefore, Chapter 6 discussed the nature of the concept and requirements on the basis of the sources that have formed part of this Thesis, and with a primary view towards EU competition law laid down three new legal definitions. In respect of effectiveness concepts (I), the result was:

> (I)(a) Reparatory sanctions are effective, when they are capable at compelling and restoring compliance with the laws including to terminate any violation thereof.
>
> (I)(b) Punitive sanctions are effective, when they are capable of being enforced by enforcement authorities in the legal justice system.

The distinction between reparatory (a) and punitive sanctions (b) in respect of effectiveness was necessary in light of the constitutional conception of sanctions, because the nature and purpose of reparatory and punitive sanctions are not identical.

The effectiveness of reparatory sanctions requires that the chosen remedial and corrective measures are capable to ensure or restore compliance and terminate violations, including, if necessary, to enforce the reparatory sanctions through the legal justice system (implied). In contrast to punitive sanctions, reparatory sanctions can be taken on voluntarily by a natural and legal person, whereby they lose their character of being sanctions, and instead, the measures

[2325] Joined Cases T-351/18 and T-584/18 – Ukrselhosprom and Versobank v ECB.

applied rather becomes voluntary remedies or correctives applied for law breaking. In this way, the legal restoration has been obtained, and the violation terminated.

Because any punitive sanction essentially is a deprivation of a life, liberty, property or civil right, they cannot, contrary to reparatory sanctions, be taken on a voluntary basis by an offender and therefore requires an imposition. This is not altered by the fact that the offender more or less willingly may give up her or his right. Nevertheless, against any unwilling offender, an effective deprivation thus requires the possibility to enforce a deprivation in the legal justice system against an offender that is unwilling to give up on her or his rights. Otherwise no punishment will be imposed and there will be no foundation for punitive sanctions to be dissuasive and they will function as empty threats of punishment without any real execution. This would also be contrary to both the retribution and deterrence theories.

Because the reparatory sanctions are not punitive sanctions, the dissuasiveness requirement only applies to punitive sanctions. Therefore, it was only necessary to provide for one legal definition of the dissuasiveness requirement (II):

> (II) Sanctions are dissuasive, when they are punitive and capable to deter the offender(s) from repeating the violation(s) and any other potential offender from committing future violation(s). For administrative pecuniary sanctions and fines to be dissuasive it is also required that they offset any benefit derived from the violation as well as punish beyond the level of restoration.

The dissuasiveness requirement applies to criminal sanctions and administrative sanctions, including those non-pecuniary sanctions identified as punitive and deterrent sanctions according to the Engel-test and the constitutional conception of sanctions. The reason is that all these sanctions results in a deprivation of a right.

For punitive pecuniary sanctions classified as criminal or administrative sanctions, the second sentence also applies. This entails that a reparatory pecuniary sanctions do not comply with the dissuasiveness requirement, just as it is not required to satisfy the dissuasiveness requirement. Disgorgement qualified as such a reparatory pecuniary sanction, just like a confiscation order will also qualify a reparatory pecuniary sanction if it only forfeits the proceeds obtained from the commission of violation (forfeiture). Hence, the mere repayments and removals of pecuniary advantages are not punitive sanctions, because a pecuniary sanction has to go beyond the level of legal restoration in order to be punitive and dissuasive. For a punitive sanction to be dissuasive it is required to take into account individual and general deterrence, so that the sanction aim to deter the specific offender from repeating the violation(s) and any other potential offender from committing future violation(s). Such a view imply an increase in

the severity of the sanctions to be imposed and a recourse towards those sanctions that will serve as an effective deterrent in order to be dissuasive.

For those sanctions that the application of the Engel-test and the constitutional conception of sanctions qualified as criminal or disciplinary non-pecuniary sanctions, it also required that these sanctions should be dissuasive. Of criminal sanctions, it was, for instance, imprisonment to be imposed on natural persons, and temporary disqualification from practice of commercial activities. Of administrative sanctions, it was, for instance, a temporary ban on natural person for discharging managerial responsibilities, and for legal persons a withdrawal and/or suspension of the authorisation. Their punitive nature is a result of a deprivation of a right. Accordingly, any prohibition to carry out such activities are punitive, and the severity and dissuasiveness increases with the length of the prohibition. The nature and seriousness ('gravity') of the violation will determine how severe and dissuasive the non-pecuniary sanction should be, together with any of the other sanctioning factors. This is not only a logical requirement following from the Engel-test and the constitutional conception of sanctions, but also one that follows from EU financial law in general as all criminal and administrative sanctions must satisfy the dissuasiveness requirement, including the non-pecuniary.

The proportionality concept, and the proportionality standard and requirement it provides for was the most controversial issue, because in a number of cases where the ECB has been one of parties before the CJEU, the CJEU has laid down the same identical concept and standard of proportionality, irrespective of whether the ECB had applied its supervisory powers, the withdrawal-power, or power to impose administrative pecuniary penalties:

> "must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

The controversial element was the obligation *'to apply the least onerous measure'*, when the legal framework provides for a choice between several appropriate measures. This is the legal position under EU financial law. However, because the purposes of reparatory and punitive sanctions not are the same, and that a punitive sanction cannot both be required to be the least onerous one and a dissuasive sanction in terms of individual and general deterrence, at the same time, we compared to EU competition law and found it necessary to provide for two different proportionality concepts and standards depending on whether the sanctioning authorities imposed reparatory or punitive sanctions:

> (III)(a) Reparatory sanctions are proportionate, when the burdens imposed do not go beyond the level of legal restoration, including the purposes (i) to ensure and restore compliance with the rules violations; (ii) the restoration of the damages caused by the violation; and (iii) to bring a violation to an end. Where there is a choice between several appropriate remedial measures, recourse must be had to the least onerous of the remedial measures.
>
> (III)(b) Punitive sanctions are proportionate, when they adequately reflect the gravity of the violation and do not go beyond what is necessary for the objectives pursued by taking into account the nature, purposes and severity of the sanction(s) and the purposes and importance of the rules violated.

Because reparatory sanctions should not amount to a punishment, and qualify as a punitive sanctions, the definition in (III)(a) pursues this fundamental purpose. However, it also goes further in acknowledging that reparatory sanctions fundamentally can be very intrusive and impose very heavy financial burdens. Therefore, it also provides for a proportionality-standard that requires minimum reparation rather than maximum reparation and optimisation. Because the proportionality-standard also provides for an appropriateness-requirement in order to choose the appropriate remedial measure, the proportionality-standard are governed by the notion of proportionality in kind *("poetic exactness")* in order to repair the nature and seriousness of the specific violations committed or any other problem, deficiency, or weakness in the financial or legal position. Therefore, reparatory sanctions by the effectiveness and proportionality requirements provided ensures the basic level of orderly justice.

Because punitive sanctions are allowed to go beyond the level of legal restoration, and that their severity and dissuasiveness also must adequately reflect the gravity of the specific violation(s) committed, including the nature, seriousness, and severity of the specific violation(s), the proportionality-standard for punitive sanctions are governed by the notion of proportionality in degree *("poetic justice")*, and therefore essentially a requirement that considers whether the severity of the sanctions is *excessive*. Hence, it works by way of imposing a restriction on the severity of the punishment. When more than one sanction is imposed for one or more violations, proportionality in degree increasingly becomes the appropriate proportionality-standard in order to ensure overall proportionality in the sanction-package.

Furthermore, it was argued that by the three general requirements for sanctions of effectiveness, proportionality and dissuasiveness, it was also implied that the nature, seriousness and severity of the specific violation(s) committed may deemed it necessary and appropriate to imposed more than one sanction in order to restore compliance and punish the offender for their level of responsibility involved in the commission of the violation(s), thereby also taking into account their level of culpability, intent or negligence. Hence, proportionality in degree

again become the governing standard to ensure overall proportionality in the different inter-play-combinations between reparatory and punitive sanctions.

4. Research Question 4

By the fourth and final Research Question we asked: *RQ-(IV) – "May EU sanctions law with respect to sanctioning in the financial sectors contribute with any standards and principles on sanctions to the international framework on financial sanctions?"* – The answers to the fourth Research Question was given in Chapter 5 on "EU Financial Sanction Regimes I – The Concept, and Its Principles and Structures – Assessment I." By reference to Assessment I, Section II of Chapter 5 allowed us to conclude the following:

In *Chapter 4* we concluded very generally with respect to the international standards and principles on sanctioning that the international framework on sanctions did not have a compelling answer to what defines a legal power as a sanction and how sanctions should be applied. On the other hand, the standards and principles pointed to a number of notions within the topics that where discussed in Chapter 2 and 3. Sanctions were those legal powers that was imposed on natural or legal persons by a legal authority for their violations of law provisions or supervisory decisions addressed to them. It was also concluded that the purposes of legal powers and sanctions that had to be available to the sanctioning authorities where either preventive and restorative, or punitive. The preventive and restorative purposes were mostly associated with remedies and corrective powers, while the punitive purpose with sanctions. The international framework also generally required that sanctions should be effective, proportionate and dissuasive, despite the BCP framework did not contain any such express requirements. However, there were no legal definitions of the three general requirements to sanctions except some rather broad and open-ended considerations. The BCP framework nevertheless pointed out that remedies and corrective powers where characterised as legal powers that did not require an imposition, because they can be adopted by the banks themselves on a voluntary basis in order to ensure or restore compliance with the laws. This was a distinguishing feature in the comparison to sanctions, as sanctions cannot be adopted on a voluntary basis by the banks, and thus required an imposition by a sanctioning authority. Hence, as was argued by Aquinas in Chapter 2, punitive sanctions must be something against the will of the offender.

With the open-ended conclusions in Chapter 4, we initiated *Chapter 5* and in Section II we conducted an assessment of whether the constitutional conception of sanctions defined

in Chapter 3 and the standards and principles that followed therefrom could contribute with any standards and principles to and/or fill out any missing gap in the international framework on financial sanctions. From an EU sanctions law-perspective this was possible because the conclusions in Chapter 3 were derived on the basis of large comparative material on law and sanctions found within different areas of law that gave the conclusions a general character, in particular in two aspects: (i) the conclusions were not restricted to the scope of any specific areas of law, but went across all areas of law, including criminal and administrative laws and different areas within administrative and other civil laws such as financial laws; and (ii) the conclusions were not restricted to the laws of one EU Member State, but went across the laws of all EU Member States, including those non-EU Member States that are parties to the ECHR. In addition, the EU commission had in the EU Communication on sanction regimes adopted after the global financial crisis taken policy and legislative actions on the basis of a comprehensive and comparative review of the pre-crisis national financial sanction regimes of the EU Member States. It was argued that the nature of these policy and legislative actions not only governed the legislative design of the new post-crisis legal framework on financial sanctions, but also resembled what the international framework would identify as standards and principles. Because the international framework on financial sanctions and the EU communication aimed to provide for effective, proportionate and dissuasive financial sanctions, the constitutional conception of sanctions and the principles that followed therefrom together with the standards and principles that derived from the EU commission's policy and legislative actions aimed to fill out any missing gaps in the international framework on financial sanctions, where appropriate. The assessment resulted in 'conceptual minimum requirements for effective, proportionate, and dissuasive sanctions'. The main standards and principles were:

First, the conclusions from comparative material published in the reports from the previous sectoral Committees (CEBS and CESR) were consistent with the constitutional conception of sanctions, in particular with respect to the distinction between reparatory and punitive sanctions. The concept of reparatory and punitive sanctions were also found consistent with the terminology and concepts used in the international standards and principles on sanctioning.

Second, as consequence of the first point we therefore argued that any appropriate toolbox of sanctions requires the availability of a number of different types of reparatory and punitive sanctions. The appropriateness-standard for sanctions required that the sanctioning authorities should be able to imposed sanctions that were optimal in terms of effectiveness, proportionality, and dissuasiveness. Accordingly, the appropriateness-standard also required that

the sanctions should reflect (i) the nature and seriousness of the specific violations; and (ii) that the sanction subjects are both natural and legal persons. We therefore concluded that the BCP framework only provided for reparatory sanctions and that it lacked standards and principles on punitive sanctions, just as it contained no express requirements for sanctions to be effective, proportionate and dissuasive. The FATF framework lacked standards and principles on reparatory sanctions for the violations of preventive rules, but less on punitive sanctions. The IOSCO framework required the availability of both reparatory and punitive sanctions, but lacked clear standards and principles on their appropriateness, including how these sanctions should be appropriately applied in practice. Finally, we concluded generally that the BCP, IOSCO, and FATF frameworks did not specify which specific violations should be targeted with reparatory and punitive sanctions, including criminal sanctions (IOSCO).

Third, we argued that the appropriateness-standard for financial sanctions also requires that: (i) appropriate sanctions are available to be imposed against both natural and legal persons; and (ii) liability for the violation committed to be the relevant criterion that determines the appropriate sanction subject, including in contractual relationships where the liability to sanctions should fluctuate with the natural or legal person that benefitted from the violation committed, just as it should be possible to establish jointly liability. We therefore concluded that the international framework on financial sanctions did require sanctions to be available against natural and legal persons, but that it did not determine which sanctions that are appropriate for which violations. Neither the BCP, IOSCO nor FATF satisfies the second (ii).

Fourth, we argued that even when the sanction regimes do not distinguishes between criminal and administrative sanctions, the principle that governs the availability of criminal sanctions is that these are the most severe of the punitive sanctions intended to be imposed on natural or legal persons for the most serious and reckless of violations. Accordingly, the most serious and reckless of violations should be targeted with the most severe of the punitive sanctions, wherefore this principle required that the most severe sanctions and serious violations are matched in any legal framework and can be identified. We concluded that the international framework on financial sanctions already had singled-out money laundering and financing terrorism as criminal offences, which should be targeted with the power to confiscate property and other criminal sanctions. Market abuse was also suggested to require the availability of criminal sanctions. Otherwise, the international framework was mostly silent on which criminal sanctions that were deemed appropriate, wherefore imprisonment was suggested for natural persons, and that the power to withdraw or revoke a licence or authorisation held by legal

persons were suggested to be reserved for the most serious violations. Finally, it was require that criminal fines should be more severe than administrative fines.

Fifth, we argued that one of the most underestimated problems was the appropriate legal conceptualisation of fines. We argued that fines needs to be punitive and deterrent and therefore to go beyond the level of legal restoration. We also argued that the severity of the fines must be defined by reference to some legal benchmark or structural standard to satisfy the requirement of dissuasiveness, in particular for large rational cross-border financial institutions. We concluded that the BCP framework not even required that fines should be made available in the sanction regimes, and that the international framework on financial sanctions in general did not provide for any legal conceptualisation of fines.

Sixth, for sanctions to be effective, proportionate and dissuasive in their practical application, we argued that the sanctioning authorities must adhere to certain sanctioning factors, including aggravating and mitigating circumstances. On the basis of the previous principles, we suggested that certain sanctioning factors were deemed appropriate: (i) the seriousness of the violation; (ii) the pecuniary benefits derived from the violation; and (iii) the financial strength of the natural or legal person, for instance, by taking into account the annual income of natural persons and the annual turnover of the legal persons for setting the appropriate severity level of fines to be imposed against legal and natural persons. We concluded that the international framework on financial sanctions did not provide for any sanctioning factors, and that it does not satisfy these standards and principles.

Seventh, and finally we argued that there is confluence between the stigmatising effect legal sanctions, the deterrence theory, the dissuasiveness requirement for sanctions, the proper functioning of the financial markets, and the aim at creating a level playing field and to protect investors. Therefore, there are also strong arguments for a general requirement for the publication of sanctions, whereby the publication discloses the identity of the offender, the nature and character of the violation committed and the sanctions imposed for the violation committed. We concluded that the international framework on financial sanctions did not provide for any rules on the publication of sanctions, and does not satisfy this principle.

Here we may nevertheless add that the three legal definitions of the concepts and requirements for sanctions of effectiveness, proportionality, and dissuasiveness given above, can be applied or drawn upon in order to construct three general definitions to be provided in the international framework of financial sanctions.

5. Other Results and Un-Addressed Questions

Because the discussions in Chapter 2 required us to distinguish between what is a punishment and what was argued to be an *'institutional concept of punishment'*; that Chapter 3 showed that the ECtHR adhered to whether a sanction regime contained criminal classification factors that would make the sanction regime in question resemble a *"regime of punishment'*; and Chapter 5 revealed that EU commission adopted and applied a notion of a *'sanction regime'*, which now also can be found in a number of Recitals within the legislative acts of EU financial law, Chapter 5 argued for a more consistent, coherent and general concept of a legal sanction regime. As the discussion in Chapter 5 also revealed that the notion adopted and applied by the EU commission not was consistent with how the notion is operating in EU financial law, we found it necessary to provide for a general definition of the concept of a *'sanction regime'*:

> "The legal framework covering sanctions for the violations of laws under which one or more sanctioning authorities are responsible for the imposition and enforcement of sanctions."

From this definition, five constitutive elements and pillars for the legal concept of a sanction regime followed: (A) 'legal framework(s)', which observes the rule of law; (B) 'violations or violation-regimes', which allows for the imposition of one or more specific types of sanctions; (C) 'sanctions', which satisfies the conceptual minimum requirements for effective, proportionate, and dissuasive sanctions; (D) one or more 'sanctioning authority', which nevertheless may depend upon the features of the legal system of a country or region and its institutionalisation of its legal system of criminal justice; and (E) appropriate rules on the 'enforcement of sanctions'. The pillars was then applied to the post-crisis legal framework on financial sanctions, and they structured the discussions in Chapter 6 and 7. We argued that this concept was mostly a theoretical concept, but that it nevertheless contained nation-building aspects in order to promoted for further integration between the financial and legal systems. Otherwise, we argued that the fifth pillar (E) lacked conceptual clarity and certainty, and that future research and developments may help to create principles on enforcement (of sanctions).

In Chapter 6 we also discussed the rules on the publication of sanction, primarily for the purpose of the Engel-test. The discussion thus carried an internal restriction and the topic cannot be viewed as fully exhausted. Nevertheless, the discussion pointed out that the objectives of the rules were in line with the deterrence theory and specific and general deterrence, wherefore they ensured that the sanctions would have a stigmatising and deterrent effect on the specific offender and potential offenders, but also that they ensured the transparency in the

financial markets, including the smooth and orderly functioning of the financial markets. We argued that issuers of financial instruments therefore are subject to, at least, three types of sanctions: (i) the legal sanctions imposed for the violations of financial laws by the sanctioning authorities (causing stigmatisation); (ii) the reputational losses due to the publication of the legal sanctions imposed (reputational sanctions causing loss in market share); and (iii) decreases in market value due to the pricing mechanism (market sanctions). On this background, it was argued and concluded that neither the ECtHR nor the CJEU have had the possibility to assess how the rules on the publication of sanctions would influence the Engel-test, but that they most likely would consider the publication of sanctions as a new criminal classification factor additional to those already discussed in Chapter 3 that would be relevant for the severity assessment under the third Engel-criterion, in particular, as the legal position under EU financial law is that only administrative sanctions and not criminal sanctions are required to be published. The rules on the publication of sanctions may therefore also be an aspect of law and sanctions that will deserve more attention in the future for the purposes of the Engel-test.

II. JUSTICE

To do full justice to the subject matters discussed in this Thesis, a last observance needs to ask what *orderly* justice generally requires in terms of financial law? – Thomas Aquinas pointed out that there are two species of justice, 'distributive justice' and 'commutative justice'. Both species of justice are in line with the objectives of the IMF and World Bank, the rule of law and the two notions governs the two species of justice found within the FSAP.

It was once said that the free markets provides for the most efficient allocation of limited resources, and that a market participant in pursuit for its own gain as well "as in many other cases, [is] led by an invisible hand to promote an end which was no part of [its] intention."[2326][2327] Therefore, the invisible hand has also been said to have an ""order-preserving" force,"[2328] a force which can bring about "effective market discipline," including "appropriate financial incentives to reward well managed institution,"[2329] and other market participants.

It was also once said that your eyesight is useless if your insight is blind. One of the most fundamental insights to the nature of the topics discussed in this Thesis has been the

[2326] Adam Smith, *Wealth of Nations* (Wordsworth Editions 2013) 445.
[2327] ibid 19 and 445.
[2328] Rothschild E, 'Adam Smith and the Invisible Hand' (1994). The American Economic Review, Volume 84, No. 2, p. 319.
[2329] 2012 BCP, para. 53, p. 16.

writings of Thomas Aquinas. With his notion of commutative justice also comes Aquinas' notion of 'restitution'. In its essence it carries a very basic idea of which it is necessary to distinguish between compensation and acts of recompense on the one side and punishment on the other.[2330] The idea governs the ECtHR's view in its case-law, hence also the constitutional conception of sanctions, but it also governs the international standards and principles on sanctioning and a number of views expressed in IOSCO's publication on "Credible Deterrence In The Enforcement of Securities Regulation."[2331] Even more, the same idea is now also governing the rules on the publication of sanction as it is only the punitive sanctions, not the reparatory ones, that are intended to be published. However, the view is not only a very fundamental one, but also a much older one. In the Old Testament, it is written in Numbers:

> "[5] And the Lord spake unto Moses, saying,
>
> [6] Speak unto the children of Israel, When a man or woman shall commit any sin that men commit, to do a trespass against the Lord, and that person be guilty;
>
> [7] Then they shall confess their sin which they have done: and he shall recompense his trespass with the *principal* thereof, and add unto it the *fifth part* thereof, and give it unto him against whom he hath trespassed."[2332]

Therefore, by bringing this governing notion of '*sanctions'* together with the market *'forces'*, we may in the spirit of the Engel-test, first, read and interpret the black letters on the *wall*, in order to, second, *look behind the appearances*, and then proclaim to the king*s*:

– MENE, MENE, TEKEL, UPHAR-SIN.[2333]

[2330] Chapter 2, Section II(1)(A)(I).
[2331] IOSCO CDESR, paras. 86 and 92-94, pp. 35-37.
[2332] Numbers 5: 5-7. Italics added.
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13/08/2019 – Piraeus Europe AG.
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16/07/2018 – Crédit Agricole Corporate and Investment Bank.
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14/03/2018 – Banco de Sabadell, S.A.
24/08/2017 – Banco Popolare di Vicenza S.p.A.
13/07/2017 – Permanent tsb Group Holdings Plc.

National Financial Sanction Regimes:

14/11/2022 – Supervised Entity
30/11/2021 – The Governor and Company of the Bank of Ireland.
18/09/2020 – Supervised Entity.
03/03/2020 – Ulster Bank Ireland Designated Activity Company.
21/01/2020 – Coöperatieve Rabobank U.A.
23/10/2019 – Natural person related to a supervised entity.
21/05/2019 – RBC Investor Services Bank S.A.
03/10/2018 – Citibank Europe plc.
22/12/2017 – 29 natural persons related to Veneto Banca S.p.A.
25/05/2017 – 26 natural persons related to Banca Popolare di Vicenza.
09/11/2016 – Caceis Bank Deutschland GMBH.
06/10/2016 – KBC Bank Ireland Plc.

D. European Securities and Market Authority

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