THE INTERACTION BETWEEN CRIMINAL LAW AND PROFESSIONAL REGULATORY PROCEEDINGS

Remy Farrell SC

PRDBA Annual Conference 24th May, 2016: Professional Regulation in the Financial Sector

INTRODUCTION

Under domestic Irish law there is little difficulty distinguishing between proceedings that are criminal and those that are not. In Melling v. Ó Mathghamhna[1] the indicia that are the hallmark of criminal proceedings were set out:

- the presence of a prosecutor;
- the allegation of an offence;
- the mode of trial;
- the imposition of a criminal sanction;

In that case the Supreme Court very roundly rejected the attempt by the State to impose what was manifestly a criminal sanction in the context of a criminal case. When one reads the judgement it is difficult to understand how the State came to make the argument it did.

The demarcation between what is criminal and what is a civil or administrative fine under our constitutional dispensation is a bright line distinction. Most obviously the

[1] [1962] I.R. 1

mode of trial distinguishes one from the other – in particular the existence of jury trial in the context of non-minor offences. Traditionally there has been very little difficulty in distinguishing between the criminal and the non-criminal, be it regulatory, administrative or disciplinary.

However, the position under Convention law and, increasingly relevant, EU law by way of the Charter of Fundamental Rights is much less clear. Under that dispensation the concept of what is criminal and what is not is somewhat more elusive and difficult to pin down. Whilst there are subtle distinctions between the approach adopted by the European Court of Human Rights and the European Court of Justice there has been a considerable convergence in recent years. This is largely as a result of the Charter which explicitly borrows from the Convention and the Strasbourg case law. The ECJ has unsurprisingly cited much of the case law from the ECtHR in its interpretation and application of the Charter which essentially mirrors the Convention. I don't propose to distinguish to any great extent between the approach of the ECJ or the ECtHR for the purpose of this paper given this recent convergence. Rather than distinguish between the Convention and the Charter and their respective courts I will simply refer to both under the heading of European law and courts.

The purpose of this paper is to look at the concept of a criminal charge under European law and consider whether disciplinary and regulatory proceedings might properly be regarded as criminal proceedings within those frameworks and what the consequences might be.

THE CONCEPT OF A "CRIMINAL CHARGE"

The first and perhaps most important point to grasp in relation to the concept of a "criminal charge" under European law is that it is wholly autonomous. In other words the manner in which the state characterizes the proceedings is not determinative of whether they are truly criminal or not. This is important in the context of the Irish constitutional dispensation.

Whilst Irish law very clearly delineates that which is criminal and, by implication and necessary exclusion, that which is not this is not in any sense determinative.

The leading case is still Engel –v- Netherlands[2]. In that case the ECtHR set out a number of different criteria to be taken account of in deciding whether or not a punishment was criminal in nature. These can be summarized as follows.

Firstly you consider how the sanction is categorized under domestic law, i.e. whether it is described as a criminal or administrative measure. This however is only a starting point and is given limited weight by the court.

In the case of Ozturk –v- Germany[3] the applicant had been charged and convicted of relatively minor road traffic offences which were punishable only by way of a fine.

[2] ECtHR (8th of June 1976).

Significantly the German Authorities had reclassified and redefined such offences so that they were no longer strictly speaking regarded as criminal offences. Under German Law a criminal offence (*Straftat)* attracted certain basic procedural rights that would have complied with Article 6 of the Convention whereas regulatory offences (*Ordnugswidrigkeit*) did not. The court took the view that whilst the classification of a particular type of offence as being criminal or non-criminal by the State in question was a matter of relevance and significance, the concept of what was in fact a criminal charge was entirely autonomous. In other words it was not open to a State simply to reclassify offending behaviour as being non-criminal for the purpose of avoiding the due process rights that otherwise would attach to it. The following extract from the judgement of the court demonstrates the rationale behind this proposition:

> *49. The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention.*
>
> *By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual (see, mutatis mutandis, the above-mentioned Engel and others judgment, ibid., p. 33, 80) as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions - which are numerous but of minor importance - of road traffic rules. The Convention is not opposed to the moves towards "decriminalisation" which are taking place - in extremely varied forms - in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.*
>
> *50. Having thus reaffirmed the "autonomy" of the notion of "criminal" as conceived of under Article 6 (art. 6), what the Court must determine is whether or not the "regulatory offence" committed by the applicant was a "criminal" one within the meaning of that Article (art. 6). For this purpose, the Court will rely on the criteria adopted in the above-mentioned Engel and others judgment (ibid., pp. 34-35, 82). The first*

[3] ECtHR (21st of February 1984)

> *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 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States.*

Secondly, the Court looks at the nature of the offence. This appears to be a more important criterion than the characterization of the sanction. The Court asks whether it is primarily compensatory in nature or is it inherently punitive. The ECtHR would seem to regard deterrence as being one of the indicia of a criminal punishment.

It also considers whether it is directed at a particular category of person or whether it applies to society at large. However, it might be noted that in Engel the sanctions in question related to military law which necessarily only applied to soldiers. Nonetheless the ECtHR considered the charges to be criminal in nature in principle at least.

A further point that should be made in this regard is that the consideration of the sanction or penalty generally arises in the context of a fine and/or disqualification or other ancillary consequence. As a general rule (to which Engel itself is an exception) the deprivation of liberty will be taken as an indicia of the criminal nature of the charge. Given the provisions of Article 38 of the Constitution this is unlikely to be much of an issue under Irish law as any sanction in the nature of deprivation of liberty will be regarded as arising from a criminal charge as a matter of definition.

Thirdly, the Court looks at the severity of the penalty. The more serious it is the more likely it is to be regarded as criminal in nature. If that is very substantial, this factor also contributes to the conclusion that it falls within the ambit of a criminal charge. However, the Court has tended to regard very minor penalties as also coming within the criminal sphere. In Ozturk the penalty was a very small financial fine. Nonetheless it was held to be a criminal charge. As such the criterion in relation to gravity is somewhat notional. In another case[4] a €3 sanction was also considered to be criminal in nature.

It should be apparent from the foregoing that the concept and definition of a criminal charge is potentially much broader than our traditional concept under domestic law. This immediately begs the question as to what other systems of sanctioning under Irish law might be regarded as criminal for the purposes of European law and the practical consequences of this.

In the next sections I will look at some of the types of sanctioning regime that the European Courts have considered to fall within the concept of a criminal charge and

[4] Ziliberberg (2005)

attempt to identify some of the domestic sanctioning regimes to which similar analyses might apply.

PART IIIC OF THE CENTRAL BANK ACT, 1942

The most obvious example of a sanctioning regime that probably falls to be considered as coming within the context of a criminal charge in Irish law is Part IIIC of the Central Bank Act, 1942.

The Administrative Sanctions Procedure under Part IIIC is a scheme of regulation applying to all Regulated Financial Service Providers (RFSPs) under the Act. It allows the Bank to enquire into whether a given RFSP or those concerned in the management of same have committed what is described as a suspected prescribed contravention (SPC).

An SPC might be contrary to a statutory provision, a statutory instrument, a European instrument or even a regulatory document. As such it is intended to be first and foremost a responsive regulatory tool.

Following an Inquiry, where a SPC has been shown to have been committed the Bank can impose one or more of the sanctions below:

- caution or reprimand
- direction to refund or withhold all or part of money charged or paid, or to be charged or paid, for the provision of financial service by a financial service provider
- a direction to pay the Central Bank a monetary penalty (not exceeding the greater of €10,000,000 or 10% of turnover where the financial service provider is a body corporate or an unincorporated body and not exceeding €1,000,000 where the financial service provider is a natural person and for persons concerned in the management of a financial service provider).
- disqualification of a person from being concerned in the management of a regulated financial service provider
- revocation or suspension of an authorisation
- direction to the regulated financial service provider to cease committing the contravention
- direction to pay the Central Bank all or part of its costs incurred by the Central Bank in the investigation of the matter and the holding an Inquiry.

Whilst sanctions such as disqualification or revocation of a licence might well be regarded as inherently regulatory the power to impose sanctions on RFSPs and those concerned in the management of same is very significant.

The European Courts have had little difficulty in regarded similar schemes as giving rise to criminal charges in the European law sense. In Menarini Diagnostics S.r.l. v. Italy[5] the ECtHR considered that the imposition by the AGCM (an independent regulatory body in charge of competition) of a fine of six million euros on a company for anti-competitive conduct amounted to a criminal charge.

A similar conclusion was reached by the Hong Kong Courts in Koon Wing Yee v. Inisder Dealing Tribunal and Another[6]. The judgment contains a useful discussion of both Strasbourg and UK authorities on the point. In addition Hong Kong Court of Final Appeal considered that the fact that the proceedings were considered to be regulatory was somewhat beside the point and was not in any sense dispositive of them also being criminal:

> *60. To describe SIDO as "regulatory" is an imprecise use of that expression. SIDO is not regulatory in the sense that a licensing scheme or a comprehensive road traffic statute (containing detailed licensing and registration provisions) is regulatory. To say that SIDO regulates insider dealing is to misdescribe it and to disguise or colour its true nature and purpose which is, in substance, to stamp out insider dealing by punishing those who engage in it. Insider dealing is certainly not a regulatory offence.*
>
> *61. This comment, however, does not dispose entirely of the point which the appellant seeks to make by suggesting that the legislation is regulatory. The appellant draws attention to the desirability of allowing governments and legislatures some degree of freedom in selecting the means by which an "insidious mischief", such as insider dealing is to be dealt with. As the materials to which reference has already been made so clearly show, there is a real question whether civil or criminal proceedings are the most effective means of combating the mischief. This, so the argument runs, is a persuasive ground for recognizing that arts 10 and 11 of the BOR should not be so broadly construed as to override the legislative classification of the proceedings as civil and, in particular, to preclude the decriminalization of offences.*
>
> *62. Granted the need for the courts to give weight to the decisions of a legislature and the need for a fair balance between the general interest of the community and the personal rights of the individual[31], there are two answers to this argument. First, it seeks to recognize the force of the dissenting opinions in Ozturk v. Germany[32] that decriminalization, at least of minor offences, may not bring a case within the meaning of "determination*

[5] ECtHR (2011)

[6] [2008] HKCFA 21; [2008] 3 HKLRD 372; (2008) 11 HKCFAR 170; FACV 19/2007 (18 March 2008)

> *of a criminal charge" in art.6 of the Convention and that regulatory offences lie outside that conception. As Potter LJ pointed out in Han[33], the Strasbourg Court has disregarded these dissenting opinions and I am not persuaded that this Court should adopt them, even if some of the comments in the judgment of the majority in Ozturk may require qualification by reason of later decisions of the Strasbourg Court. It is enough that the domestic legislative classification is an important consideration which will be given appropriate weight by the courts. It has not been demonstrated that the Court of Appeal misunderstood or misapplied this principle by giving inadequate weight to the judgment of the legislature.*
>
> *63. Secondly, the argument seeks to reduce the protection given by arts 10 and 11 of the BOR by subjecting the protection of human rights to an ill – defined area of legislative discretionary judgment. To interpret arts 10 and 11 in this way would run counter to the generous interpretation traditionally given to provisions protecting human rights and fundamental freedoms and would weaken the valuable protection given by arts 10 and 11 to individuals who are charged with serious misconduct which may result in punishment. There is no justification for weakening this valuable protection in order to expand the area in which the important domestic legislative classification of provisions is recognized by the courts as having more weight than, or equal weight with, factors (2) and (3). To do so would disturb the fine balance between the interests of the community and the personal rights of the individual, which has been carefully achieved by the courts, and tilt the balance significantly against the rights of the individual.*

As such it can credibly be argued that the fact that a given scheme is regulatory does not greatly inform the question of whether or not it is also criminal in the European law sense.

By way of counterpoint it might be noted that a different view was reached in the English case of Fleurose v. Securities & Futures Authority Ltd. & Anor[7]. This case concerned market manipulation. The trader in question appeared before the Disciplinary Appeals Tribunal of the Securities and Futures Authority and was suspended from acting as a registered person for 2 years and ordered to pay £175,000 towards to the costs of the disciplinary proceedings. It will be seen that the sanctions regime under consideration here was very similar to that contained in Part IIIC. The Court of Appeal considered *Engel* and some of the other Strasbourg judgments that had been handed down at that point. However, there was little enough by way of an attempt to apply the Engel criteria to the facts of the case.

[7] [2001] EWCA Civ 2015

Rather the following was the conclusion on the question of whether or not the imposition of the penalty was to be considered a criminal charge for the purpose of the Human Rights Act, 1998:

> *11. There are no English decisions in point, but there was a decision of the Cour de Cassation, namely Commission des Operations de Bourse v M Jean-Marc Oury (5.2.1999) in which the Court quashed a penalty of FF 500,000 imposed on M Oury. Mr Speaight submitted that one of the matters upon which the Court there relied was a breach of article 6(2) of the Convention and that therefore the Court must have been of the view that the proceedings involved the determination of a criminal offence. The submission was however hampered by the fact that the French and English material placed before this court were in an incomplete and unsatisfactory state and that the decision of the Cour de Cassation appears to have had a number of grounds and that whatever view they took of the Convention was not crucial to their decision. Since reserving judgment I have taken the opportunity of looking at the "conclusions" of Advocate General Lafortune, a note of the M. Metivet, the rapporteur and the Court's formal decision in No 436 on the 5th February 1999. Even with the help of these it is not clear to what extent the COB's powers are the same as those of the DAT or whether the penal nature of the COB's powers was in issue before the Cour de Cassation or was the basis of its decisions. In those circumstances we have not thought it right to let that decision influence us in this judgment.*
>
> *12. Mr. Speaight submitted that there was no exact parallel between the members of the financial services industry and members of the medical profession or of legal bodies such as the Law Society or the Bar. He submitted that the former required no examination qualifications whereas the latter did. He submitted that in a free society there was a basic right to trade in the market place provided one was prepared to be regulated, whereas there was no such basic right to be a doctor or a lawyer. He submitted, without any supporting evidence, that there were substantially more people in the financial sector than in the legal or medical sectors. He submitted that, although in theory an individual who wished to trade in the financial sector was acting voluntarily in deciding to submit himself to the SFA's code, in practice he had no option if he wished to trade. He relied on these factors in combination to support his submission that the regulatory code was in practice closer to the criminal code of general application than the codes under consideration in the case law. He relied on the possibility of an unlimited fine which could be imposed for a breach of the Statement of Principles.*
>
> *13. We accept of course that to be debarred from gaining one's livelihood in an activity in which one has done so for much of one's life is a serious matter. However, applying the principles recently set out in Han & Yau quoted above we are not persuaded by any of these submissions that the proceedings*

instituted by the SFA against M Fleurose are properly to be regarded as involving a criminal charge or offence.

However, the precedential value of this case may be somewhat limited given the clear trend apparent from the more recent European cases. It is fair to say that the substantial balance of authority[8] is in favour of a scheme such as that contemplated by Part IIIC being regarded as criminal for the purposes of Article 6.

TAX SURCHARGES AND PENALTIES

Part 47 of the Taxes Consolidation Act, 1997 makes elaborate provision in relation to the imposition of surcharges and penalties. For example under Section 1053 where a return is filed negligently, the penalty is €125 plus the difference between the correct liability and the tax paid. More pertinently where a return is filed fraudulently, the penalty is €125 plus twice the difference between the correct liability and the tax paid – Section 1054.

In the last number of years the European Court of Human Rights has considered similar schemes of surcharge and penalty to be tantamount to criminal liability and thereby attracting the protection of Article 6 of the Convention.

In Pakozdi v. Hungary[9] the ECtHR went so far as to consider that the imposition of a tax surcharge and penalty imposed on an administrative basis amounted to a criminal charge:

19. As regards the domestic classification of surcharges, the Court notes that they there are not applied under criminal-law provisions but as part of the fiscal regime. Furthermore, under the Hungarian legal system the surcharges are not characterised as criminal penalties but rather as administrative sanctions, not entailing a criminal record. Consequently, surcharges cannot be said to belong to criminal law under the domestic legal system. However, this consideration is not decisive.

20. Turning to the second criterion, namely the nature of the conduct imputed to the applicant, the Court notes that the Tax Authority imposed tax surcharges on the applicant for having supplied incorrect information concerning her personal income tax, and this based on the general tax legislation (see paragraph 12 above) directed towards all persons liable to pay tax in Hungary and not towards a limited group with a special status.

Furthermore, it is apparent that the tax surcharges are not intended as pecuniary compensation for damage but as a punishment to deter reoffending and to punish breaches of tax payment obligations. It may therefore be concluded that the surcharges were imposed by a rule the purpose of which was deterrent and punitive.

[8] See also *Lilly France S.A. v. France* (dec.); *Dubus S.A. v. France*;
[9] (25.11.14)

21. As regards the severity of the potential penalty (see paragraph 12 above), tax surcharges are imposed in proportion to the amount of the tax avoided, normally fixed at 50 per cent, without any upper limit. Indeed, in the present case the surcharges imposed by the Tax Authority were very substantial and totalled to HUF 5,480,808 (EUR 19,500). Since there is no indication that the judicial review could lead to the imposition of surcharges of a higher amount, it is the surcharges actually imposed that indicate what was at stake in the judicial proceedings.

22. In the Court's opinion, the general character of the legal provisions on tax surcharges and the purpose of the penalties show that the applicant was charged with a criminal offence for the purposes of Article 6 of the Convention, further evidenced by the severity of the penalty imposed on the applicant. Article 6 was therefore applicable to the review proceedings.

This approach was confirmed most recently in Kiiveri v. Finland[10]:

32. The Court has taken a stand on the criminal nature of tax surcharges, in the context of Article 6 of the Convention, in the case Jussila v. Finland (cited above). In that case the Court found that, regarding the first criterion, it was apparent that the tax surcharges were not classified as criminal but as part of the fiscal regime. This was, however, not decisive but the second criterion, the nature of the offence, was more important. The Court observed that the tax surcharges were imposed by general legal provisions applying to taxpayers generally. Further, under Finnish law, the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re offending. The surcharges were thus imposed by a rule, the purpose of which was deterrent and punitive. The Court considered that this established the criminal nature of the offence. Regarding the third Engel criterion, the minor nature of the penalty did not remove the matter from the scope of Article 6. Hence, Article 6 applied under its criminal head, notwithstanding the minor nature of the tax surcharge (see Jussila v. Finland [GC], cited above, §§ 37-38). Consequently, proceedings involving tax surcharges are "criminal" also for the purpose of Article 4 of Protocol No. 7.

It is clear from Pakodzi that the ECtHR considered the amount of the penalty imposed – in that case €19,500 – to be a significant determinant in reaching its conclusion. That amount was calculated on the basis that the penalty was fixed at 50% the amount of tax avoided. However, as is apparent from the provisions of Section 1054 of the 1997 Act the penalty is double the amount of tax avoided. It also appears from Kiiveri that the general nature of the application of such rules (i.e. to all taxpayers) is a further strong indicia of the criminal nature of such sanctions.

[10] (10.2.15)

It is difficult to avoid the conclusion that a similar analysis might apply to a case where substantial penalties and surcharges were imposed under the Taxes Consolidation Act, 1997.

It might also be noted that similar conclusions have been reached in relation to the sanctions imposed as part of customs law – Salabiaku v. France[11].

DISCIPLINARY PROCEEDINGS

The question as to whether the provisions of Article 6 might be considered to apply to disciplinary proceedings – i.e. to solicitors, doctors, dentists, nurses etc – is somewhat less clear. Although it did give detailed consideration to the issue in Albert and Le Compte v. Belgium the ECtHR considered it unnecessary to give a ruling on the issue in circumstances where it considered that the proceedings fell within the civil sphere and the issues in the case could be resolved on that basis.

However, in other cases the ECtHR seemed to lean against considering such proceedings as being criminal. In the case of disciplinary proceedings resulting in the compulsory retirement of a civil servant, the Court found that such proceedings were not "criminal" within the meaning of Article 6, inasmuch as the domestic authorities managed to keep their decision within a purely administrative sphere (Moullet v. France (dec.)). It has also excluded from the criminal head of Article 6 a dispute concerning the discharge of an army officer for breaches of discipline (Suküt v. Turkey (dec.)).

It should, however, be emphasized that disciplinary proceedings that involve the imposition of a substantial fine might give rise to a different analysis. This is particularly so given the many occasions on which the court has pointed to the extent of the fine imposed as being an indicia of a criminal sanction.

LICENSING REGIMES AND GRANT SCHEMES

Given the prominence of the ECHR since Lisbon and the explicit references to same in the Charter the ECJ has, in recent years, been moving towards the ECtHR position in relation to Article 6 rights. Specifically it has adopted very much the same approach as Strasbourg in relation to the identification of what is criminal and what is not. As such the Engel test applies mutatis mutandis.

There have been some unsuccessful attempts to assert that the revocation of grant entitlements or exclusion from such schemes is a sanction which should attract that protection of Article 6 as a criminal sanction and the equivalent Charter rights on the grounds that it is tantamount to imposition of a criminal sanction.

The recenct decision in the case of Łukasz Marcin Bonda[12] is an example. Mr Bonda was a Polish farmer who had made a false declaration in relation to CAP payments.

[11] 7/10/88

[12] *Case C-489/10*

Under the relevant regulations an administrative punishment was imposed on him which amounted to 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.

He was also prosecuted before the domestic courts for a fraud offence. In those proceedings he sought to raise a *ne bis in idem* argument. That argument was necessarily predicated on the assumption that the administrative punishment was to be regarded as *criminal* within the taxonomy of the Convention/Charter.

The Polish Courts referred the following question to the ECJ:

> *'What is the legal nature of the penalty provided for in Article 138 of [Regulation No 1973/2004] which consists in refusing a farmer direct payments in the years following the year in which he submitted an incorrect statement as to the size of the area forming the basis for [the single area payment]?'*

The ECJ considered that the sanction did not amount to a criminal penalty as it only applied to those who voluntarily participated in the scheme:

> *28 It must be recalled that the Court has previously held that penalties laid down in rules of the 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 (see Case 137/85 Maizena and Others [1987] ECR 4587, paragraph 13; Case C-240/90 Germany v Commission [1992] ECR I-5383, paragraph 25; and Case C-210/00 Käserei Champignon Hofmeister [2002] ECR I-6453, paragraph 43).*
>
> *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 Käserei Champignon Hofmeister, paragraph 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 Maizena and Others, paragraph 13; Germany v Commission, paragraph 26; and Käserei Champignon Hofmeister, paragraph 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 (Käserei Champignon Hofmeister, paragraph 41).

31 There is nothing to justify a different answer being given with respect to the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004.

The ECJ went on to apply the Engel test:

37 According to that case-law, three criteria are relevant in this respect. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (see, inter alia, ECHR, Engel and Others v. the Netherlands, 8 June 1976, §§ 80 to 82, Series A no. 22, and Sergey Zolotukhin v. Russia, no. 14939/03, §§ 52 and 53, 10 February 2009).

38 As regards the first criterion, it must be observed that the measures provided for in Article 138(1) of Regulation No 1973/2004 are not regarded as criminal in nature by European Union law, which must in the present case be equated to 'national law' within the meaning of the case-law of the European Court of Human Rights.

In relation to the second leg of the test:

39 As regards the second criterion, it must be ascertained whether the purpose of the penalty imposed on the farmer is punitive.

40 In the present case, the analysis in paragraphs 28 to 32 above shows that the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 are to apply only to economic operators who have recourse to the aid scheme set up by that regulation, and that the purpose of those measures is not punitive, but is essentially to protect the management of European Union funds by temporarily excluding a recipient who has made incorrect statements in his application for aid.

41 As the Advocate General observes in point 65 of her Opinion, it also points against a punitive nature of those measures that the reduction of the amount of aid that may be paid to the farmer for the years following that in which an irregularity has been found is subject to the submission of an application in respect of those years. Thus if the farmer makes no application for the following years, the penalty which may be imposed on him under Article 138(1) of Regulation No 1973/2004 becomes ineffective. That is also the case if the farmer no longer satisfies the conditions for the grant of the aid. Finally, the penalty also becomes 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.

42 It follows that the second criterion mentioned in paragraph 37 above does not suffice to make the measures provided for in Article 138(1) of Regulation No 1973/2004 criminal in nature.

Similarly the ECJ's conclusion in relation to the third leg:

43 As regards the third criterion, it should be noted, as pointed out in paragraph 41 above, that the sole effect of the penalties provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 is to deprive the farmer in question of the prospect of obtaining aid.

What is of interest in Bonda is the idea that it might be possible to argue that exclusion from a grant scheme or a licensing scheme along with the imposition of financial penalties might be regarded as amounting to a criminal charge. Any review of the European authorities tends to suggest that the decisions of both the ECJ and ECtHR are fact and context sensitive. Although Bonda is authority for the proposition that such schemes do not give rise to criminal charges it remains an open question as to whether a similar view would be reached in different and more extreme circumstances. Particularly where the sanction imposed was much more akin to a straightforward fine.

CONSEQUENCE OF REGULATORY PROCEEDINGS BEING REGARDED AS CRIMINAL

It will be apparent from the foregoing that there are credible arguments to be made to the effect that some of the sanctioning regimes in force in Ireland might also be regarded as criminal for the purposes of European law. This begs the question as to the consequences of such an identification.

The starting point is a consideration of Article 6 of the Convention:

1.In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2.Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3.Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Obviously Article 6.1 applies to both civil and criminal determinations. For present purposes it is the provisions of Article 6.3 that are of most interest. In particular the rights to an interpreter, free legal aid and to examine witnesses. It will be immediately apparent that these are not necessarily rights that are afforded as a matter or course in regulatory or disciplinary proceedings.

In addition the rights contained in the 7th Protocol to the Convention also apply to criminal proceedings in the broad sense. Two of these rights are of particular significance in the context of the matters under consideration.

Firstly Article 2 of the 7th Protocol provides for an automatic right of appeal:

Right of appeal in criminal matters

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Whilst such rights of appeal may exist in the context of some domestic sanctioning regimes they are by no means universal.

Article 4 provides for a double jeopardy rule – more commonly referred to the *ne bis in idem* rule under European law:

Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article15 of the Convention.

A similar rule applies under the Charter[13].

It is apparent from the plain text of these provisions that it may be possible to assert an entitlement to a number of basic procedural rights in relation to such sanctioning regimes and procedures on the assumption that they are properly regarded as criminal from a European law perspective.

NE BIS IN IDEM

The most important of these rights is undoubtedly the *ne bis in idem* right contained in Article 4 of the 7th Protocol and Article 50 of the Charter.

We have already seen how such a right might be asserted in a practical manner in the case of Bonda referred to above. In effect Mr Bonda sought to avoid a criminal prosecution (in the sense that we would understand it) on the basis that he had already been the subject of a criminal sanction in that his entitlement to grant aid had been withdrawn.

Whilst his challenge did not succeed it is not difficult to imagine how a similar challenge might be brought in the context of somebody who has been the subject of tax surcharges and penalties. If, for example, a double penalty under Section 1054 of the Taxes Consolidation Act, 1997 has been imposed can the taxpayer contend that he has been the subject of a criminal sanction in the European law sense? There are good grounds for supposing so.

That being so this begs the question as to whether the taxpayer can then be prosecuted for the same misconduct. The European authorities tend to suggest that he could not.

[13] Article 50: No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

If this is so then it has profound implications for the manner in which revenue investigations and prosecutions are pursued.

As already discussed the argument in relation to disciplinary proceedings is somewhat more tenuous. Nonetheless the question arises as to whether a solicitor who has been the subject of a significant fine imposed by the SDT and approved by the High Court can also be prosecuted for the same misconduct.

The situation under Part IIIC of the Central Bank Act, 1942 is somewhat more straightforward as it makes explicit provision in relation to ne bis in idem as between the ASP and conventional criminal proceedings:

> *(1) If the Bank imposes a monetary penalty in accordance with section 33AQ or 33AR and the prescribed contravention in respect of which the sanction is imposed is an offence under a law of the State, the financial service provider or other person concerned is not liable to be prosecuted or punished for the offence under that law.*
>
> *(2) The Bank may not impose a monetary penalty on a financial service provider, or on a person concerned in the management of the financial service provider, in accordance with section 33AQ or 33AR, if-*
>
> > *(a) the financial service provider or other person has been charged with having committed an offence under a law of the State and has either been found guilty or not guilty of having committed the offence, and*
> >
> > *(b) the offence involves a prescribed contravention.*

It is of note that the extent of the double jeopardy protection is in relation to the imposition of the fine as opposed to the other sanctions. This of itself represents an acknowledgment by the legislature of the inherently *criminal* nature (in the European law context at least) of the imposition of a large fine.

The prohibition on being tried twice in the broad European law sense may require a fundamental recalibration of the approach to criminal (in the Irish sense) prosecution by prosecutors that also enjoy a civil sanctioning power. Moreover, in the event that administrative sanctioning regimes such as the ASP become more widespread it will be necessary to reconsider the role of criminal prosecution in the broader regulatory context.

Rather than regarding criminal prosecution and administrative or regulatory enforcement as simply different routes to enforcement which may be deployed simultaneously or in sequence the deployment of one may well preclude the deployment of the other.

RIGHT TO SILENCE

Another aspect of the identification of a regulatory or disciplinary process as involving the determination of a criminal charge is the right to silence. To date the Irish courts have not really dealt with this in any coherent fashion.

In the case of Rogers v. an Post[14] some brief consideration was given to the right to silence in the context of disciplinary proceedings where the plaintiff was also the subject of a criminal prosecution. The judgment in turn references Carroll v. Law Society[15] where similar issues were raised.

The judgments note that it is often a feature of disciplinary proceedings that the registrant has an obligation to answer questions and provide information. Often this is an express statutory obligation. However, in both cases the court avoided dealing with the issue on the basis that it was not for the courts to direct the procedures of administrative tribunals in advance.

In fact it could be said that the courts have traditionally dodged the rather tricky issue of whether or not regulatory or disciplinary proceedings encompass a right to silence in the sense that it is traditionally understood in the domestic criminal context. In Gilligan v. CAB**[16]** the same issue arose in relation to Section 9 Proceeds of Crime Act which permitted the Court to make an order directing respondent to file an affidavit setting out his assets. In circumstances where the proceedings were predicated on the assertion that the assets of the respondent derived from criminal conduct this gave rise to a rather obvious issue in relation to self incrimination.

The issue was ultimately resolved by requiring an undertaking that such evidence would not be used against the respondent in a criminal trial. The utility of the undertaking was predicated on close connection between CAB the Gardai and the DPP[17].

An obvious means of pressing the issue so far as the right to silence is concerned is by means of establishing that the process in question is in truth a criminal process in the European law sense. This should present little difficulty insofar as an administrative sanctions process such as Part IIIC of the Central Bank Act, 1942 is concerned. There is a substantial amount of European authority to suggest that the privilege may be asserted in relation to administrative sanctions proceedings of a similar type: Orkem SA v. Commission[18] & Dalmine SpA v. Commission.

How such a privilege might apply in the context of the Revenue's powers to impose civil sanctions is much less clear given the obligation of tax payers to make returns and provide information.

---

[14] [2014] IEHC 412
[15] [2000] 1 ILRM 161
[16] [1998] 3 IR 185
[17] See also M. v. D. [1998] 3 IR 175
[18] [1989] ECR 3282

The existence of a privilege against self incrimination in the regulatory context gives rise to a number of practical consequences. For example it would appear to follow from cases such as Re National Irish Bank Ltd. (No. 1)[19] and Dunnes Stores Ireland Company v. Ryan[20] that admissions that are compelled by means of a formal requirement made by a regulator are simply not admissible (except in the special case of a prosecution for obstruction). If such a right arises in the context of a regulatory or disciplinary proceedings it has the potential to alter the nature of the relationship between the regulator and the regulated and in particular the nature and scope of investigative powers and functions.

In particular it may permit of a much more robust response to regulatory investigations on the part of those suspected of transgression. In effect it may permit of an approach that is more in line with that which is sometimes adopted in criminal investigations.

A further corollary of the right to silence that is not well understood outside of the domestic criminal context is that silence itself ought generally not be regarded as probative - DPP v. Finnerty[21]. In other words silence is not proof of anything and no adverse inference can be drawn from same.

One point, however that needs to be emphasized is that the right to silence does not really have any meaningful application to documentary material. In the recent decision of DPP v. Gormely & White[22] the Supreme Court underlined that self incrimination only arises in relation to statements – not real evidence or documentary evidence.

A final point to note in the context of the right to silence is the vexed question as to whether or not it applies to companies and other incorporeal persons. Certainly more recent pronouncements from Strasbourg would tend to suggest it does. In OAO Neftyanaya Kompaniya Yukos v. Russia[23] the ECtHR upheld the claim made by Yukos, a company, that it's Article 6 rights had been infringed in the context of civil proceedings. As a matter of principle the same logic should apply in relation to criminal proceedings.

There is also persuasive, if perhaps obscure, authority from the Supreme Court of Sweden in the case of Petrolia ASA v. The Public Prosecuting Authority[24] in which

---

[19] [1999] 3 I.R. 145
[20] [2002] 2 IR 60
[21] [1994] 4 IR 364
[22] [2014] IESC 17
[23] ECHR 20th September, 2011
[24] Supreme Court of Sweden - 1st June, 2011 – note: in **Minister for Justice, Equality and Law Reform v. Murphy** [2010] IESC 17 the Supreme Court had regard to a decision of the Supreme Court of Finland in the context of the European arrest warrant system and indicated a general willingness to consider judgements from other civil law jurisdictions where available.

that court reviewed the case-law of the European Court of Human Rights and concluded that whilst the ECtHR had never considered the specific issue of whether the privilege applied to companies all of the indications theretofore were that other Article 6 rights did. As such it concluded that companies also enjoyed a privilege against self incrimination.

CONCLUSION

The purpose of this paper is intended simply to draw attention to the issue of whether the concept of criminal proceedings as understood in European law might have application to regulatory and disciplinary proceedings. Quite how one asserts the various Article 6 (and Protocol) Rights is another day's work. The inherent limitations of the European Convention on Human Rights Act, 2003 have been the subject of much consideration by the Supreme Court in recent years. A useful invocation of the rights in issue may well require some degree of subtlety and forward thinking.