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Naming and Shaming in Financial Market Regulations: A Violation of the Presumption of Innocence?

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1. Introduction

In the last couple of years, naming and shaming – the publication of offences and administrative sanctions including the name of the offender by national supervisors – has become a popular regulatory tool in the financial markets both within and outside the EU.

The Netherlands is one of the Member States that has incorporated such a publication regime in its legal framework. It is laid down in the Financial Supervision Act (FSA) (*Wet op het Financieel Toezicht, Wft*), which came into force on 1 January 2007. Under this Act, the Dutch financial supervisor can take the following measures: (i) the issuing of a public warning,¹ (ii) the publication of an imposed administrative fine² and (iii) the publication of an imposed incremental penalty payment.³ The first measure is a discretionary power, whereas the latter two measures are based on a general obligation to publish (*beginselflicht tot publicatie*). A general obligation to publish implies that the supervisor is obliged by law to publish, unless such publication would harm the object of supervision.⁴

Such publication may, however, give rise to some questions in the light of certain fundamental rights, such as the presumption of innocence.⁵ For instance, is the publication of a sanction provided with adequate safeguards to ensure that the presumption of innocence is not violated? Does the accused person still have the possibility to challenge the decision of an imposed sanction before a court? In other words, does the publication of a sanction which is made prior to a final court verdict on the guilt of a perpetrator constitute a violation of the presumption of innocence?

The subject of naming and shaming in the financial market regulation has not only become an important matter on the agenda of the Dutch legislator, but on the agenda of the European legislator as well. Recently, the Capital Requirements Directive IV (CRD IV)⁶ introduced minimum standards

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1 Arts. 1:94, 1:95 and 1:96 Wft.

2 Arts. 1:97 and 1:98 Wft.

3 Art. 1:99 Wft.

4 Art. 1:97(4) Wft.

5 The presumption of innocence, laid down in Article 48 of the Charter of Fundamental Rights of the European Union (CFR) and Article 6(2) of the European Convention on Human Rights (ECHR), implies that the person concerned shall be presumed innocent until he has been proved guilty according to the law.

6 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

for the publication of administrative sanctions. CRD IV was the result of the Basel III accord, which introduced revised standards on financial regulation in response to the financial crisis. In order to ensure compliance with the new EU banking rules, the European Commission believes that it is important to have effective, proportionate and dissuasive sanctioning regimes in all Member States. Greater convergence and the reinforcement of existing national regimes can significantly help to prevent the risk of the improper functioning of the financial markets and contribute to the development of a level playing field within the internal market.⁷ Such reinforcement can be required (among other things) by adequate administrative sanctions for violations of key provisions of CRD IV and the publication of such sanctions.⁸ The Commission notes that the publication of sanctions may have a strong deterrent effect on credit institutions, mainly because they will incur reputational damage. Furthermore, the wide publication of sanctions would help consumers and investors to be better informed and it would ‘punish’ any wrongdoers by avoiding the use of their services.⁹

Therefore, Article 68 CRD IV introduced new rules on the publication of administrative sanctions, and these rules read as follows:

‘Member States shall ensure that the competent authorities publish on their official website at least any administrative penalties against which there is no appeal and which are imposed for breach of the national provisions transposing this Directive or of Regulation (EU) No. 575/2013, including information on the type and nature of the breach and the identity of the natural or legal person on whom the penalty is imposed, without undue delay after that person is informed of those penalties. Where Member States permit publication of penalties against which there is an appeal, competent authorities shall, without undue delay, also publish on their official website information on the appeal status and outcome thereof (...).’¹⁰

These new EU rules ensure that all national supervisors of the Member States have the power to publish imposed sanctions. National supervisors remain primarily responsible for the actual application of sanctions. They are obliged to publish those administrative sanctions against which no appeal is possible and as regards the national legal frameworks that do permit the publication of sanctions which are still open to appeal, the national supervisor must also publish that it is subject to appeal and further information on the outcome thereof.

CRD IV only prescribes the publication of sanctions, but it does not address the question of what form this publication should take in relation to the presumption of innocence. The European Commission has however addressed this principle in relation to naming and shaming in criminal proceedings in a recent draft Directive.¹¹ This Proposal requires that Member States must ensure that, before a final conviction, public statements and official decisions from public authorities do not refer to suspects or accused persons as if they have already been convicted.¹² According to the Commission, the presumption of innocence should be without prejudice to the possibility of the publication, according to national

and 2006/49/EC, OJ L 176, 27.6.2013. The CRD IV Package, consisting of a Regulation and a Directive (which entered into force on 28 June 2013, respectively 17 July 2013) form the new EU rules on capital requirements for credit institutions and investment firms.

7 Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions, reinforcing sanctioning regimes in the financial services sector, COM(2010) 716 final, 8.12.2010, p. 16.

8 Proposal for a Directive of the European Parliament and of the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, COM(2011) 453 final, 20.07.2011, pp. 7-8.

9 Commission staff working paper, impact assessment accompanying the document proposal for a Directive of the European Parliament and the Council on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, SEC(2011) 952 final, 20.07.2011, p. 13.

10 Art. 68 CRD IV also prescribes the rule of anonymous publication in case of a limited number of circumstances. Such publication can be seen as ‘naming and shaming without the naming’ and will not be discussed in this article.

11 Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821/2, 27.11.2013.

12 Art. 4 of the draft Directive. This Directive only applies to criminal proceedings. Administrative proceedings leading to sanctions such as competition, trade, tax, and financial services proceedings are not covered by this Directive. Recital 6 of the draft Directive.

law, of decisions imposing sanctions following administrative proceedings.¹³ This raises the question of what the role of the presumption of innocence is in case of naming and shaming in administrative proceedings, i.e. the publication regime under CRD IV and the FSA.

As CRD IV will have effect as from 1 January 2014 and as the FSA dates back to 2007, the question could arise whether the publication regime under the FSA is still in accordance with CRD IV when seen from the perspective of the presumption of innocence.¹⁴ Article 68 CRD IV only speaks of 'the publication of administrative penalties', which means that the public warning under the FSA would not fall under the scope of CRD IV. The administrative fine and the incremental penalty payment, however, are administrative sanctions under Dutch law. As stated above, CRD IV obliges the national supervisor, without undue delay, to publish administrative penalties on its website and also to publish information on the possibility of an appeal against such publication and, if any appeal is made, on the outcome thereof. Yet, this obligation is not explicitly stated in the FSA. In one of the Parliamentary documents of the FSA, the Dutch legislator only noted that 'it would be obvious' that the supervisor indicates in the publication that the administrative sanction is still subject to appeal.¹⁵ If no such obligation is prescribed by law, one could question whether the FSA does provide for adequate safeguards to ensure that the presumption of innocence is always respected. In other words, is naming and shaming under the FSA a violation of the presumption of innocence as laid down in Article 6(2) ECHR?

Obviously, the publication regime of the FSA will be regulated by CRD IV and, therefore, such a regime falls within the scope of Union law. However, the question of the presumption of innocence (and thereby, inherently, the question of qualification as a criminal charge) in this article will not be determined by Union law but by the case law of the European Court of Human Rights (ECtHR). After all, the jurisdiction of the ECtHR extends to the Member States when applying Union law. Article 6 of the Treaty on the European Union covers both the CFR and the ECHR as it stipulates that the EU shall respect fundamental rights, as guaranteed by the ECHR as general principles of Union law. Article 52(3) CFR explicitly points out the relationship between the CFR and the ECHR by stating that, insofar as the CFR contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down in the ECHR. The right of the presumption of innocence is laid down in both Article 6(2) ECHR and Article 48 CFR, and accordingly, the meaning and scope of this right are the same in both legal documents. Based on the foregoing, Article 48 CFR will not be applied in this article. The application of the CFR does not add much value given the fact that the Article 6 ECHR criteria concerning a criminal charge have been fully applied by the European Court of Justice (ECJ) in the cases *Bonda*¹⁶ and *Akerberg Fransson*.¹⁷ I will discuss this subject further in Section 4.

The question whether naming and shaming under the FSA constitutes a violation of the presumption of innocence as laid down in Article 6(2) ECHR will thus be the main subject of this article. Before this question can be answered, it is necessary to determine whether the publication measures under the FSA can be qualified as a criminal charge. Accordingly, this question will be addressed as well. The purpose of this article is twofold. First, I will examine whether the existing legal safeguards against the publication measures under the FSA are sufficiently adequate in order to prevent any breach of Article 6(2) ECHR. Furthermore, the publication measures under the FSA do not only affect the Dutch financial market regulation. They may also affect the financial markets of other EU Member States due to the fact that the financial market regulation is part of the EU internal market. Moreover, CRD IV will take effect from 1 January 2014.¹⁸ An analysis of the Dutch publication regime in the light of the presumption of innocence may be of interest for other Member States as they, most likely, will be faced with similar problems when implementing Article 68 CRD IV. In addition, non-EU countries which face identical regulation and

13 Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821/2, 27.11.2013, p. 7.

14 The Dutch Parliament published a draft proposal of the Implementation Act of CRD IV on 24 April 2013. In the proposal amendments are made to Art. 1:97 Wft and the Annexes of Arts. 1:79 and 1:80 Wft. In the light of the presumption of innocence, no relevant amendments have been made.

15 *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, p. 421.

16 Case C-489/10, *Lukasz Marcin Bonda*, 5 June 2012, ECR I-0000.

17 Case C617/10, *Aklagaren v Hans Akerberg Fransson*, 12 June 2012, not yet published.

18 EU Member States will have until 31 December 2013 to transpose CRD IV into national legislation.

enforcement issues may benefit from this discussion. In that light it is essential to examine whether the publication measures under the FSA are in accordance with CRD IV in so far as the presumption of innocence is concerned.¹⁹ If that is the case, it could be useful to determine if the Dutch publication regime could serve as an example for other EU states and even for non-EU states. It must be noted that this article will mainly focus on the relationship between naming and shaming under the FSA and the presumption of innocence. The discussion regarding CRD IV as mentioned above will be relevant for the concluding recommendations.

In Section 2 hereunder, the publication measures under the FSA and their legal safeguards will be explained. Section 3 will deal with the relevant European jurisprudence on the relationship between naming and shaming under the FSA and the presumption of innocence under Article 6(2) ECHR. The questions whether the publication measures under the FSA can be qualified as a criminal charge and, accordingly, whether they constitute a breach of Article 6(2) ECHR, will be discussed in Section 4. Based on these findings, a concluding analysis will follow in Section 5.

2. Naming and shaming under the Dutch Financial Supervision Act

2.1. Some characteristics

Within the context of the FSA, I would describe naming and shaming as the discretionary power, or the general legal obligation, of the financial supervisor to publish an established offence or an administrative sanction in response to such an offence, as well as the (company) name of the (legal) person responsible for the offence on its website or through a press release by way of: (i) issuing a public warning, (ii) publishing an imposed administrative fine or (iii) publishing an imposed incremental penalty payment.²⁰ The reason for imposing a legal obligation to publish administrative sanctions lies in that fact that the Dutch legislator considers such violations as a serious offence.²¹

The FSA does not contain any provisions on how these publication measures should be published. According to the explanatory document on the FSA, 'it is obvious' that the national supervisor will opt for publication on its website and that, if appropriate, a press release will be issued.²² However, the supervisor is bound by the secrecy provision of the FSA which stipulates that confidential data may not be disclosed. Confidential data do not include, however, the (company) name of the presumed violator.²³

The enforcement of the FSA rests with the two supervisors in the Netherlands, the Dutch Central Bank (*De Nederlandsche Bank, DNB*) and the Netherlands Authority for the Financial Markets (*Stichting Autoriteit Financiële Markten, AFM*).²⁴ The FSA is governed by administrative law. The decision by the supervisor to take any of the publication measures under the FSA is qualified as an administrative decision (*bestuursbesluit*). As a consequence thereof, the addressee of such a decision has the right to object and the right to appeal to the administrative court. The addressee of a publication measure under the FSA includes the presumed offender, any co-perpetrator and any *de facto* director. Offences under the FSA can be committed by both natural and legal persons.

The aim of naming and shaming under the FSA is to protect the parties on the financial markets and to promote the proper functioning of the financial markets. The legislator makes no distinction between any of the publication measures under the FSA, and therefore, all three types of publication measures

19 This article will not discuss the implementation of Article 68 CRD IV into the FSA. The discussion on CRD IV will be limited to the legal safeguards of the publication measures provided under both the new Directive and the FSA in order to determine whether the presumption of innocence is fully respected.

20 Naming and shaming is not only incorporated in Dutch (financial) administrative law, but also in Dutch (financial) criminal law. The publication of a court verdict is considered to be an 'additional penalty' in both the Economic Offences Act (*Wet op de Economische Delicten*) and the Criminal Code (*Wetboek van Strafrecht*). Apparently, the legislator sees this form of naming and shaming as a punitive sanction and consequently as a criminal charge. I will not further discuss such publication in this article.

21 *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, pp. 420-421.

22 *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, p. 303.

23 *Kamerstukken II* (Parliamentary Papers) 2003/04, 29 708, no. 3, p. 47.

24 DNB and the AFM operate in cooperation with each other. DNB is in charge of prudential supervision and the AFM is responsible for regulating behaviour on the financial markets. Naming and shaming by the AFM will occur more frequently than by DNB, given the fact that the AFM is less restricted in the exercise of its supervising task than DNB. Both institutions must enforce the same law (the FSA), but due to their respective statutory objectives they apply different publication practices. When using the term 'supervisor' in this article, I refer to both the AFM and DNB.

are considered to warn the public.²⁵ Although publication may be felt by the violator as a sanction, such publication does not justify it as such.²⁶ By referring to the *Öztürk* case,²⁷ the legislator comes to the conclusion that publication cannot be considered as a criminal charge as it is not designed to punish, deter, or retaliate.²⁸

Up until now, there is no case law of the Dutch administrative court on the classification of the public warning as an administrative sanction, let alone a punitive sanction. There are, however, judgments by the administrative court on the publication of an administrative fine. In several judgments, the court stated that such a publication measure is primarily aimed at warning the public and that it does not constitute any form of punishment.²⁹ Even though publication may be felt as such, it does not qualify as a punitive sanction. Accordingly, the court follows the view of the legislator in this regard. With regard to the publication of an incremental penalty payment, the court decided that this publication measure has a function of warning and informing.³⁰

2.2. The public warning

A public warning is issued by the supervisor through a notification by which the presumed perpetrator is informed that an infringement of the FSA has been ascertained. The supervisor can issue a public warning in case of a violation of: (i) a prohibitory provision of the FSA, (ii) a limited number of other provisions of the FSA³¹ and (iii) any provision designated by a Decree of a European Regulation pursuant to Article 288 of the Treaty on the functioning of the European Union. As said before, the public warning does not fall under the general obligation to publish. The supervisor may decide at its own discretion whether a public warning will be issued or not. When making such a decision, the supervisor must weigh the general interest of warning the public against the interest of any possible adverse consequences for the violator (often a financial institution) concerned.³²

When will a public warning be issued? The supervisor will do so in case of a violation of the FSA which is sufficiently serious not to refrain from enforcement. A public warning must be seen in itself, apart from an administrative fine and an incremental payment penalty. A public warning can be issued before an administrative sanction is imposed. It is not a substitute for any action of enforcement by the supervisor.³³

If the supervisor decides to issue a public warning, it shall inform the person involved of its decision.³⁴ Such decision should contain the following information: (i) the established infringement; (ii) the content of the publication; (iii) the grounds on which the decision has been based; (iv) the manner in which the public warning will be issued; and (v) the term after which the public warning will be issued.³⁵ This enumeration is not exhaustive. Other aspects can be added to the decision.

Which legal remedies does a presumed violator have against the public warning? A public warning may not be issued before the lapse of five business days after the presumed offender has been notified of the relevant decision.³⁶ This term allows him/it to request the court in preliminary relief proceedings for a preliminary injunction, which will be granted in case of immediate urgency. Immediate urgency implies the impossibility to restore the implementation of an administrative decision.³⁷ Whether such a request will be granted depends on the court in preliminary relief proceedings which decides on whether the supervisor has justly made his decision to publish. A preliminary injunction suspends the issuing of

25 *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, pp. 301-302 and 417.

26 *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, p. 301.

27 ECtHR, *Öztürk v Germany*, [1984] 6 EHRR 409.

28 *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, p. 302.

29 *Voorzieningenrechter Rechtbank Rotterdam* (Administrative Court) 3 September 2008, *JOR* 2008, 274, with annotation by Hoff, *Voorzieningenrechter Rechtbank Rotterdam* (Administrative Court) 2 July 2009, *JOR* 2009, 262.

30 *Voorzieningenrechter Rechtbank Rotterdam* (Administrative Court), 6 July 2009, *JOR* 2009, 233, with annotation by Grundmann-van de Krol.

31 Arts. 1:58(2), 1:58a (2), 1:58b(2), 1:58c(3), 1:59(2), 1:67(1), 1:77(1) third sentence, 4:4(1), or 4:4a Wft.

32 *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, p. 417.

33 *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, p. 417.

34 Art. 1:95(1) Wft.

35 Art. 1:95(1) Wft.

36 Art. 1:96(1) Wft.

37 MvT Parl. Gesch. Awb II, p. 506. (Explanatory Memorandum of the General Administrative Law Act).

a public warning until the court in preliminary relief proceedings has given a judgment on the matter. Until such time, there is a preliminary publication ban on the public warning.

2.3. *The immediate public warning*

There is one important exception to the rule that the issuing of a public warning is suspended until the court in preliminary relief proceedings has given a judgment on the matter. In case the interests, which the FSA must protect, do not permit that a publication is postponed, the public warning may be issued without delay.³⁸ Such a case refers to a situation when the interests of a large number of buyers on the financial markets are in acute danger. In such a case the presumed violator should be notified of the immediate issuing of a public warning. If the presumed violator appeals to the court against such immediate issuing, the court will decide retrospectively whether the supervisor has justly or unjustly issued such warning.³⁹

To sum up, in both the regular issuing and the immediate issuing of a public warning, the presumed violator will be notified. In both situations, legal safeguards exist. In the case of a regular issuing of a public warning, the court will give a judgment *a priori* on the admissibility of such a warning (i.e. before the supervisor will issue such a public warning). In the case of the immediate issuing of a public warning, however, the court will give a judgment *a posteriori* on the admissibility of such a warning (i.e. after the supervisor has issued such a public warning). This aspect is important in relation to the presumption of innocence as the FSA does provide legal safeguards against the issuing of a public warning by a moment of control by the court.

2.4. *The publication of an administrative fine*

Under Dutch administrative law, the administrative fine is classified as a punitive sanction. The publication of an administrative fine consists of a notification of an order to impose such a sanction in response to an offence.

Under the FSA, a distinction can be made between the publication of administrative fines imposed for grave offences and the publication of administrative fines imposed for petty offences. Grave offences relate to all prohibitory provisions of the FSA and a number of other provisions under that law.⁴⁰ Petty offences are all offences for which an administrative fine can be imposed, but which do not fall under the category of 'grave offences'. The general obligation to publish applies to both types of offences. A grave offence is provided with less legal safeguards than a petty offence. The reason for this distinction is that in case of a grave offence the importance of a rapid publication is greater than in the case of a petty offence. The appeal procedure for a grave offence is also longer than the appeal procedure for a petty offence. A lengthy appeal procedure diminishes the warning character of a publication.⁴¹

Within the category of grave offences another distinction can be made in respect of the moment of publication. The supervisor must publish the administrative fine on two occasions. The first occasion is when the administrative fine is still open to appeal and the second occasion is when the administrative fine has become final. Both types of publication comply with CRD IV as the new Directive prescribes an obligation to publish sanctions against which no appeal is possible and it permits the publication of

38 These interests are: 'the orderly and transparent financial market processes, the integrity of relations between the market participants, a careful handling of clients, the soundness of companies and contributing to the stability of the financial sector.' *Kamerstukken II* (Parliamentary Papers) 2003/04, 29 708, no. 3, p. 28 (MvT) (Explanatory Memorandum).

39 *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, p. 420.

40 Including (i) Arts. 1:58(2 and 3), 1:58a(2), 1:58b(2), 1:58c(3), 1:59(2), 1:67(1), 1:77(1), first sentence, 4:4(1), or 4:4a; (ii) a provision other than the one meant under i) to which an administrative fine of Category 3 has been set by Order in Council on the basis of Art. 1:81(1); (iii) Arts. 2:10(4), 2:15(2), 2:18(2), 2:25(2), 2:26, 2:36(5), 2:45(4), 2:54(4), 2:100(2), 2:103, 2:107(1), 3:5(4), 3:8, 3:9(1), 3:39(1), 3:47(1), 3:53(1), 3:57(1), 3:57(5), 3:63(1 and 3), 3:67(1), 3:68(1 and 3), 3:69(1), 3:72(3), 3:99(1), 3:111a(1 and 2), 3:135(1), 3:138(1), 3:139(1), 3:141(1), 3:144(1), 3:145(1), 3:146(1), 3:148(1), 3:153, 3:259(1 and 2), 3:271, 3:272(1), 3:285(1 and 2), 3:286(1 and 2), 3:296(1 and 3), 4:9(1), 4:10(1), 4:19, 4:20, 4:22, 4:23, 4:24, 4:31(1 up to and including 3), 4:31a, 4:42, 4:49(1), 4:50(2), 4:53, 4:56(1), 4:59(2), 4:60(4), 4:87, 4:94(3), 4:95(3), 4:96(1 and 2), 4:100(3), 5:26(1), 5:34(1 and 2), 5:35(1 up to and including 4), 5:38(1 and 2), 5:39(1), 5:40, 5:41(1 and 2), 5:42, 5:43(1 and 2), 5:48(3 up to and including 8), 5:60(1), 5:62(1), of 5:64(1); iv) a provision other than one as meant under (iii) to which an administrative fine of Category 2 has been set by Order in Council on the basis of Art. 1:81(1), where this is specified in that Order in Council; and v) a provision of a Regulation as meant in Art. 288 of the Treaty on the functioning of the European Union, designated for this purpose by Order in Council.

41 C.M. Grundmann-van de Krol, *Koersen door de Wet op het financieel toezicht*, 2012, p. 767.

sanctions which are still open to appeal. In case of an administrative fine for a grave offence which is still open to appeal, the publication will take place immediately. This is a so-called 'early publication'.⁴² The reason for such early publication is that a grave offence is considered to be a serious violation of the FSA which does not permit the publication to be postponed until the administrative fine has become final.⁴³ The early publication is subject to the lapse of five business days after the administrative fine has been notified to the presumed violator.⁴⁴ This period of time allows the presumed violator to ask the court in preliminary relief proceedings for a preliminary injunction. If a preliminary injunction is granted, the publication is suspended until the court in preliminary relief proceedings has given a judgment.⁴⁵ In other words, the legal safeguards against an early publication do provide for a moment of judicial control. This is important for the question of a violation of the presumption of innocence as will be discussed later on.

It is a general rule that all decisions to impose an administrative fine – whether relating to grave or to petty offences – must be published after they have become final.⁴⁶ A consequence thereof is that all grave offences are published twice. As regards the petty offence this means that an administrative fine cannot be published until the decision to impose such a sanction has become final.

There is, however, an important exception to the rule of publication for a grave offence. The decision shall not be published if its publication is or might be considered as contrary to the object of the supervision on compliance with the FSA.⁴⁷ This exception is laid down in a special provision of the FSA, known as the 'unless clause'.⁴⁸

2.5. The publication of an incremental penalty payment

Under Dutch administrative law, an incremental penalty payment is considered to be a remedial sanction.⁴⁹ The aim of such a sanction is to end the established breach and/or to prevent further infringement or any recurrence thereof. A decision to impose an incremental penalty payment may only be published after the penalty has been incurred.⁵⁰ The supervisor may impose a decision for an incremental penalty payment in relation to a violation of a limited number of provisions.⁵¹ As in the case of an administrative fine, there is a general obligation to publish an incremental penalty payment, unless it would be contrary to the object of the supervising task of the supervisor under the FSA (the aforementioned 'unless clause').⁵² Contrary to the public warning and the publication of an administrative fine, the incremental penalty payment is not subject to the provision that the publication may not take place earlier than the lapse of five business days after the presumed violator has been notified of the decision to publish. The supervisor must, however, set a time limit in his order for an incremental penalty payment during which the presumed violator can comply with the condition imposed (the so-called 'term of grace'). After the lapsing of that term, the penalty will be incurred if the offence has not been terminated. During the term of grace the presumed violator can, if he/it decides to do so, appeal against the incremental penalty payment and request a preliminary injunction to suspend its publication after the penalty has been incurred.⁵³

As regards the publication of an incremental penalty payment, the FSA complies with CRD IV as it permits the publication of sanctions against which there is an appeal. However, the Directive prescribes

42 M.P. Nieuwe Weme et al. (eds.), *Handboek openbaar bod*, 2008, p. 935.

43 A.M.P.J.H. Sauv , *Naming and shaming: een onderzoek naar de juridische mogelijkheden en beperkingen voor de Arbeidsinspectie om op het terrein van de Arbeidsomstandighedenwet, de Arbeidstijdenwet, de Wet arbeid vreemdelingen en de Wet minimumloon en minimumvakantiebijslag haar inspectiegegevens te openbaren en haar boetebeschikkingen te publiceren*, 2010, p. 26.

44 Art. 1:97(2) Wft.

45 Art. 1:97(3) Wft.

46 Art. 1:98 Wft.

47 Art. 1:97(4) Wft.

48 Nieuwe Weme, supra note 42, p. 935.

49 Art. 5:31d Awb.

50 Art. 1:99(1) Wft.

51 Including: i) rules arising from the Articles listed in the Annex mentioned in connection with Art. 1:79 FSA; ii) rules with respect to the exercise of supervision over financial markets or over persons working on such markets, set out on account of an Order in Council which refers to a Regulation as meant in Art. 288 of the Treaty on the functioning of the European Union; iii) the Regulation for Credit Rating Agencies (Regulation (EC) no. 1060/2009 of the European Parliament and of the Council on credit rating agencies) and iv) Art. 5:20 of the General Administrative Law Act (*Algemene Wet bestuursrecht*).

52 Art. 1:99(1) Wft.

53 Art. 1:99(2) Wft.

that the national supervisor should publish information on the appeal status and the outcome thereof. Even though this is common practice by the Dutch supervisor, the FSA does not prescribe such a rule. This will be further discussed in Section 5.

2.6. *The immediate publication of an administrative fine and an incremental penalty payment*

The supervisor may proceed to the immediate publication of an administrative fine or an incremental penalty payment only in the event that the interests that the FSA aims to protect do not permit any further delay.⁵⁴ Such immediate publication is a discretionary power. In case of the imposition of an administrative fine for a grave offence, the immediate publication implies that the publication cannot be suspended until the lapse of five business days, nor – in case a request for a preliminary injunction has been made – until the court in preliminary relief proceedings has given a judgment. When the supervisor decides to publish an administrative fine for a petty offence immediately, this sanction may already be published before it has become final. The immediate publication of an incremental penalty payment implies that the supervisor proceeds to such publication before the penalty has been incurred and, in the case of an appeal, before the decision on publication has become final.⁵⁵

The supervisor may proceed to the immediate publication of any sanction in cases similar to the issuing of an immediate public warning.⁵⁶ Before the supervisor may proceed to an immediate publication, a weighing of interests must be made between the legitimate interests of the person concerned, on the one hand, and the extent to which the offence will endanger the interests of the investors and consumers, on the other.⁵⁷

The immediate publication of an administrative sanction is provided with less legal safeguards than the regular publication of an administrative sanction. For instance, in case of the immediate publication of an administrative fine the person concerned cannot request a preliminary injunction within a period of five business days. In case of the immediate publication of an incremental penalty payment, such sanction will have already been published before the incremental penalty payment has been incurred. In summary, contrary to the regular procedure of the publication of a sanction, the court decides *a posteriori* on the question whether such publication has been made justly or unjustly.

3. *Janosevic v Sweden*

A next step in the analysis of the relationship between naming and shaming and the presumption of innocence is to examine the European jurisprudence on this subject.

Up until now, neither the ECJ, nor the ECtHR has given any ruling on the question of whether naming and shaming in the national financial market regulations of the EU Member States violates the presumption of innocence. However, there is some EU case law on naming and shaming under competition law which I cannot leave unmentioned.

A first example is the publication of a decision by which a penalty is imposed although this publication was not prescribed. The ECJ does permit such publication provided that it does not disclose any of the relevant undertaking's business secrets.⁵⁸ As this judgment dates back to 1970 and as the Court did not address the presumption of innocence, this judgment is not relevant in the context of this article.

In a more recent case on the publication of a non-final European competition fine the Court of First Instance (now: the General Court) decided that such publication is a means of informing other individuals.⁵⁹ The main interest of the judgment concerns the relationship between the principle of transparency and the duty to respect business secrets and protect private data in competition proceedings.

⁵⁴ Art. 1:100 Wft.

⁵⁵ D. Busch (ed.), *Groene Serie Toezicht Financiële Markten*, 2008. Art. 1:100 Wft, note 5.

⁵⁶ A public warning can be issued immediately in the case of an acute danger to the interests of a large number of consumers on the financial market. *Kamerstukken II* (Parliamentary Papers) 2005/06, 29 708, no. 19, p. 420.

⁵⁷ K. Frielink, 'Commentaar bij de artikelen 1:94 t/m 1:101 Wft', in: K. Frielink et al. (eds.), *Deel I, Wet op het financieel toezicht, Commentaar Financieel Recht*, 2007, pp. 250-264. Art. 1:110 Wft, note C1.

⁵⁸ Case C-41/69, *ACF Chemiefarma NV v Commission*, [1970] ECR 661.

⁵⁹ Cases T 259-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich AG and Others (Lombard Club) v Commission of the European Communities*, [2006] ECR II-5169.

The Court did not explicitly address the question of the sanctioning character of the publication nor was the presumption of innocence a matter of discussion in this judgment. For those reasons, I will not refer to this case.

The Court of First Instance did, however, take note of the presumption of innocence in another competition case. The Court decided that the presumption of innocence is clearly not respected in the case where, prior to formally imposing a penalty on the undertaking charged, the press is informed of the proposed finding.⁶⁰ As this case concerned publication before the sanction was imposed, it is not applicable to naming and shaming under the FSA. After all, no administrative decision has yet been made by an administrative authority on the guilt of the person concerned in response to an established offence.

Whether or not naming and shaming under the FSA constitutes a violation of the presumption of innocence may become clear when we look at a judgment of the ECtHR. In the *Janosevic v Sweden* case,⁶¹ two taxi companies had a tax surcharge imposed by the Swedish tax authorities for committing fraud in declaring their turnover data. The fine had been imposed before it obtained legal effect. The applicant had claimed that his right to be presumed innocent was breached among other things by the fact that the tax authority's decision to impose a tax surcharge had been enforced prior to a determination of his liability by a court in that respect.

The ECtHR determined that the presumption of innocence in Article 6(2) ECHR could not be seen as excluding enforcement measures being taken before a decision on the tax surcharges had become final. However, considering that the early enforcement of the tax surcharge may have serious implications for the person concerned and may adversely affect his or her defence in the subsequent court proceedings, as with the position with the use of presumptions in criminal law, the Member States are required to confine such enforcement within reasonable limits that strike a fair balance between the mutual interests involved.⁶² In this assessment, one of the factors that need to be taken into account is whether the tax surcharge can be recovered and whether the original legal position can be restored in the event of a successful appeal against the decision to impose the tax surcharge.⁶³ The Court came to the conclusion that there had been no breach of the presumption of innocence, because the Swedish legal system offered sufficient legal guarantees for the interests of the person concerned.⁶⁴

In my opinion, *Janosevic v Sweden* is the only European judgment which can be directly applied to naming and shaming under the FSA in relation to the presumption of innocence. Under Dutch law, this (Swedish) tax surcharge would qualify as an administrative fine.⁶⁵ Even though the *Janosevic v Sweden* case did not involve any publication of an administrative decision, the same conclusion can be drawn with respect to the immediate enforcement of decisions. The *Janosevic v Sweden* case and naming and shaming under the FSA are similar in the sense that both involve an administrative decision made by an administrative authority on the guilt of the person concerned in response to an established offence. This administrative decision had not yet become final so that the person concerned could still take legal action. Accordingly, *Janosevic v Sweden* can be applied to those publication measures under the FSA that qualify as a criminal charge.

4. The relationship between the publication measures under the FSA and the presumption of innocence

The relationship between naming and shaming under the FSA and the presumption of innocence in Article 6(2) ECHR can be discussed on the basis of two questions. The first question is whether naming and shaming under the FSA can be qualified as a criminal charge to which Article 6(2) ECHR will apply. For the qualification of a criminal charge, I use the criteria laid down in *Engel v The Netherlands*.⁶⁶ These

60 Case T-62/98, *Volkswagen AG v Commission*, [2000] ECR II-2707.

61 ECtHR, *Janosevic v Sweden*, [2004] 38 EHRR 22.

62 See *Janosevic v Sweden*, supra note 61, Para. 106.

63 See *Janosevic v Sweden*, supra note 61, Paras. 107-108.

64 See *Janosevic v Sweden*, supra note 61, Para. 109.

65 Annotation by Widdershoven in ECtHR 23 July 2002, *Janosevic v Sweden*, no. 34619/97, EHRC 2002/88.

66 ECtHR, *Engel v the Netherlands*, [1976] 1 EHRR 647.

criteria are: (i) the legal classification of the offence under national law; (ii) the very nature of the offence; and (iii) the nature and degree of severity of the penalty that the person concerned risks incurring.⁶⁷ These criteria were also recently applied in the EU context in the cases *Bonda* and *Akerberg Fransson*. The ECJ followed the ECtHR's reasoning in these cases when it decided on the criminal nature of certain administrative sanctions which had been imposed. This means that the interpretation of the Article 6 ECHR criteria concerning a criminal charge by the ECJ is fully in line with the interpretation of that article by the ECtHR.

The second question is whether the decision to impose a publication measure under the FSA constitutes a breach of Article 6(2) ECHR. Here, I will make use of the aforementioned criteria established in the *Janosevic v Sweden* case. Each question will be discussed in relation to the public warning, the publication of an administrative fine, the publication of an incremental penalty payment and, finally, the immediate publication of an administrative sanction.

4.1. The public warning

In order to qualify a public warning as a criminal charge, it is necessary that the *Engel* criteria are met. When testing the public warning against the first *Engel* criterion (i.e. the legal classification of an offence under national law), this publication measure is not classified as a criminal offence under Dutch law. The FSA does not qualify a public warning as a sanction, let alone a criminal one. However, the classification under national law is of relative value in determining whether the publication measure qualifies as a criminal charge. The second criterion represents a factor of appreciation which has greater weight.⁶⁸ The publication measure can be criminal in character if the second or third criterion is met.

The second *Engel* criterion – the nature of the offence – implies the nature of the relevant legal provision which has been infringed. This provision should contain a rule that is directed, not towards a given group possessing a special status, but towards all citizens.⁶⁹ A prohibitory provision under the FSA and a provision which has been designated by a Decree of a Regulation pursuant to Article 288 of the Treaty on the functioning of the European Union are examples of rules that are directed towards all citizens. However, this is not the only relevant indicator in assessing the second criterion. The nature of the offence should also be considered in relation to the corresponding penalty.⁷⁰ Deterrence and punishment are, therefore, not only to be taken into consideration when discussing the third *Engel* criterion. Accordingly, there is a relationship between the second and third *Engel* criterion.⁷¹

The third *Engel* criterion – the nature and degree of severity of the penalty that the person concerned risks incurring – was further established in the *Öztürk* case, in which the ECtHR ruled that the penalty must be a 'deterrent and punitive'.⁷² However, the meaning of these terms was not further explained by the Court. Hence, I follow the interpretation given by Swart. According to this author, the term 'deterrent' is aimed at preventing a recurrence of an offence on a special level (i.e. deterring the offender) and a general level (i.e. deterring persons other than the offender). The term 'punitive' implies an element of punishment.⁷³

In applying the term 'deterrent' to a public warning, this publication measure must deter both the offender and others. By publishing the offence, both the offender and others will think twice before they decide to commit an offence. However, a more important question is whether the public warning can be considered as 'punitive'. Certain authors argue that the public warning (and the publication of an administrative fine and an incremental penalty payment) are forms of punishment in the sense of specific identifiable loss, i.e. reputational damage.⁷⁴ I do not find this argument very convincing given the fact

67 See *Engel v The Netherlands*, supra note 66, Para. 82.

68 See *Öztürk v Germany*, supra note 27, Para. 52.

69 See *Öztürk v Germany*, supra note 27, Para. 53.

70 See *Öztürk v Germany*, supra note 27, Para. 52.

71 In this article, the qualification whether the penalty of each publication measure is 'deterrent and punitive' as an indicator for the second criterion will be discussed in the assessment of the third criterion.

72 See *Öztürk v Germany*, supra note 27, Para. 53.

73 A.H.J. Swart, *De rechten van de mens in het uitleveringsrecht, preadvies voor de Nederlandse Vereniging voor Internationaal recht*, 1982, p. 151.

74 D.R. Doorenbos, *Naming & Shaming, Serie Onderneming en Recht, deel 38*, 2007 p. 88, A.C. Beijering-Beck, 'Naming en shaming op grond van de Wet op het financieel toezicht', in: *Genoemd en gedoemd? Over actieve openbaarmaking door bestuursorganen (Preadviezen Jonge VAR 2011)*, 2012, p. 15 and Sauv , supra note 43, p. 38.

that by imposing *any* punitive sanction the relevant person is brought into disrepute. If this argument is used to exemplify punishment in the sense of a specific identifiable loss in order to qualify a sanction as punitive, then every sanction, by definition, would be punitive. Furthermore, I find the argument of reputational damage not to be suitable for any legal qualification. This would be more appropriate within the economic context.

The public warning as such is not punitive, but its content may be. The content of the publication measure – informing that an offence has been committed – does not punish the offender as such. Given that fact, the content of a public warning cannot be qualified as punitive. Accordingly, the third *Engel* criterion cannot be met. My conclusion is therefore that the public warning cannot be qualified as a criminal charge. As a consequence, Article 6 ECHR, including the presumption of innocence, is not applicable. If the public warning cannot be considered as a criminal charge and thus does not fall under the scope of Article 6 (2) ECHR, also the immediate public warning does not fall under the scope thereof.

4.2. The publication of an administrative fine

Now, some comments on the publication of an administrative fine. Can this publication measure under the FSA be considered as a criminal charge? Here again, the same *Engel* criteria apply. With regard to the first *Engel* criterion, i.e. the legal classification of an offence under national law, a distinction can be made between a violation which qualifies as an economic criminal offence and a violation which does not qualify as such. If the offence qualifies as an economic criminal offence, the first *Engel* criterion is met. If the offence does not qualify as an economic criminal offence, the publication of an administrative fine cannot be legally classified as a criminal offence under Dutch law.

According to the second criterion of the *Engel* case, i.e. the very nature of the offence, such an offence should be directed towards all citizens. If the publication of an administrative fine is imposed for a grave offence under (i) any prohibitory provision under the FSA, (ii) another provision that is subject to a fine with tariff number 2 or 3 under the Decree pursuant to Article 1:81(1) FSA; and (iii) a provision which has been designated by a Decree of a Regulation pursuant to Article 288 of the Treaty on the functioning of the European Union, the relevant rule is directed towards all citizens. The same applies to a petty offence under a provision which has been designated by a Decree of a Regulation pursuant to Article 288 of the Treaty on the functioning of the European Union. The publication of an administrative fine in respect of such an offence meets the second *Engel* criterion as well.

By applying the third *Engel* criterion, i.e. the nature and degree of severity of the offence, I believe that the publication of an administrative fine will deter both the offender and others. By publishing an administrative fine, both the offender and others will think twice before committing any offence that may lead to an administrative fine. With regard to the punitive character of the offence, the content of the publication should be its determining factor. The publication of an administrative fine contains a notification of an administrative fine having been imposed. Clearly, an administrative fine is a punitive sanction (under Dutch administrative law) and can therefore be considered as a deterrent and punitive. The offender is punished by an unconditional obligation to pay the imposed fine. If the content of the publication is punitive, a relevant question is whether the mere act of publishing is punitive.

Doorenbos argues that the publication of an administrative fine is inextricably linked with the administrative fine itself by referring to a number of ECtHR cases.⁷⁵ Therefore, the publication can be considered as a consequence of the criminal charge (the administrative fine) and, accordingly, falls under the scope of Article 6(2) ECHR.⁷⁶ Also Roth and the Dutch court speak of an inextricable link between the publication and the sanction itself.⁷⁷ However, no further explanation is given by any of these parties. I agree with the view of the Dutch court and the authors mentioned above that the decision to publish an administrative fine and the decision to impose such a sanction cannot be seen separately from one another. The imposition and the publication of such sanction are basically one and the same decision.

⁷⁵ ECtHR, *Ringvold, Hammern, O. and Y v Norway*, [2003] appl. no. 34964/97 (unreported), 30287/96 (unreported), 29237/95 (unreported), 41 EHRR 87.

⁷⁶ Doorenbos, *supra* note 74, p. 90.

⁷⁷ G.P. Roth, 'De publicatie van waarschuwingen en boetes onder de Wft', 2006 *Ondernemingsrecht*, no. 46, p. 152 and *Rechtbank Rotterdam* (District Court of Rotterdam) 8 April 2010, *JOR* 2010/158 (with annotation by Voerman in *JOR* 2010/159), Para. 2.12.

After all, in its decision to impose an administrative fine, the supervisor indicates that the sanction will be published. This indication implies that the decision to publish has been made together with the decision to impose the fine. As a result, the administrative fine and its publication each have a punitive character. Accordingly, all the *Engel* criteria are met and, consequently, the publication of an administrative fine can be considered as a criminal charge in the sense of Article 6 ECHR.

By concluding that Article 6 ECHR is applicable, the following question is whether the presumption of innocence is violated by the publication of an administrative fine. Doorenbos argues that this is so in the case of an early publication by a public authority (such as the financial supervisor) due to the lack of a court judgment at this stage.⁷⁸ I think that this is incorrect, because the presumption of innocence will always apply, even before the moment the matter has been brought before a court. Doorenbos seems to link the judicial intervention to administrative procedures. In the administrative phase in which the supervisor imposes a fine which it also publishes, the presumption of innocence can be violated even before the matter has been brought before a court. After all, the presumption of innocence may be infringed not only by a court but also by other public authorities.⁷⁹

In order to answer the question on the presumption of innocence, the ruling set out in the *Janosevic v Sweden* case is relevant. In my opinion, the publication of an administrative fine is subject to a fair balance between the mutual interests of the parties involved. Here, I follow Beijering-Beck in her reasoning that the ‘unless clause’ implies a certain level of a weighing of interests. The general obligation to publish does not exclude the situation that such publication can be omitted if it would lead to a disproportionate disadvantage to the (legal) person concerned or if the financial markets would be seriously jeopardized. In such circumstances, publication is contrary to the object of the supervision concerning compliance with the FSA. Accordingly, under those circumstances an exception should be made with respect to the general obligation to publish.⁸⁰ With that aspect in mind, I must note that the ‘unless clause’ is not an ideal example of a fair balance between the mutual interests of the parties as the interests of the person concerned are made subordinate to the interest of warning the public.

A distinction must be made between an early publication and publication which has become final. Based on the ruling in the *Janosevic v Sweden* case, there is a possibility to have the early publication of an administrative fine suspended, but this suspension does not occur automatically. Article 6(2) ECHR is not breached by the early publication of an administrative fine if the person concerned requests a preliminary injunction and this request is granted by the court in preliminary relief proceedings. The publication of an administrative fine which has become final does not violate the presumption of innocence as the decision to impose such a fine was based on evidence that the offender is guilty according to the law.

4.3. *The publication of an incremental penalty payment*

In order to determine whether the publication of an incremental penalty payment is a criminal charge, the *Engel* criteria again apply. The order for an incremental penalty payment which has not been complied with within a specific term classifies as an administrative offence. Accordingly, the publication measure does not meet the first criterion. As mentioned before, the classification under national law is of relative value. For Article 6 ECHR to be applicable, it suffices if the second or the third criterion is met as these criteria are alternative, and not necessarily cumulative.⁸¹

As previously mentioned, the supervisor may impose an incremental penalty payment in respect of a violation of regulations in the exercise of its task of supervising the financial markets or persons working in such markets, all as set out on account of a Decree which refers to a Regulation as meant in Article 288 of the Treaty on the functioning of the European Union, the Regulation on Credit Rating Agencies and Article 5:20 of the General Administrative Law Act. In case of a breach of these regulations, the second *Engel* criterion will apply as each of these regulations is directed towards all citizens.

In order to meet the second and third *Engel* criteria, the penalty should be a deterrent and punitive. Both the offender and others will be deterred by the publication measure – aimed at special and general

78 D.R. Doorenbos, ‘Schandpaal en onschuldpresumptie’, 2003 *Nederlands Juristenblad*, p. 2193.

79 ECtHR, *Allenet de Ribemont*, [1995] 20 EHRR 557, Para. 36.

80 Beijering-Beck, supra note 74, p. 43.

81 See *Öztürk v Germany*, supra note 27, Para. 54.

prevention – due the fact that the incremental penalty payment will be published after it has been incurred. Whether the publication measure can be considered as punitive depends on the content of the publication. Unlike the publication of an administrative penalty, the argument of publication being ‘inextricably linked with the imposition of a sanction’ as mentioned above cannot be used in respect of the publication of an incremental penalty payment. This latter type of sanction applies to a reparatory sanction, whereas the publication of an administrative penalty solely concerns a punitive sanction. In order to assess whether the publication measure is punitive, a distinction must be made between the situation in which the offence has in the meantime been halted and the situation in which the offence is still being committed. Sauvé notes that the publication of an incremental penalty payment can be regarded as an extra incentive to persuade the offender to comply with the order.⁸² Michiels argues that in a situation where an incremental penalty payment has been incurred and where the relevant publication takes place after the offence has been halted, such publication can no longer be regarded as a reparatory sanction.⁸³ I share these views as such publication can no longer be considered as an incentive to comply with the order of an incremental penalty payment. After all, the person concerned has already complied with the order by terminating the offence. The object of publishing an incurred incremental penalty payment while the relevant offence no longer exists is solely to punish the offender.⁸⁴ Accordingly, this type of publication cannot be seen as a way of warning the public as the legislator does.

In sum, the publication of an incurred incremental penalty payment when the relevant offence no longer exists does not meet the first criterion. However, the second and third criteria are met and accordingly such publication measure is considered as a criminal charge. But the publication of an incurred incremental penalty payment while the offence continues cannot be qualified as punitive and, subsequently, not as a criminal charge.

A next question is whether the presumption of innocence in Article 6(2) ECHR is breached when the incremental penalty payment has been incurred but the relevant offence no longer exists. Here, the ruling under the *Janosevic v Sweden* case applies once again on the basis of the same arguments for the presumption of innocence in relation to the publication of an administrative fine. The publication of an incremental penalty payment is also subject to the ‘unless clause’ and is provided with the possibility to suspend the publication. Accordingly, the publication of an incurred incremental penalty payment which takes place while the offence no longer continues is subject to a fair balance between the mutual interests of the parties involved. Furthermore, such publication does not violate the presumption of innocence if certain conditions are fulfilled. The person concerned must request a preliminary injunction to suspend the publication and this request must be granted by the court in preliminary relief proceedings.

4.4. The immediate publication of an administrative sanction

One of the conclusions made earlier in this article is that the early publication of an administrative fine and the publication of an incurred incremental penalty payment while the relevant offence no longer continues are each considered as a criminal charge. In line herewith, it is obvious that the immediate publication of these sanctions can be regarded as a criminal charge as well. For that reason, it is not necessary to discuss the *Engel* criteria again in this respect.

The main question is whether the immediate publication of a sanction constitutes a violation of the presumption of innocence of Article 6(2) ECHR. Again, the ruling laid down in *Janosevic v Sweden* applies. An immediate publication does not contain the legal safeguards that provide for the possibility of its suspension. Accordingly, such a publication measure by definition constitutes a breach of Article 6(2) ECHR.

⁸² Sauvé, supra note 43, p. 41.

⁸³ F.C.M.A. Michiels, “‘Naming and Shaming’ in het markttoezicht”, 2007 *Nederlands Tijdschrift voor Bestuursrecht*, no. 16, p. 88.

⁸⁴ Sauvé, supra note 43, p. 41.

5. Conclusion

In this article I have tried to demonstrate how naming and shaming in the Dutch financial markets relates to the presumption of innocence. This relationship cannot be defined unambiguously. As regards the public warning, this publication measure does not violate the presumption of innocence as it cannot be considered as punitive and, accordingly, as a criminal charge. The early publication of an administrative fine and the publication of an incurred incremental penalty payment when the relevant offence no longer exists will, however, always constitute a violation of the presumption of innocence, unless certain conditions are fulfilled. These conditions imply that the person concerned must first request a preliminary injunction. Secondly, such a preliminary injunction needs to be granted by a court in preliminary relief proceedings. As a result, the publication will be suspended until a court in preliminary relief proceedings has decided on the guilt of the presumed offender. If guilt has been established, the decision on the publication has become legally final which implies that the presumption of innocence has been respected. The immediate publication of an administrative sanction is, by its very nature, always a violation of the presumption of innocence as such form of publication does not offer any legal guarantees for being suspended.

In view of these considerations, it seems odd that the Dutch legislator comes to the conclusion that all three publication measures are solely meant to warn the public by referring to the *Öztürk* case. After all, the fact that warning the public is the primary object of the publication measures does not exclude a publication from having a punitive character. My conclusion is that the Dutch legislator has gone too far by legally anchoring the early publication of an administrative fine and the publication of an incurred incremental penalty payment when the relevant offence no longer exists to such an extent that their application in fact results in a violation of the presumption of innocence. The Dutch publication regime in its present form is not a good example of how naming and shaming should be used in the context of financial market regulations by Member States, nor by non-EU states. Under the Dutch publication regime, the balance between an effective and proportionate sanctioning regime and respecting the presumption of innocence is distorted. In order to restore such a balance, I would recommend the following.

First of all, the immediate publication of an administrative sanction as an instrument of naming and shaming should be abolished in its entirety. Such a regime, which is not even prescribed by CRD IV, clearly violates Article 6(2) ECHR given the fact that no legal safeguards are offered. Secondly, the FSA should prescribe that the early publication of an administrative fine and the publication of an incurred incremental penalty payment when the relevant offence no longer exists should at least contain an indication that the publication is still subject to appeal.⁸⁵ Such a provision does not yet exist under the current FSA, although it is required by Article 68 CRD IV. This means that the Dutch legislator will have to amend the FSA accordingly before the date of application, which is 1 January 2014.

My third recommendation is that in the FSA a specific provision should be included prescribing that the publication should contain the following information: if an appeal is lodged and this appeal is granted, the publication of the decision will be suspended until the court has rendered its judgment in preliminary relief proceedings. Surprisingly, the new Directive does not contain any such provision. The FSA does contain provisions on the possibility of suspending the publication of an administrative fine and an incremental penalty payment, but I find that such information should be explicitly included in the publication itself.⁸⁶ Therefore, I would recommend that in the FSA a special provision should be included which is similar to the provision of the public warning which prescribes which information should be included in the publication.⁸⁷ In my view, all relevant information on the legal safeguards available to the presumed offender should be made known by the supervisor in case of publication. After all, providing information on the legal safeguards is essential in relation to the presumption of innocence.

⁸⁵ The notification of such information has, meanwhile, already become common practice for the Dutch supervisors.

⁸⁶ Arts. 1:97(2) and 1:99(2) Wft.

⁸⁷ See Art. 1:95(1) Wft.

Similar recommendations could be made to the EU legislator and the ECJ. As Article 52(3) CFR does permit more extensive protection under EU law, these institutions could create more legal safeguards against naming and shaming than those developed by the ECtHR in *Janosevic v Sweden*.

If the aforementioned recommendations would be taken into account, naming and shaming under the FSA could be applied without resulting in any violation of the presumption of innocence.

My attempt to analyze the Dutch naming and shaming practice in respect of the presumption of innocence might be of interest to other countries. Other EU Member States which face comparable issues in the implementation of CRD IV and non-EU states which deal with identical regulation and enforcement problems should be aware of the fragile balance between naming and shaming and the presumption of innocence. On the one hand, the public should be warned in case of a serious violation by publishing the relevant sanction in response thereto. On the other hand, the supervisor should exercise the necessary due care in order to respect the fundamental right of the presumption of innocence. If other countries would follow the Dutch publication regime by anchoring a legal general obligation to publish sanctions, they should ensure that the relevant supervisor is obliged to indicate in the publication that the presumed offender has the right to appeal and that if such an appeal is granted, the publication will be suspended. The present Dutch publication regime in respect of the presumption of innocence will, hopefully, compel the Dutch legislator to amend the FSA accordingly and serve as an example for other countries of how naming and shaming should not be applied. ¶