ENFORCING EU LAW AT THE NATIONAL LEVEL

EU GENERAL PRINCIPLES AND THE IMPOSITION OF FINES

Edited by
Dawid Miąsik

ROUTLEDGE

Enforcing EU Law at the National Level

This book examines the interface between EU primary law and national substantive and procedural legislation governing fines imposed by Member States for breaches of European law or national implementing legislation. It focuses on analyzing the general principles of EU law and the European fundamental rights enshrined in the Charter of Fundamental Rights of the European Union. It explains the links between EU law and national fining legislation or proceedings that trigger the duty to respect EU primary law. It covers the concepts of consistent interpretation, the primacy of EU law, and the effectiveness of European fundamental rights and general principles from the perspective of national fining proceedings and the protection of individuals. The collection discusses the following principles and fundamental rights: the principle of legal certainty, the principle of protection of legitimate expectations, the principles of equal treatment and non-discrimination, the principle of proportionality, the principle of ne bis in idem, the principle of good administration, and the right to an effective remedy. Each principle or fundamental right has been analyzed coherently, with the focus on the rights of individuals and the duties of national administrative authorities and courts in the course of national fining proceedings. It also explores the interdependencies between various principles and rights, as well as some specific problems in this area that have occurred in Poland, thus showing the practical importance of the research, or issues that are common to all Member States irrespective of differences in national procedures and fining provisions. The volume will be a valuable resource for researchers, academics, and policy-makers working in the areas of EU law, Administrative Law, and Comparative Law.

Dawid Miąsik is an Adjunct Professor at the Department of European Law at the Institute of Law Studies, Polish Academy of Sciences, Poland, and a Judge of the Polish Supreme Court in the Chamber of Labour and Social Security.

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Introduction

Dawid Miąsik

The idea for this book arose during research on the impact of EU law principles on the imposition of fines by national public administration bodies (No. 2021/43/B/HS5/01252). Sanctions imposed by Member States, particularly fines for breaches of European law or national implementing legislation, play a significant role in ensuring the effectiveness of EU law. While the Member States are under a duty of loyal co-operation to introduce sanctions into their national systems and enforce them effectively against various breaches of EU law, this duty is nowadays additionally regulated in EU secondary legislation. It usually takes the form of a general clause of the duty to introduce "effective, proportionate and dissuasive administrative sanctions". Sometimes, however, the regulation of sanctions or fines to be introduced into the national legislation and then enforced by the national administrative authorities (NAAs) is much more extensive. Certain directives, not to mention regulations such as the Digital Services Act[1] or the Artificial Intelligence Act,[2] regulate all the elements of the sanctioning norm, including the addressee, the subject matter of the infringements, the fine (or other sanction), the method for calculating it and the circumstances to be taken into account when establishing its actual amount. This confirms the importance of fines in securing the effectiveness of EU law.

However, instead of analysing the fines and modes of their application in various areas of EU substantive law, it was decided to focus on the general principles and fundamental rights enshrined in the Charter of Fundamental Rights of the European Union (the Charter),[3] due to the ongoing process of

1 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022, 27 October 2022, L 277, pp. 1–102.

2 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), OJ 2024, L 1689, 12/7/2024, pp. 1–144

3 OJ 2000, C 364, 18 December 2000, pp. 1–22.

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European constitutionalisation and interesting developments that have taken place at the interface between the principles of EU law, national fining legislation and the practice of its application. Both national legislatures, at the stage of implementing EU law into their respective national legal orders, and national administrative authorities, at the enforcement stage, are obliged to respect those principles and rights guaranteed under the Charter, irrespective of the level of detail of the fining regulation under EU law.

The initial investigation showed a significant number of preliminary references coming not only from the newest Member States, which raised various aspects of the application of general principles of EU law and European fundamental rights in national fining proceedings. These issues also concerned the very principles of EU law, such as direct effect and primacy. These references from national courts not only demonstrated a wide scope of interference between EU law and national fines but also unearthed significant practical problems that national authorities and courts still face if EU primary law is to be respected in the course of national fining proceedings. On the other hand, the initial research into Polish practice showed a virtual unawareness among both the fining authorities and the courts of various jurisdictions of the duty to interpret and apply national fining provisions, both substantive and procedural, in a manner consistent with the requirements stemming from European general principles of law and fundamental rights.

Fines are not only a preferred measure of securing the effectiveness of EU law. Some governments may also be tempted to use them as an instrument of a national illiberal policy to impose fines on opponents. Under the pretext of enforcing EU law, certain governments may use administrative authorities and fines to drive foreign or rebellious undertakings or individuals out of the market or to force them to comply with various illegitimate and undemocratic expectations. Here, European general principles of law and fundamental rights may provide individuals with additional remedies, such as the emerging remedy of non-enforceability of judgments or fining decisions that violate the Charter. Failure to respect at least some of these principles and rights should be considered an apparent violation of EU law, justifying damages from the Member State at fault.

These reasons convinced us that there is not only room for further research on the general principles of EU law and fundamental rights, but that there is also a need to fill the gap in the research by providing a study focused on a specific perspective – the perspective of national financial proceedings, the duties of the national administrative authorities and national courts hearing appeals from fining decisions.

The book consists of three parts. Part 1 (“Enforcement of EU law at the national level by fines: General issues”) contains three chapters dealing with issues common to all fining proceedings and the application of all European principles and fundamental rights. Chapter 1 focuses on the sources of Member States’ duty to respect EU law principles in national fining proceedings and on the various links that enable national authorities to determine whether a given set of fining proceedings falls within the scope of EU law. Chapter 2 is devoted to the most important tool in the hands of any national authority applying provisions of national law falling within the scope of EU law: the principle of consistent interpretation. This principle also requires closer examination, as most fines imposed by national administrative bodies can be labelled "criminal penalty". This results in certain constraints on the duty of consistent interpretation of national law. Chapter 3 discusses the overall consequences of the failure to observe principles of EU law by a national legislature (recourse to various aspects of the principle of primacy) or by a fining authority (various forms of re-hearing, re-opening, correcting or even non-executing decisions on fining and damages).

Part 2 of the book ("Application of specific general principles of EU law in national fining proceedings") analyses the European general principles of law and fundamental rights that are applicable to national fining proceedings. It commences with the principle of legal certainty, which not only serves as a legitimate limitation to the principle of consistent interpretation, but also lures individuals with a potentially wide scope of application and protection against maverick interpretations of national legislation leading to fines being imposed. The key question to be answered is whether this umbrella principle truly offers additional guarantees beyond the use of the principle of *lex mitior*.

The following chapter is devoted to the principle of protection of legitimate expectations, which is derived from the principle of legal certainty. Here the key element is the requirements that must be met by the fining practice of the NAA for the legitimate exceptions to arise. This calls for an examination of the various guidelines issued by the NAAs. The principles of equal treatment and non-discrimination follow. While discrimination can easily be established in respect of both national fining legislation and fining practice, the principle of equal treatment seems to offer individuals an equally elusive standard of protection as the principle of legal certainty. This chapter also offers a perspective that differs slightly from that adopted in others: it decodes the existing standard from the case law developed in the course of reviewing fining practices in European proceedings due to a lack of preliminary references raising inequality issues at the national level. The principle of proportionality follows as a key principle with the widest potential impact on the interpretation and application of national fining legislation. It is followed by the closely connected principle of *ne bis in idem*, which has lost its original content and no longer protects individuals from double jeopardy, but rather from the cumulation of excessive, and hence disproportionate, penalties. Recent developments in the Court of Justice of the European Union case law concerning the requirement to co-ordinate duplicate proceedings, in particular, call for an original examination, as it may serve as a barrier to imposing effective and dissuasive sanctions at the national level for infringements committed within the territory of the fining Member State but independently fined by authorities of another Member State.

The next two chapters are devoted to procedural rights that raise different research questions. The right of defence and the presumption of innocence are well-established general principles of EU law and are developed in EU competition law. Unlike most other principles and fundamental rights under consideration, they impact the procedural solutions in force in the Member States. This calls for a closer examination of how the European procedural fundamental rights influence the national procedural rules: independently or through the national procedural autonomy test. On the other hand, the principle of good administration offers a good example of a general principle of EU law that supplements the narrower protection offered by the Charter of Fundamental Rights, thereby providing individuals with additional protection. Part 2 of the book concludes with Chapter 11, on the right to an effective remedy. This right is an example of fundamental rights that initially operated only at the judicial stage of fining proceedings but have developed into rights binding on administrative authorities.

Part 3 of the book ("Enforcement of EU law at the national level by fines: Specific problems and case studies") presents the working of the general principles of EU law and fundamental rights in national fining proceedings in specific areas of law. It begins with a study of the current problem concerning the legal certainty principle's impact on fines imposed for novel anti-competitive practices in the digital economy. The next chapter deals with the question of national data protection authorities mitigating penalties, based on a case study of fines imposed for infringement of the General Data Protection Regulation.[4] This part of the book concludes with a chapter devoted to the principle of *ne bis in idem* in bid-rigging cases.

The authors invited to contribute to this book come from various Polish academic and research institutes. Each has already acquired significant knowledge in general principles or fundamental rights.

I would like to thank the authors for accepting my invitation to participate in the project and for their contributions. I also thank my research team (Dr Michalina Szpyrka and Kamil Kapica) for their assistance in editing this volume.

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ 2016, L 119, 4/5/2016, pp. 1–88.

Part 1

Enforcement of EU law at the national level by fines

General issues

1 Duty to respect the EU general principles of law and fundamental rights in national fining proceedings

Monika Szwarc

Introduction

The enforcement of EU law is currently at the core of Member States' integration in the EU. Otherwise, European integration would be nothing more than paperwork with no effects or benefits for the societies and economies of the Member States cooperating within the EU framework. Enforcement, defined by A.J. Gil Ibanez as a "process that requires action from either the State or the Commission in order to force other actions to fulfil the obligations imposed on [companies and individuals] by Community law",[1] is effectuated in the EU according to two models. The first one, the so-called "direct model", is based on the actions of the EU institutions and bodies, in particular the European Commission. The second one, the "indirect model" (or decentralised model), is based on the actions of national authorities and bodies.[2]

This chapter focuses on the decentralised model, as the main point of interest here is national fining proceedings, thus the actions of the national administrative authorities (NAAs). At this point in European integration, it is unquestionable that, in general, sanctions are crucial to the application of EU law in the Member States and to the proper enforcement of obligations stemming from EU law for its addressees. This is the result of the long evolution of EU law, which started with the judgment of the Court of Justice of the EU (CJEU) in the *Greek Maize* case, in which it held that

1 A.J. Gil Ibanez, *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits*, Oxford – Portland 1999, p. 15. As the author explains, the terms "application" and "compliance" imply the active behaviour of addressees, while "enforcement" steps down when non-compliance exists. In a similar vein, see M. Scholten, EU (Shared) Law Enforcement: Who Does What and How?, in: S. Montaldo, F. Costamagna, A. Miglio (eds.), *EU Law Enforcement: The Evolution of Sanctioning Powers*, London – New York 2021, pp. 7–23.

2 For the typology and general outline, see C. Harding, Models of Enforcement: Direct and Delegated Enforcement and the Emergence of a 'Joint Action' Model, in: C. Harding, B. Swart (eds.), *Enforcing European Community Rules*, Dartmouth 1996, pp. 22–42; K. Mortelmans, General Aspects of Europeanization and Horizontalization of Enforcement, in: J.A.E. Vervaele (ed.), *Compliance and Enforcement of European Community Law*, The Hague – London – Boston 1999, pp. 51–69.

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> where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty [principle of loyal cooperation, Article 4(3) of the TEU today] requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.[3]

The Court then added that

> whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.[4]

From that moment, establishing sanctions in national law for infringements of EU law (by Member States' legislatures) and then imposing these sanctions by national authorities (including NAAs and courts) have been recognised as reflections of the duty of loyal cooperation that binds the Member States in relations with the EU as an international organisation. The indirect enforcement of EU law thus requires that the Member States do the following:

1) introduce laws that define obligations for addressees and sanctions for infringements of these obligations under EU law (in cases that fall within the scope of EU directives);
2) introduce laws that regulate sanctions for infringements of obligations that stem from directly applicable provisions of EU law (in cases that fall within the scope of EU regulations);
3) apply the laws from points 1 and 2 to impose sanctions – in case of a breach – on those with duties stemming from EU law in individual cases.

The role of NAAs must be seen as crucial to the enforcement of EU law in administrative proceedings that result in the imposition of sanctions (and, in particular, fines).

This chapter contains a general introduction to more detailed analysis of different aspects of the impact of EU legal principles on the imposition of fines by NAAs. It sets out the legal basis for NAAs' duty to respect the principles of EU law. It then explains the link between EU law and national fining proceedings. Last but not least, it elaborates on the distinction between the

3 Case 68/88, *Commission v. Greece*, EU:C:1989:399, para. 23.
4 Case 68/88, *Commission v. Greece*, EU:C:1989:399, paras 24–25.

administrative and criminal nature of fines and explains the legal implications of this distinction for national fining proceedings.

NAA and the duty to respect the principles of EU law (the *Costanzo* formula)

Let us start with the general statement that the obligation to apply EU law unquestionably relies not only on national courts, but more generally on all national authorities and bodies. In the *Costanzo* case, which is the starting point of this line of CJEU judgments, the national court had doubts whether an individual might rely on the provisions of the directive (which was recognised as directly effective in the meaning of the *Becker*[5] and *Marshall*[6] judgments) in proceedings before an administrative authority in the same way as in proceedings before a national court (which had already been confirmed by the CJEU). The Court confirmed that an individual may rely on a directly effective provision of an EU directive against a State which has failed to implement the directive in national law in the prescribed period or has failed to do so correctly, also in proceedings before an administrative authority.[7]

Thus, there should be no doubt that NAAs are bound by the duty to apply EU law in all proceedings with an EU element (see the section "When is an NAA's duty to respect principles of EU law activated? (The link between EU law and national fining proceedings)" below), to use conforming interpretation of EU law where necessary and to give full effect to directly effective provisions of EU law, including disapplying national provisions which conflict with EU provisions. It was also confirmed that these duties are binding on administrative authorities when they issue individual administrative decisions.[8] Such a standpoint has been confirmed in many different contexts of disputes between those with duties under EU law and administrative bodies, including the national regulatory body for the railway sector,[9] municipalities,[10] national immigration authorities,[11] police and security services,[12] tax authorities,[13]

5 Case 8/81, *Becker*, EU:C:1982:7.
6 Case 152/84, *Marshall*, EU:C:1986:84.
7 Case 103/88, *Costanzo*, EU:C:1989:256, paras 29–31.
8 Case C-224/97, *Ciola*, EU:C:1999:212, paras 30–32.
9 Case C-582/22. *Die Länderbahn*, EU:C:2024:213, paras 62–63.
10 Cases C-348/22, *Comune di Ginosa*, EU:C:2023:301, para. 77; C-102/21 and C-103/21, *Autonome Provinz Bozen*, EU:C:2022:272, para. 46; C-97/11, *Amia*, EU:C:2012:306, paras 38–39.
11 Case C-924/19 PPU and C-925/19 PPU, *FMS, FNZ and others*, EU:C:2020:367, paras 183–184.
12 Case C-378/17, *Minister for Justice and Equality and Commissioner of An Garda Síochána*, EU:C:2018:979, para. 38.
13 Cases C-628/15, *Commissioners for Her Majesty's Revenue and Customs*, EU:C:2017:687, para, 54; C-274/14, *Banco de Santander*, EU:C:2020:17, para. 78.

public authorities acting as an employer,[14] competition authorities[15] and all organisations or bodies which are subject to the authority or control of the State or which possess special powers beyond those resulting from the normal rules applicable to relations between individuals.[16]

Over the years, this duty has been confirmed by the CJEU in different aspects, and also recently in the *Popławski* case, where it stated that a national minister – just like any national court – is required to interpret national law in the light of the aim and provisions of EU acts (framework decision).[17] Undoubtedly, this obligation is relevant in the context of primary and secondary EU law (not only the EU directives). This includes the Charter of Fundamental Rights of the European Union (CFR) and the general principles of EU law, which both constitute part of primary EU law.

When is an NAA's duty to respect principles of EU law activated? (The link between EU law and national fining proceedings)

The Member States are bound by EU law in all cases that fall within its scope. In particular, the Member States are bound by the general principles of EU law, including those enshrined in the CFR, whenever they "implement EU law". The scope of this notion – implementing EU law – for the purposes of assessing whether a given Member State (and its authorities, in a particular case) has the duty to apply the general principles of EU law, is subject to the abundant and constantly developing case law of the CJEU. In general, there are two different situations in which the Member States and their NAAs are bound by the general principles of EU law (and the Charter).

Firstly, this is true in all situations when they rely on overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of the internal market's freedoms (free movement of goods, persons, services and capital), which was confirmed long before the CFR entered into force.[18] This standpoint was also confirmed after the CFR entered into force, when the CJEU recognised in *Pfleger* that

> where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the Treaty, it may benefit from the exceptions provided for by EU law in order to justify that fact only in so far as that complies with the fundamental rights enforced by the Court. That obligation to comply with fundamental rights

14 Cases C-177/10, *Santana*, EU:C:2011:557, para. 53; C-444/09 and C-456/09, *Gavieiro and Torres*, EU:C:2010:819, para. 73; C-429/09, *Fuß*, EU:C:2010:717, para. 40.

15 Case C-198/01, *CIF*, EU:C:2003:430, para, 49–50.

16 Cases C-188/09, *Foster and Others*, EU:C:1990:313, para. 18; C-413/15, *Farell*, C-413/15, EU:C:2017:745, para. 33.

17 Case C-573/17, *Popławski*, EU:C:2019:530, paras 72 and 94.

18 Case C-260/89, *ERT*, EU:C:1991:254, para. 43.

> manifestly comes within the scope of EU law and, consequently, within that of the Charter. The use by a Member State of exceptions provided for by EU law in order to justify an obstruction of a fundamental freedom guaranteed by the Treaty must, therefore, be regarded [...] as 'implementing Union law' within the meaning of Article 51(1) of the Charter.[19]

Such an approach has also been applied by the CJEU in the context of fining procedures before NAAs. For example, national provisions which provide an obligation to draw up and keep social and labour documents on posted workers in the host Member State, which in turn may give rise to additional expenses and administrative and economic burdens for companies based in other Member States, are to be recognised as a restriction on the freedom to provide services. The same is valid if the national provisions establish administrative permits for the provision of services within the State's territory by a company based in another Member State. In consequence, any national legislation imposing penalties on either a service provider or the recipient of those services for non-compliance with such obligations – which constitute restrictions on the freedom to provide services – is likely to render the exercise of that freedom less attractive.[20] As a result, the administrative authority of that Member State is acting within the scope of "implementation of EU law" within the meaning of the *ERT/Pfleger* formula and is bound by the general principles of EU law, including the Charter. Therefore, the compatibility of national legislation, which is the legal basis for proceedings before an NAA and is in effect for the imposition of fines, "must be examined in the light both of the exceptions provided for by the Court's case-law and of the fundamental rights guaranteed by the Charter".[21]

The second way that the Member States are bound by the general principles of EU law is in all situations when they are implementing EU law,[22] which means both adopting legally binding provisions at the national level (in particular, in the case of EU directives) and applying (by NAA) national provisions implementing EU directives or directly applicable provisions of EU regulations. After the Charter entered into force, the CJEU confirmed this rule in the context of fining proceedings before NAA in the *Fransson* case, where it stated that

> tax penalties and criminal proceedings for tax evasion, such as those to which the defendant in the main proceedings has been or is subject because the information concerning VAT that was provided was false, constitute implementation of Articles 2, 250(1) and 273 of Directive

19 Case C-390/12, *Pfleger*, EU:C:2013:747, para. 36.

20 Case C-64/12, *Maksimovic*, EU:C:2019:723, paras 30–32.

21 For the same line of reasoning, see cases C-235/17, *Commission v. Hungary*, EU:C:2019:432, para. 66; C- 544/19, *ECOTEX*, EU:C:2021:803, para. 89; C-55/22, *NK*, EU:C:2023:670, paras 30–31.

22 Case C-292/97, *Karlsson*, EU:C:2000:202, para. 37.

> 2006/112 (previously Articles 2 and 22 of the Sixth Directive) and of Article 325 of the TFEU and, therefore, of European Union law, for the purposes of Article 51(1) of the Charter.[23]

It was interesting to observe that the CJEU recognised the obligation to introduce sanctions under the very general Article 273 of the VAT Directive[24] and the more detailed Article 325 of the Treaty on the Functioning of the European Union (TFEU). At present there should be no doubts that the obligation to apply the general principles of EU law, including fundamental rights enshrined in the CFR, relies on the Member States, including their NAAs and national courts, in the following types of national fining proceedings:

- when national authorities apply sanctions for infringements of EU regulations;[25]
- when national authorities apply sanctions for infringements of national law implementing EU directives (VAT),[26] excise duty[27] and market abuse;[28]
- when national authorities apply sanctions for infringements of obligations stemming from EU decisions;[29]
- where sanctions are established for infringements of the international agreements that constitute part of EU law.[30]

23 Case C-617/10, *Fransson*, EU:C:2013:105, para. 27; see also M. Szwarc, Application of the Charter of Fundamental Rights in the Context of Sanctions Imposed by Member States for Infringements of European Union Law: Comment on Fransson Case, *European Public Law*, 2014, vol. 20, no. 2, pp. 229–245; cases C-524/15, *Menci*, EU:C:2018:197, para. 21; C-97/21, *MV-98*, EU:C:2023:371, para. 22; C-570/20, *BV*, EU:C:2022:348, para. 26.

24 Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11 December 2006, p. 1–118, the VAT Directive) reads as follows: "Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons".

25 Case C-77/20, *K.M.*, EU:C:2021:112, where the CJEU confirmed that "the obligation on the Member States to ensure that sanctions which are effective, proportionate and a deterrent are imposed for infringements of the rules of the common fisheries policy is of fundamental importance", para. 29.

26 See e.g. Cases C-617/10, *Fransson*, EU:C:2013:105, Case C-524/15, *Menci*, EU:C:2018:197; C-564/15, *Farkas*, EU:C:2017:302; C-712/17 *EN.SA*, EU:C:2019:374; C-935/19, *Grupa Warzywna*, EU:C:2021:287.

27 Case C-820/21, *Vinal*, EU:C:2023:667, paras 37–38.

28 Case C-537/16, *Garlsson*, EU:C:2018:193, para. 23.

29 Commission Decision of 13 December 2006 (2006/928/EC) establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ L 354, 14 December 2006), pp. 56–57 (no longer in force).

30 Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 43:

> The obligation under Article 61 of the TRIPS Agreement to provide for criminal procedures that are, at the very least in cases of wilful trademark counterfeiting or copyright

For the sake of this chapter's completeness, it seems necessary to also add that, in some situations, the application of EU law is provoked by the fact that national legislation, which in general is enacted outside the scope of EU law, contains references to it. Such situations are identified before the CJEU in the context of assessing whether it has jurisdiction to give a preliminary ruling (to answer preliminary questions posed by national courts). As the CJEU rules this is possible

> in situations in which the facts of the case in the main proceedings fell beyond the field of application of EU law but in which those provisions of EU law had been rendered applicable by domestic law due to a renvoi made by that law to the content of those provisions. In those cases, the provisions of domestic law incorporating provisions of EU law did not limit the application of the latter.[31]

However, the Court's interpretation of EU law in purely internal situations is allowed and necessary only when these provisions were made applicable by national law directly and unconditionally.[32]

An NAA's duty to respect EU law and the legal nature of fines

Member States' freedom to choose appropriate sanctions and its limits

As already confirmed by the CJEU in *Greek Maize*, in the indirect model of enforcement of EU law, the Member States enjoy a wide margin of discretion as to the choice of sanctions for infringements of EU law, as long as no EU provisions call for harmonisation of sanctions. This means that in general they may choose from civil, administrative or criminal sanctions, including administrative or criminal fines (which are the main point of interest in this volume). Furthermore, it was confirmed that sanctions for infringements of

piracy on a commercial scale, capable of resulting in effective, deterrent and proportionate penalties, binds each member of the WTO, including the European Union and its Member States, and forms part, as is apparent from the case-law referred to in paragraph 39 above, of EU law, irrespective of acts of internal harmonisation. The Court's case-law according to which a Member State is implementing EU law, within the meaning of Article 51(1) of the Charter, where it is discharging an obligation, laid down in a provision of EU law, to provide for effective, proportionate and deterrent penalties against the persons responsible for the offences referred to by that provision (see, to that effect, case C-537/16, *Garlsson Real Estate and Others*, EU:C:2018:193, paras 22 and 23) applies to the case at hand. The fact that that obligation is laid down in an international agreement entered into by the European Union and not in internal EU legislation is, in that regard, irrelevant, as follows from the case-law referred to in paragraph 38 above.

31 Case C-482/10, *Cicala*, EU:C:2011:868, para. 17 and the case law referred to therein.

32 Case C-482/10, *Cicala*, EU:C:2011:868, para. 19 and the case law referred to therein.

EU provisions may take the form of administrative penalties, criminal penalties or even a combination of the two.[33]

However, over time the discretion of the Member States was gradually restricted. Firstly, whichever regime of sanctions they choose (civil, administrative or criminal), these sanctions must be effective, dissuasive and proportionate, and must be imposed in a non-discriminatory manner (*Greek Maize* requirements). Secondly, the CJEU reconstructed the implied powers of the EU to impose criminal penalties for infringements of environmental protection law in cases C-173/03 *Commission v. Council* and C-440/05 *Commission v. Council*.[34] It was declared that in some cases, criminal sanctions may be the only solution that ensures the effective application of EU law. Under the Treaty of Lisbon, this line of reasoning was incorporated into primary law, since under Article 83(2) of the TFEU, Member States may be required to introduce minimum rules with regard to criminal offences and penalties "[i]f the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures".[35]

Thirdly, and very importantly, over time the EU legislature introduced provisions concerning sanctions into EU secondary acts. The requirements from the *Greek Maize* ruling are codified in many EU regulations[36] and EU directives.[37] Additional conditions are introduced in both EU regulations[38]

33 Case C-617/10, *Fransson*, EU:C:2013:105, para. 34. Provided that the ne bis in idem principle is respected, see also M. Szwarc, Effectiveness of EU law and protection of fundamental rights – in search of balance in the context of the ne bis in idem principle, *Studia Prawnicze* [The Legal Studies], 2019, vol. 4, no. 220, pp. 37–58; case C-40/21, *T.A.C.*, EU:C:2023:367, paras 25–26 and the case law cited therein.

34 Case C-176/03, *Commission v. Council*, EU:C:2005:542; case C-440/05, *Commission v. Council*, EU:C:2007:625.

35 Article 83(2) TFEU. For further discussion of this evolution, see in particular M. Dougan, From Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law, in: M. Cremona (ed.), *Compliance and Enforcement of EU Law*, Oxford 2012, pp. 74–131; in the Polish literature, see also M. Szwarc-Kuczer, *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego [EU Competence to Harmonise Substantive Criminal Law]*, Warsaw 2011.

36 See e.g. Article 19(1) of Regulation (EC) No. 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No. 3821/85 and (EC) No. 2135/98 and repealing Council Regulation (EEC) No. 3820/85 (*OJ* L 102, 11/04/2006), pp. 1–14; Article 50 of Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ L 190, 12 July 2006), pp. 1–98; Article 14 of Regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union and repealing Regulation (EC) No. 1889/2005 (OJ L 284, 12 November 2018), pp. 6–21.

37 See e.g. Article 14 of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (*OJ L 96, 12/04/2003), pp. 16–25 (no longer in force)*.

38 Article 44 of Regulation No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No.

and EU directives.[39] Still, because of the existence of Article 83(2) of the TFEU, under EU acts adopted on legal bases other than this provision, the EU legislator does not impose on the Member States an obligation to enact criminal sanctions. As a result, doing so would necessitate the employment of Article 83(2) of the TFEU.[40] In other cases the choice between the criminal and administrative regimes of liability for infringements of EU law is left to the Member States, with a slight predilection of the CJEU towards the criminal regime (justified by effectiveness and deterrence) when it comes to protecting the financial interests of the EU:

> while the Member States are free to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two, they must nonetheless ensure, pursuant to Article 325(1) of the TFEU, that cases of serious fraud or other serious illegal activities affecting the financial interests of the European Union

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2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999 (*OJ L 286, 29 October 2008), pp. 1–32), in which the general obligation was established for the Member States to introduce* "effective, proportionate and dissuasive administrative sanctions", with the additional guideline that "a maximum sanction of at least five times the value of the fishery products obtained by committing the serious infringement" shall be introduced and that "in case of a repeated serious infringement within a five-year period, the Member States shall impose a maximum sanction of at least eight times the value of the fishery products obtained by committing the serious infringement". According to the same Article, the Member States were explicitly left the choice to use "effective, proportionate and dissuasive criminal sanctions" either as an alternative or as supplementary measures; see also Article 90 of Council Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No. 847/96, (EC) No. 2371/2002, (EC) No. 811/2004, (EC) No. 768/2005, (EC) No. 2115/2005, (EC) No. 2166/2005, (EC) No. 388/2006, (EC) No. 509/2007, (EC) No. 676/2007, (EC) No. 1098/2007, (EC) No. 1300/2008, (EC) No. 1342/2008 and repealing Regulations (EEC) No. 2847/93, (EC) No. 1627/94 and (EC) No. 1966/2006 (*OJ L 343, 22 December 2009), pp. 1–50.*

39 Article 58 (1) and (2) of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 05 June 2015), pp. 73–117, which established the general obligation for the Member States to introduce measures to hold liable entities for breaches of national provisions transposing this Directive, provided that such sanctions are effective, proportionate and dissuasive, and administrative sanctions "without prejudice to the right to provide for and impose criminal sanctions". Additional rules for determining the type and level of administrative sanctions or measures in individual cases were introduced under Article 60(4) of this Directive.

40 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ L 198, 28 July 2017), pp. 29–41.

> are punishable by criminal penalties that are effective and that act as a deterrent.[41]

Last but not least, the Member States – in particular courts and NAAs in proceedings before them – are bound by the general principles of EU law. As is constantly repeated by the CJEU,

> in the absence of harmonisation of European Union legislation in the field of penalties applicable where conditions laid down by arrangements under that legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with European Union law and its general principles, and consequently in accordance with the principle of proportionality.[42]

At this point it is worth highlighting the fact that NAAs are bound by the general principles of EU law, including those enshrined in the CFR, because as national authorities they are addressees of duties imposed on the Member States when they implement EU law. Therefore, the duty to respect the general principles of EU law must be effective not only at the stage of adopting national provisions implementing EU provisions (in particular EU directives) but also of applying and enforcing them, thus in individual proceedings before NAAs. In other words, because they participate in the imposition of sanctions for infringements of EU law, they must be recognised as implementing EU law and thus as being bound by the general principles of EU law.

Between the administrative and criminal natures of fines and why it matters

As stated above, in most of cases the Member States are free to choose between the administrative and criminal regimes of sanctions, including fines. Still, the legal consequences of such a choice are important because the legal character implies the possibility to apply either the CFR or general principles of EU law (this is visible particularly in the case of proportionality) but also implies the way that EU law may be effective in national proceedings (limits to consistent interpretation in criminal cases).

41 To that effect, see cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, EU:C:2021:1034, para. 191; C-213/19, *Commission v. United Kingdom* (Action to counter undervaluation fraud), EU:C:2022:167, para. 219; C-107/23 *PPU, C.I. and Others*, EU:C:2023:606, para. 84.

42 Cases C-210/10, *Urbán*, EU:C:2012:64, para. 23; C-255/14, *Chmielewski*, EU:C:2015:475, para. 21; Case C-69/15, *Nutrivet*, EU:C:2016:425, para. 50; C-564/15, *Farkas*, EU:C:2017:302, para. 59; C-712/17 *EN.SA*, EU:C:2019:374, para. 39; C-655/18, *Schenker*, EU:C:2020:157, para. 42; C-935/19, *Grupa Warzywna*, EU:C:2021:287, para. 26.

The implications of the distinction between the administrative and criminal regimes of liability are reflected in particular in the context of the principle of proportionality. It is either the general principle of EU law, which applies to all situations when sanctions are imposed, or the principle enshrined in Article 49(3) of the CFR, which provides that the severity of criminal penalties must not be disproportionate to the offence. Therefore, in order to apply Article 49(3) of the CFR it is necessary to examine whether the sanction (fine) in question is "criminal in nature".[43] To put it another way, when administrative fines are recognised as criminal, then the Charter articles apply, including its Article 49(3). The same rule applies to other rights guaranteed under the Charter's provisions on criminal proceedings: Article 48(1), Article 49(1) and (2) and Article 50. The second example is the principle of *ne bis in idem* enshrined in Article 50 of the CFR, which obviously grants individuals protection against duplication of criminal proceedings. Still, when the definition of a criminal fine was interpreted as covering administrative fines of a criminal nature, it became crucial to distinguish such fines from any other administrative fines (without a criminal nature), as Article 50 applies only to the first category.[44]

However, the practical importance of the distinction between fines of an administrative versus a criminal character is limited in the CJEU case law, which does not apply it consistently. Often, taking into account that the application of the CFR is limited in criminal cases, the CJEU tends to complement the assessment of fines with the standard of the general principles of EU law. In some cases, the CJEU applies both standards of the CFR and the general principles. Consequently, the distinction explained above is important in the context of the principle of *ne bis in idem* and consistent interpretation of national law.

Criminal nature of administrative fines

The *prima facie* clear distinction between criminal and administrative sanctions became blurred when the European Court of Human Rights (ECtHR) adopted an extensive interpretation of a "criminal case" for the purposes of applying Article 6 of the European Convention on Human Rights (ECHR) and Article 4(1) of Protocol No. 7 to the ECHR, where the principle of *ne bis in idem* is codified. According to the ECtHR, in order to assess the criminal nature of proceedings before national courts and thus any sanction imposed as a result, three criteria are relevant: the legal classification of the offence under national law, the very nature of the offence and the nature and severity of the

43 Case C-544/19, *Ecotex*, EU:C:2021:803, para. 90; C-40/21, *T.A.C.*, EU:C:2023:367, para. 33.

44 As confirmed, for example, in case C-117/20, *bpost*, EU:C:2022:202, para. 24; C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 44 and C-55/22, *NK*, EU:C:2023:670, para. 46.

penalty that the person concerned is liable to incur.[45] This standpoint was included by the CJEU in the reasoning under EU law in *Bonda*,[46] repeated in *Fransson*[47] and many other rulings since.[48]

Such an extensive interpretation of the criminal proceedings and criminal sanctions imposed, which may include administrative sanctions classified as such in the national legal system (when certain conditions are met), also has important implications for proceedings before NAAs. It may thus happen that even if offences (and fines) are classified as administrative under national law, their intrinsic nature and the severity of the related penalties may nevertheless result in them being recognised as criminal.[49]

The analysis of the CJEU case law in this matter has not resulted in more general guidelines as to how to identify the intrinsic nature of penalties (apart from its repressive character) or how to establish a degree of severity that would necessitate recognising an administrative fine as criminal in nature. Instead, an *ad casum* analysis indicates examples in which administrative fines were considered as such. In judicial practice before the CJEU, several situations can be distinguished:

- fines are established and imposed in the criminal procedure, and no doubts arise as to the nature of fines because the legal classification is already criminal under national law;[50]
- fines are established as part of the administrative law and imposed under the administrative procedure, and no doubts arise as to their nature (in accordance with the *Engel/Bonda* criteria) because they are recognised as administrative fines;[51]

45 Cases *Engel and Others v. the Netherlands*, 8 June 1976, §§ 80–82, Series A no. 22; *Sergey Zolotukhin v. Russia*, no. 14939/03, §§ 52–53, 10 February 2009.

46 Case C-489/10, *Bonda*, EU:C:2012:319, paras 36–37.

47 Case C-617/10, *Fransson*, EU:C:2013:105, para. 35.

48 Cases C-524/15, *Menci, EU:C:2018:197,* para. 26; Case *C-537/16, Garlsson, EU:C:2018:193,* para. 28; C-439/19, para. 88; C-544/19, *Ecotex*, EU:C:2021:803, para. 91; C-97/21, *MV-98*, EU:C:2023:371, para. 38; C-40/21, *T.A.C.*, EU:C:2023:367, para. 34; C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 45; C-55/22, *NK*, EU:C:2023:670, para. 44.

49 Cases C-439/19, *B*, EU:C:2021:504, para. 88; C-97/21, *MV-98*, EU:C:2023:371, para. 41; C-40/21, *T.A.C.*, EU:C:2023:367, para. 35; C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 48; C-55/22, *NK*, EU:C:2023:670, para. 45.

50 Case C-77/20, *K.M.*, EU:C:2021:112. In this case, the preliminary reference to the CJEU in the context of criminal proceedings and the questions concerned the proportionality not of the fine in itself, but of the forfeiture of the catches; the case is nonetheless relevant as the CJEU, without giving it additional reflection, took the view that the EU standard to assess this case was not only the EU Regulation, but also Article 49(3) of the Charter (C-35/20), para. 58.

51 Cases C-210/10, *Urban,* EU:C:2012:64; C-287/14, *Eurospeed*; EU:C:2016:420, C-501/14, *El-Em-2001,* EU:C:2016:777; C-255/14, *Chmielewski*, EU:C:2015:475; C-190/17, *Zheng,*

- fines are established as part of the administrative law and imposed in the administrative procedure, but they have features which justify the national court recognising them as "criminal in nature" and referring the questions to the CJEU (in accordance with the *Engel/Bonda* criteria);[52]
- fines are established as part of the administrative law and are imposed under the administrative procedure, and the CJEU recognises the criminal character of such penalties.[53]

When dealing with the criterion of the *intrinsic nature of the offence*, the CJEU requires the assessment

> whether the penalty at issue has a punitive purpose and the mere fact that it also pursues a deterrent purpose does not mean that it cannot be characterised as criminal penalty. It is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. By contrast, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature.[54]

Furthermore, in a case decided in a different context of applying EU data protection provisions to the use of penalty points for road traffic offences, the CJEU also took due account of both the intention to repair harm and a punitive purpose.[55] On the other hand, prohibiting someone from holding elective public office for a certain period pursues a preventive – and not punitive – objective.[56]

In order to present the CJEU's reasoning in this context, it is also worth mentioning the *Volkswagen* case, in which the main proceedings were conducted by the Italian Competition and Markets Authority concerning administrative fines for unfair commercial practices. In national legislation protecting consumers from unfair commercial practices, administrative fines could be imposed of "between EUR 5,000 and EUR 5,000,000, according to the gravity and duration of the infringement. In the case of unfair commercial practices within the meaning of Article 21(3) and (4), the penalty may not be

EU:C:2018:357; C-452/20, *PJ*, EU:C:2022:111 and C-564/15, *Farkas,* EU:C:2017:302; C-935/19, *Grupa Warzywna,* EU:C:2021:287, C-835/18, *Terracult,* EU:C:2020:520; C-712/17, *EN.SA,* EU:C:2019:374; C-487/14, *Total Waste Recycling*; EU:C:2015:780; C-64/18 *Maksimovic*, EU:C:2019:723.

52 Cases C-570/20, *BV*, EU:C:2022:348, para. 28; C-55/22, *NK*, EU:C:2023:670, para. 47.

53 Cases C-544/19, *Ecotex*, EU:C:2021:803, para. 96; C-97/21, *MV-98*, EU:C:2023:371, para. 49; C-27/22 *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para 54; C-820/21, *Vinal AD*, EU:C:2023:667, para 56.

54 Cases C-97/21. *MV-98*, EU:C:2023:371, para. 42; C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 49.

55 C-439/19, *Latvijas Republikas Saeima (Penalty points)*, EU:C:2021:504.

56 Case C-40/21, *T.A.C.*, EU:C:2023:367, paras 40–41 and the case law of the ECtHR cited therein.

lower than EUR 50,000".[57] When assessing the intrinsic nature of the fine, the CJEU considered that

> if the objective of that provision was to deprive the relevant undertaking of the unfair competitive advantage, the fact remains that the fine varies according to the gravity and duration of the infringement in question, which demonstrates a certain gradation and progressiveness in the determination of the penalties which may be imposed. In addition, if that was the objective of that provision, the fact that it appears to provide that the fine may reach a maximum amount of EUR 5,000,000 would be likely to result in that objective not being achieved where the unfair competitive advantage exceeds that amount. Conversely, the fact that it appears that, according to the second sentence of Article 27(9) of the Consumer Code, the amount of the fine may not be lower than EUR 50,000 with regard to certain unfair commercial practices, would mean that the fine is, in respect of those practices, capable of exceeding the amount of the unfair competitive advantage.[58]

Even if the CJEU did not explicitly decide whether this indicated a punitive purpose of the fine in question, it seems that the fact that the amount of the fine exceeds the unfair competitive advantage gives it a punitive purpose (as it exceeds reparation of the harm caused).

When dealing with the criterion of the *severity of the sanction (fine)*, it must be remarked that the CJEU did not formulate a more general test for recognising a given fine as criminal. Still, it stems from well-established CJEU case law that penalties under competition law are criminal in nature.[59] In other fields there are several examples of administrative penalties that were recognised by courts (either national courts referring preliminary questions or the CJEU) as criminal in nature, due to their severity for the addressee:

- a fine of 30% of the VAT due, which was added to the payment of that tax;[60]
- a fine of between EUR 100,000 and EUR 5,000,000 for infringements of prohibitions against insider trading, where it should be increased by up to three times the amount or up to an amount ten times greater than the proceeds or profit obtained from the offence if the fine is insufficient despite the

57 Case C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 15.

58 Case C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 52.

59 Recently, in the context of the *ne bis in idem* principle, see Case C-151/20 *Nordzucker*, EU:C:2022:203, para. 32.

60 Case C-524/15, *Menci*, EU:C:2018:197, paras 6 and 33.

maximum amount having been applied, taking into account the offender, the proceeds or profit obtained or the effects produced on the market;[61]

- a fine of between EUR 20,000 and EUR 3,000,000 (along with imprisonment) for infringements of prohibitions against insider trading, where it should be increased by up to three times the amount or up to an amount ten times greater than the proceeds or profit obtained from the offence if the fine is insufficient despite the maximum amount having been applied, taking into account the offender, the proceeds or profit obtained or the effects produced on the market;[62]
- where the infringing party is a natural person, a fine equivalent to 25% of the total amount of the tax already paid, or 50% in the case of a repeat infringement, or where the infringing party is a legal person, a financial penalty equivalent to 50% of the total amount of the tax already paid, or 100% in the case of a repeat infringement;[63]
- an increase of 40% of the tax due (where the offence was intentional) and a fine of EUR 37,500 and a term of imprisonment of five years, or in cases when the acts were carried out or enabled by means of purchases or sales without invoices or with invoices which do not refer to real transactions or were designed to obtain unjustified reimbursements from the State, a fine of EUR 75,000 and a term of imprisonment of five years (in this case it was the referring court that recognised these administrative penalties as criminal in nature);[64]
- a fine of approximately EUR 250 in respect of a first offence and a maximum of EUR 1,000 (in this case the fine was imposed for the offence of failing to record the sale of a packet of cigarettes [worth approximately EUR 2.60] and to issue a fiscal cash register receipt relating to that sale, evading approximately EUR 0.50 in VAT);[65]
- a fine of between EUR 5,000 and EUR 5,000,000;[66]
- a fine of up to EUR 60,000 for the offence of organising lotteries (which were reserved for the State's monopoly) and a fine of between EUR 1,000 and EUR 10,000 for each gaming machine or other object infringing the law, or of between EUR 3,000 and EUR 30,000 in the case of a first and subsequent repeated infringement, or in the event of an infringement by means of more than three gaming machines or other objects, a fine of between EUR 3,000 and EUR 30,000 for each gaming machine or other object infringing the law, or between EUR 6,000 and EUR 60,000 in the

61 Case *C-537/16, Garlsson, EU:C:2018:193*, paras 6–7 and 35.
62 Case C-596/16, *Enzo di Puma*, EU:C:2018:192, paras 7 and 38.
63 Case C-544/19, *Ecotex*, EU:C:2021:803, paras 16 and 95–96.
64 Case C-570/20, *BV*, EU:C:2022:348, paras 5–6 and 28.
65 Case C-97/21, *MV-98*, EU:C:2023:371, paras 6 and 47–48.
66 Case C-27/22, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*, EU:C:2023:663, paras 6 and 54.

case of a repeated infringement (in this case it was the referring court that assessed the administrative fines as being criminal in character);[67]
- a fine for failing to levy excise duty amounting to twice the excise duty not levied and no less than BGN 500 (approx. EUR 250) – since the national legislation did not provide for a maximum limit to that amount, in this case before the referring court the fine corresponded to EUR 128,000.[68]

Despite the fact that the case law referred to above has been built up on an *ad hoc* basis, several general conclusions may be drawn from it. Firstly, all the cases mentioned above were decided in the context of interpreting the principle of *ne bis in idem*, where it was important to assess whether an administrative fine was of a criminal nature, as Article 50 of the CFR protects individuals against further criminal proceedings for the same act. Therefore, the principle of *ne bis in idem* does not apply in cases involving accumulated administrative and criminal sanctions, but only when an administrative penalty (in particular, a fine) is not considered criminal in nature under the *Engel/Bonda* criteria. In contrast, in cases decided in a different context, especially with respect to the principle of proportionality, the national courts – and as a result, the CJEU – will not consider whether the administrative fine in question is criminal in nature. In such cases, the national court shall generally refer questions concerning respect for the principle of proportionality (often in the context of the requirement that penalties for infringements of EU provisions must be proportionate, which stems directly from the directive or regulation in question). Then, the CJEU rather consistently repeats that

> in the absence of harmonisation of EU legislation in the field of penalties applicable where conditions laid down by arrangements under such legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality.[69]

When assessing the proportionality of such fines, the CJEU requires that "the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation" and that "the severity of penalties must be commensurate with the seriousness of the infringements for which

67 Case C-55/22, *NK*, EU:C:2023:670, para. 4.

68 Case C-820/21, *Vinal AD*, EU:C:2023:667, paras 17 and 56.

69 Cases C-210/10, *Urban*, EU:C:2012:64, para. 23; C-255/14, *Chmielewski*, EU:C:2015:475, para. 21; C-69/15, *Nutrivet*, EU:C:2016:425, paras 50–51; C-655/18, *Schenker*, EU:C:2020:157, para. 42.

they are imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality".[70] However, the severity in this context is analysed for the purpose of assessing the proportionality of an administrative fine and not its criminal character.

In order to draw the most comprehensive picture of the CJEU's standpoint in this context, it seems necessary to note that in two rulings, namely *Link-Logistic* and *MI and TB*, the CJEU – without assessing the character of administrative fines – referred both to the proportionality as a general principle of EU law and the proportionality of penalties to the seriousness of criminal offence as enshrined in Article 49(3) of the Charter.[71] On the one hand, such reasoning blurs the line between the standard applicable to administrative fines and that applicable to criminal fines, as explained in *Ecotex*. On the other hand, it might be an implicit signal that even if this issue was not explicitly addressed by the CJEU in the rulings, the Court considered the national penalties at stake as administrative penalties which are criminal in nature according to the *Engel/Bonda* criteria.

Secondly, more general conclusions may be drawn as to what level of administrative fines would very likely lead to considering such fines criminal in nature. In situations where administrative fines are envisaged for sums due to the state (in particular VAT, excise tax, etc.), they are usually established as a percentage of the tax due (starting at 25%) being added to the amount due. In situations where administrative fines are envisaged for infringements of other obligations (such as the obligation to present a buyer with a receipt for a purchase of cigarettes or the prohibition against insider trading), the fines are established as a range between a minimum and maximum with the possibility of the fine being multiplied, in particular without an upper limit. According to the CJEU case law, it seems that a fine of even EUR 250, which can be imposed for any VAT evasion, must be recognised as criminal in nature.

At the same time it must be remembered that the amount of an administrative fine is not a self-standing criterion for assessing the criminal character of such a fine. Rather, the amount of an administrative fine must be analysed in the context of both the second and third requirements from the *Engel/Bonda* cases. This means that it must first be assessed whether a given administrative fine puts the addressee of an obligation in a worse position than if they had paid the amount due. When the amount of a fine is higher than sheer compensation for damages caused by the failure to pay due taxes, it can be concluded that it has not only a compensatory objective but also a repressive one. And only secondly, the limits of administrative fines are to be considered in the context of their severity for the addressees of obligations.

70 Cases C-255/14, *Chmielewski*, EU:C:2015:475, paras 22–23; C-190/17, *Zheng*, EU:C:2018:357, paras 41–42.

71 Cases C-384/17, *Link Logistik*, EU:C:2018:810, paras 40–41; C-870/19, *MI* and C-871/19, *TB*, EU:C:2021:233, paras 45 and 49.

Conclusions

NAAs are under an obligation to apply EU law in all proceedings with an EU element. Such an obligation stems from the principle of loyal cooperation, which is binding on all national authorities, including NAAs. The respect for EU law in national fining proceedings encompasses both primary and secondary EU law, and thus includes provisions of the CFR and the general principles of EU law. This results in the duties to directly apply effective provisions of EU law and to interpret national law in conformity with the EU law in question (consistent interpretation). An NAA not respecting EU law, including its general principles and the CFR, in fining proceedings will lead to the administrative decision being partially or totally incompatible with EU law. As a result, such a decision may be recognised as infringing the applicable law and subject to judicial control by a competent national court.

The NAAs are bound by the CFR and the general principles of EU law in all cases that fall within the scope of EU law, thus where they "implement EU law". The notion of Member States implementing EU law is interpreted very widely, to include 1) situations when they rely on overriding requirements in the public interest in order to justify rules which are liable to obstruct the exercise of the internal market's freedoms (free movement of goods, persons, services and capital); 2) all situations when they are implementing EU law, which means both adopting legally binding provisions at the national level (in particular, EU directives) and (an NAA) applying national provisions to implement EU directives or applying directly applicable provisions of EU regulations; and 3) situations in which the national legislation is enacted outside the scope of EU law, but contains references to it, provided that the EU law is made applicable by national law directly and unconditionally. The duty to respect the general principles of EU law must be effective not only at the stage of adopting national provisions to implement EU provisions (in particular, EU directives), but also of applying and enforcing them, thus in individual proceedings before the NAAs. Because the NAAs participate in the imposition of sanctions for infringements of EU law, they must be recognised as implementing EU law and thus must be bound by the general principles of EU law.

However, it is true that in most cases the Member States are free to choose between the administrative and criminal regimes of sanctions (including fines), but the practical consequences of such a choice may be particularly important in two instances. Firstly, the principle of *ne bis in idem* applies only when both proceedings are criminal in nature. Secondly, the principle of consistent interpretation of national law (in the light of EU law) is limited when it would lead to establishing or aggravating criminal liability.

Therefore, the question of the criminal character of administrative fines becomes crucial in the context of respecting the general principles of EU law and the CFR in national fining proceedings. The case law of the CJEU in this respect, even if decided on a case-by-case basis, provides important guidelines as to when an administrative fine should be recognised as criminal in nature.

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2 The principle of consistent interpretation

Its application and limitations in national fining proceedings

Agnieszka Sołtys

Introduction

The obligation to interpret national law in conformity with EU law (the obligation of consistent interpretation) is an autonomous legal construct of EU law developed in the case law of the Court of Justice of the European Union (CJEU). The obligation of consistent interpretation constitutes one of the instruments that ensures the effectiveness of EU law in the national legal systems – next to the principles of direct effect and of primacy and Member States' liability for breaches of EU law.[1] The following analysis, carried out in relation to the CJEU case law, is devoted to the application of this instrument in national fining proceedings. It is constructed around elements of the legal structure of the obligation of consistent interpretation: its subjective scope, standard of interpretation, subject matter and limitations (sections "The duty of consistent interpretation and national administrative authorities", "Standard of interpretation (EU norm) for consistent interpretation in national fining proceedings", "National provisions subject to consistent interpretation in national fining proceedings" and "Fining proceedings and limits of consistent interpretation"). With this approach, the specific problems concerning consistent interpretation in fining proceedings can be identified. The section "Limits of consistent interpretation – a lesson from Poland (Case study of the control proceedings under Article 10(2) of Directive 2002/20)" includes the case study of a ruling of the Polish Supreme Court which illustrates the controversies concerning consistent interpretation in fining proceedings. The analysis is preceded by a general description of the obligation of consistent interpretation (section "Overview of the principle of consistent interpretation and its elements").

1 For the instruments that ensure the effectiveness of EU law in national proceedings, see N. Półtorak, *European Union Rights in National Courts*, Alphen aan den Rijn 2015.

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Overview of the principle of consistent interpretation and its elements

According to the obligation of consistent interpretation,[2] the authorities of Member States are obliged to interpret national law in conformity with EU law, its content and its purpose.[3] National authorities are required to do whatever lies within their jurisdiction, so far as possible, when applying the interpretative methods recognised by domestic law, in order to give full effect to EU law.[4] The CJEU has also specified that the obligation of consistent interpretation requires national courts to change established case law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of EU law and to disapply, on their own authority, an interpretation adopted by a higher court (which it must follow under its national law) if it is not compatible with the EU law concerned.[5]

The obligation of consistent interpretation was initially developed with reference to directives. Further development of the CJEU case law confirmed that it also applies to EU treaty norms, regulations, the general principles of EU law, norms of international treaties binding on the EU and framework decisions issued within the (former) third pillar of the EU. The obligation of consistent interpretation is binding, irrespective of whether the given provision of EU law – serving as a normative standard in the process of consistent interpretation – has direct effect. That allows the consistent interpretation to

2 For a detailed analysis of the legal structure of the obligation of consistent interpretation, see A. Sołtys, *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewniania efektywności prawa Unii Europejskiej [The Obligation of Consistent Interpretation as an Instrument to Ensure the Effectiveness of EU Law]*, Warszawa 2015. The findings therein are employed in this publication.

3 Cases: 14/83, *von Colson*, EU:C:1984:153, para. 26; 157/86, *Murphy*, EU:C:1988:62, para. 11; C-106/89, *Marleasing*, EU:C:1990:395, para. 8; C-91/92, *Faccini Dori*, EU:C:1994:292, para. 26; joined cases C-397/01 to C-403/21, *Pfeiffer*, EU:C:2004:584, para. 113; C-105/03, *Pupino*, EU:C:2005:386, para. 43; C-212/04, *Adeneler*, EU:C:2006:443, para. 108; joined cases C-378/07 to C-380/07, *Angelidaki*, EU:C:2009:250, para. 197; C-12/08, *Mono Car Styling*, EU:C:2009:466, para. 60; C-555/07, *Kücükdeveci*, EU:C:2010:21, para. 48; C-282/10, *Dominguez*, EU:C:2012:33, para. 24; C-94/11, *Amia*, EU:C:2011:411, para. 28; C-176/12, *AMS*, EU:C:2014:2, para. 38; C-351/12, *OSA*, EU:C:2014:110, para. 44; C-26/13, *Árpád Kásler*, EU:C:2014:282, para. 64; C-573/17, *Popławski*, EU:C:2019:530, paras 72–73.

4 Joined cases C-397/01 to C-403/21, *Pfeiffer*, EU:C:2004:584, paras 118–119; C-268/06, *Impact*, EU:C:2008:223, para. 101; C-212/04, *Adeneler*, EU:C:2006:443, para. 111; joined cases C-378/07 to C-380/07, *Angelidaki*, EU:C:2009:250, para. 200; C-12/08, *Mono Car Styling*, EU:C:2009:466, para. 64; C-555/07, *Kücükdeveci*, EU:C:2010:21, para. 48; C-282/10, *Dominguez*, EU:C:2012:33, para. 27; C-94/11, *Amia*, EU:C:2011:411, para. 29; C-282/19, *YT*, EU:C:2022:3, para. 124; C-550/19, *Obras y Servicios Públicos i Acciona Agua*, EU:C:2021:514, para. 78.

5 Cases C-441/14, *DI*, EU:C:2016:278, para. 33; C-579/15, *Popławski*, EU:C:2017:503, paras 35–36; C-573/17, *Popławski*, EU:C:2019:530, para. 78; C-279/23, *Skarb Państwa – Dyrektor Okręgowego Urzędu Miar w K. v Z. sp.j,*, para. 29.

serve as a remedy in situations when the direct effect of the EU provision is excluded.[6] From this perspective it can be argued that the obligation of consistent interpretation is the most significant tool for ensuring the effectiveness of EU law.[7]

The obligation of consistent interpretation concerns the whole body of domestic law.[8] It refers to both provisions issued to implement an EU norm and other provisions, and it is irrelevant whether they predate the EU norm constituting a standard of interpretation.[9] The obligation of consistent interpretation is closely linked to the scope of application of EU law; in other words, it does not apply to matters not covered by EU legal regulations.[10]

The key element of the obligation of consistent interpretation is its limits, which determine its significance for ensuring the effectiveness of EU law. According to the CJEU case law, the obligation to interpret national law in conformity with EU law is limited by general principles of law, in particular the principle of legal certainty and the principle of non-retroactivity of law, and cannot serve as a basis for interpreting national law *contra legem*.[11] This allows

6 The application of direct effect encounters two limitations: firstly, to be directly effective an EU norm has to be clear, precise and unconditional, and secondly, the legal source from which the norm is derived is a limitation, as framework decisions and generally directives in horizontal relations do not have direct effect.

7 See D. Miąsik, The principle of consistent interpretation of Polish law with EU law, in: M. Domańska, D. Miąsik, M. Szwarc, *National Courts and the Application of EU Law: Lessons from Poland*, London 2023, p. 78.

8 Joined cases C-397/01 to C-403/21, *Pfeiffer,* EU:C:2004:584, para 115. See also cases C-131/97, *Carbonari*, EU:C:1999:98, paras 49–50; C-212/04, *Adeneler,* EU:C:2006:443, para. 111; C-268/06, *Impact*, EU:C:2008:223, para. 101; joined cases C-378/07 to C-380/07, *Angelidaki,* EU:C:2009:250, para. 200; C-12/08, *Mono Car Styling*, EU:C:2009:466, para. 62; C-282/10, *Dominguez,* EU:C:2012:33, para. 27; C-94/11, *Amia,* EU:C:2011:411, para. 29; C-176/12, *AMS,* EU:C:2014:2, para. 38; C-351/12, *OSA,* EU:C:2014:110, para. 44; C-26/13, *Árpád Kásler*, EU:C:2014:282, para. 64; C-550/19, *Obras y Servicios Públicos i Acciona Agua*, EU:C:2021:514, para. 78; C-279/23, *Skarb Państwa – Dyrektor Okręgowego Urzędu Miar w K. v Z. sp.j*, para. 29.

9 Cases C-106/89, *Marleasing*, EU:C:1990:395, para. 8; joined cases C-240/98 to C-244/98, *Océano*, EU:C:2000:346, para. 30; C-334/92, *Wagner Miret*, EU:C:1993:945, para. 20; joined cases C-397/01 to C-403/21, *Pfeiffer*, para. 115; C-212/04, *Adeneler*, EU:C:2006:443, para. 108; joined cases C-378/07 to C-380/07, *Angelidaki,* EU:C:2009:250, para. 197; C-98/09, *Sorge*, EU:C:2010:369, para. 51; C-94/11, *Amia,* EU:C:2011:411, para. 29; C-351/12, *OSA,* EU:C:2014:110, para. 44; joined cases C-331/22 and C-332/22, *KT*, EU:C:2024:496, para. 102; C-687/22, *Julieta and Rogelion*, EU:C:2024:287, para. 31.

10 Case 125/88, *Nijman*, EU:C:1989:401.

11 Cases 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, para. 13; C-105/03, *Pupino*, paras 44 and 47; C-212/04, *Adeneler*, EU:C:2006:443, para. 110; C-268/06, *Impact*, EU:C:2008:223, para. 100; joined cases C-378/07 to C-380/07, *Angelidaki,* EU:C:2009:250, para. 199; C-12/08, *Mono Car Styling*, EU:C:2009:466, para. 61; C-282/10, *Dominguez,* EU:C:2012:33, para. 25; C-176/12, *AMS,* EU:C:2014:2, para. 39; C-351/12, *OSA,* EU:C:2014:110, para. 45; C-26/13, *Árpád Kásler*, EU:C:2014:282, para. 65; C-573/17, *Poplawski*, EU:C:2018:361, paras 75–76; C-282/19, YT, EU:C:2022:3,

one to distinguish two categories of limits of the obligation of consistent interpretation: general principles of law and interpretation *contra legem*. When decoding the latter (interpretation *contra legem* as a limit of the obligation of consistent interpretation), one should take into account both the obligation of consistent interpretation as specified by the CJEU (see the comments above) and the rules of interpretation adopted in the national legal order (its doctrine and practice). From this perspective it can be concluded that the obligation of consistent interpretation can be reconstructed as a prohibition against recognising the priority of the results of linguistic interpretation.[12] This means, inter alia, that it is not correct to qualify as "interpretation *contra legem*" an interpretation undertaken (on the basis of functional [purposive] and systemic directives of interpretation) in a situation of an unambiguity achieved on the basis of linguistic directives of interpretation.[13] It should be noted at the same time that the scope of the interpretative possibilities of the adjudicating authority varies in different branches of legal regulations. The principles of interpretation developed in relation to certain legal disciplines (such as the prohibition of analogy to the detriment of the accused in criminal law or the prohibition of imposing [increasing] tax burdens without a clear statutory basis in tax law) limit the ability of consistent interpretation to ensure the effectiveness of EU law. The reference to legal certainty, particularly important in public law regulations, may often preclude interpretative hypotheses that go beyond the linguistic meaning of the legal text. In the light of the argument that the obligation of consistent interpretation implies that the principle of priority of the results of linguistic interpretation should be rejected, the decision to disallow consistent interpretation in a given case should be preceded by an attempt to make such an interpretation. The rejection of interpretative hypotheses competing with the linguistic interpretation should rather be justified by reference to values secured by an interpretative decision referring to the linguistic meaning of the reconstructed legal norm, and not by referring to the axiomatically treated priority of linguistic interpretation.

Reference to the "general principles of law" as the limits of the obligation of consistent interpretation was made in the *Kolpinghuis Nijmegen* judgment.[14] In this case, the CJEU ruled that this obligation is subject to limitations resulting from "general principles of law which form part of Community law", mentioning in particular the principles of legal certainty and of non-retroactivity. The CJEU confirmed this position in later case law, and the wording that the obligation of consistent interpretation "is limited by general principles of law,

para. 123; C-550/19, *Obras y Servicios Públicos i Acciona Agua*, EU:C:2021:514, para. 77; C-722/22, *Sofiyski gradski sad*, EU:C:2024:80, paras 24–25.

12 This conclusion is formulated with respect to the Polish legal system, though it can be assumed to be appropriate in most of the legal systems of other Member States.

13 Views recognising, erroneously, the priority of the results of linguistic interpretation as the general principle of interpretation can still be found in practice and in the literature on the subject.

14 Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431 para. 13.

particularly those of legal certainty and non-retroactivity", became a general formula, being repeated in subsequent judgments. One implication of this statement was the recognition that consistent interpretation cannot lead to the establishment or aggravation of criminal liability.[15] It is worth noting that the CJEU, when referring to the general principles of law as the limits of consistent interpretation, has often made reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and principles arising from the constitutional traditions common among the Member States.[16]

The recognition of general principles of law as the limits of the obligation of consistent interpretation leads to the more specific question of which general principles of law may constitute these limits. The case law of the CJEU provides examples primarily in relation to criminal cases. As indicated above, in the *Kolpinghuis Nijmegen* case the CJEU mentioned the principle of legal certainty and the principle of non-retroactivity. References to the principle of legal certainty and the prohibition of retroactivity were also expressed in subsequent case law of the CJEU.[17] As emphasised in the literature on the subject, the judgment in the *Kolpinghuis Nijmegen* case also implicitly contained a reference to two other principles limiting the obligation of consistent interpretation: *nulla poena sine lege* and *nullum crimen sine lege*.[18] Reference to these principles can also be found in subsequent CJEU case law, in which it specified the general formulation in the *Kolpinghuis Nijmegen* case.[19] In its recent jurisprudence, the CJEU also referred to the respect for the rights of

15 Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431 para. 13. As to the imprecise wording of the CJEU and the controversy related to it, see the comments below.

16 Joined cases C-74/95 and C-129/95 *Criminal proceedings against X*, EU:C:1996:491 para. 25 and case C-60/02, *Criminal proceedings against X*, EU:C:2004:10, para. 63.

17 Cases C-60/02, *Criminal proceedings against X,* EU:C:2004:10, para. 61; C-105/03, *Pupino,* EU:C:2005:386, para. 44; C-268/06, *Impact*, EU:C:2008:223, para. 100.

18 See S. Prechal, *Directives in EC Law*, Oxford 2005, p. 205. See also cases C-60/02, *Criminal proceedings against X,* EU:C:2004:10, para. 61; C-105/03, *Pupino,* EU:C:2005:386, para. 45; joined cases C-74/95 and C-129/95 *Criminal proceedings against X*, EU:C:1996:491, paras 22–24; C-168/95, *Arcaro* (C-168/95), EU:C:1996:363, para. 42.

19 Joined cases C-74/95 and C-129/95 *Criminal proceedings against X*, EU:C:1996:491, para. 25:

> More specifically, in a case such as that in the main proceedings, which concerns the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive, the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law. That principle, which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

the defence of an accused person in the context of limiting the obligation of consistent interpretation.[20] In relation to the question of which general principles of law could function as a limit of consistent interpretation in areas of regulation other than criminal law, legal scholars draw attention to the (potential) importance of the principles of equality, of proportionality and – above all – of legal certainty.[21]

The question remains whether the general principles of law referred to by the CJEU are general principles of EU law or perhaps general principles of national law recognised as part of EU law.[22] In the light of the CJEU's statement, the answer to this question does not seem clear-cut. However, bearing in mind the systemic importance of principles of law in the legal order, it can be argued that the "general principles of law" referred to by the CJEU in the context of limiting the obligation of consistent interpretation should be understood as general principles of EU law. These include, in particular, principles arising from the constitutional traditions shared by the Member States.[23] In this context, it is worth noting that a distinction should be made between the situation where the limits of consistent interpretation are determined by general principles of EU law and the situation where they are determined by general principles of national law. The former is covered by the CJEU case law on general principles of law as the limits of consistent interpretation;[24] the latter is covered by the CJEU case law referring to the *contra legem* interpretation as the limits of the consistent interpretation. It should be noted that the general principles of law established in EU and national law are often significantly similar, or even identical. This is facilitated by both the genesis of the general principles of EU law[25] and the process of the Europeanisation of national law. However, it does not seem that this circumstance eliminates the (practical) significance of this distinction.

It should be emphasised that the limit of the obligation of consistent interpretation is not "worsening the situation of individuals". This statement can be found in the literature and in the case law of Polish courts, and results from an insufficient distinction between the obligation of consistent interpretation and direct effect. The former is actualised both when it serves the implementation of the EU rights of an individual and when the situation of an individual deteriorates as a result of consistent interpretation. The first situation is typical, i.e. an individual raises their EU rights against the state (and the instrument for

See also the CJEU judgment in joined cases C-870/19 and C-871/19, *MI TB*, EU:C:2021:233, discussed below.

20 Case C-282/20, *ZX*, EU:C:2021:874 para. 45.

21 See S. Prechal, *Directives…*, pp. 204–206 and 214. See also M. Weber, *Grenzen EU-rechtskonformer Auslegung und Rechtsfortbildung*, Baden-Baden 2010, pp. 142–149.

22 See S. Prechal, *Directives…*, p. 204.

23 See the reference in joined cases C-74/95 and C-129/95 *Criminal proceedings against X*, EU:C:1996:491, para. 25.

24 Initiated in case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431.

25 Stemming from "the constitutional traditions common to the Member States".

ensuring their effectiveness is consistent interpretation). However, the obligation of consistent interpretation is also permissible in a horizontal constellation (in a dispute between two private entities), as in a dispute between the state and an individual (for the benefit of the state). From the case law of the CJEU, it should be concluded that the obligation of consistent interpretation cannot lead to a deterioration of the legal situation of an individual only when such an effect would constitute an interpretation *contra legem* or a violation of the general principles of EU law.

Recalling the CJEU jurisprudence initiated by the *Kolpinghuis Nijmegen* case, it is worth noting a significant controversy. Doubts are raised by the CJEU's statement in which – in the context of limitations on the permissible results of consistent interpretation – the Court refers to limitations on the permissible results caused by the directive "of itself and independently of the national law adopted by the Member State for its implementation".[26] The implementation of a consistent interpretation, which is the application of national law in accordance with the EU norm, cannot be equated with the operation of the directive "by itself" – the latter formulation is appropriate in the context of direct effect,[27] and the imprecise references of the CJEU seem to give rise to serious doubts.[28]

When commenting on the obligation of consistent interpretation, it is also worth noting the steps necessary to implement it in the process of applying the law: 1) determining the factual circumstances; 2) determining the norm of national law regulating the given factual circumstances; 3) determining whether a given regulation of national law falls within the scope of application of EU law; 4) establishing a standard of consistent interpretation (the EU norm); and 5) implementing the obligation of consistent interpretation (*sensu stricto*), i.e. interpreting the norm of national law in accordance with the norm of EU law.[29] Such an approach emphasises that the implementation of the obligation of consistent interpretation in the process of applying the law

26 Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431 para. 13:

> That obligation on the national court to refer to the content of the directive when interpretating the relevant rules of its national is limited by the general principles of law which form of the Community law and in particular the principles of legal certainty and non-retroactivity. Thus […] a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

27 Case 152/84, *Marshall*, EU:C:1986:84, para. 48: "a directive may not of itself impose obligations on an individual and […] a provision of a directive may not be relied upon as such against such a person".

28 See e.g. the judgment of the Polish Supreme Court in case III SK 52/10, commented on in the section "Limits of consistent interpretation – a lesson from Poland (Case study of the control proceedings under Article 10(2) of Directive 2002/20)".

29 It should be noted that the above model was formulated in a general manner and thus does not refer to the specific conditions which – in relation to the first two stages – should be taken into account in the context of the individual procedures.

includes a number of stages, and their correct implementation by the national authority determines the effectiveness and correctness of the implementation of this obligation. In particular, the correct determination of a standard of consistent interpretation (the EU norm) is crucial for the effectiveness of consistent interpretation. Such a determination is based on the directives of interpretation adopted for the interpretation of EU law.[30] It is worth noting here that in numerous judgments, the CJEU emphasised that a standard of consistent interpretation (the EU norm, e.g. a norm of a directive) should be interpreted in accordance with fundamental rights or other general principles of EU law.[31] This is of significance from the point of view of the interpretation of national law – fundamental rights and general principles act in such a situation as an indirect standard of interpretation for national law (the direct standard of interpretation is the norm of EU secondary law). The other scenario is where the fundamental rights or other general principles of EU law serve as the direct standard of consistent interpretation.[32] Bearing this in mind, it is worth paying attention to when the interpretative guidelines of the CJEU concern the norm of EU law, and when they concern the norm of national law. This model of implementing the obligation of consistent interpretation in the process of applying the law helps to distinguish between these two situations.

30 The methods of interpreting EU law have been developed by the CJEU. This was not about constructing new canons of interpretation (the interpretation of EU law can be considered through the lens of linguistic, systemic and functional [purposive] rules of interpretation), but rather about the significance of purposive-functional argumentation and the role of the principles of interpretation of EU law developed by the CJEU. In particular, it is crucial to ensure the effectiveness of EU law (effective interpretation [*effet utile*]) and uniform interpretation (i.e. one that ensures that EU law is understood and applied uniformly in all EU Member States). These principles as well as the general conditions of interpretation of EU law (such as its integrative nature, multilingualism and saturation with economic terms, as well as the dynamics and heterogeneity of the socioeconomic reality regulated by it) imply a greater significance of purposive-functional argumentation in relation to argumentation based on linguistic directives of interpretation. As to the interpretation of EU law, see A. Bredimas, *Methods of Interpretation and Community Law*, Amsterdam – New York – Oxford 1978; J. Bengoetxea, N. MacCormick, Moral Soriano, Integration and Integrity in the Legal Reasoning of the European Court of Justice, in: G. de Burca, J.H.H. Weiler (eds), *The European Court of Justice*, Oxford 2001, chapter 3; J. Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Oxford 1993; A. Kalisz, *Wykładnia i stosowanie prawa wspólnotowego [Interpretation and Application of Community Law]*, Warszawa 2007.

31 See e.g. case C-497/20, *Randstad Italia*, EU:C:2021:1037, para. 73.

32 See e.g. case C-277/11, *M. v. Minister for Justice, Equality and Law Reform and Others*, EU:C:2012:744, para. 93:

> It should be added that, according to the Court's settled case-law, the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law.

See also case C-570/20, *BV*, EU:C:2022:348, commented on in the section "Standard of interpretation (EU norm) for consistent interpretation in national fining proceedings".

The duty of consistent interpretation and national administrative authorities

The obligation of consistent interpretation is addressed primarily to national courts. This can be explained by the fact that the judgments of the CJEU referring to that obligation were issued in response to preliminary questions submitted to the CJEU by national courts. However, in order to determine who is subject to the obligation of consistent interpretation it is crucial to refer to the principle of loyalty – this constitutes the legal basis of the obligation of consistent interpretation. The principle of loyalty is "binding on all the authorities of Member States including, for matters within their jurisdiction, the courts".[33] Thus, it is justified to conclude that the subjective scope of the obligation of consistent interpretation is all the authorities of a Member State which, within their competences, interpret national regulations falling within the scope of application of EU law.[34]

It is worth noting the arguments found in the literature on the subject to support this view. As has been indicated: 1) it results from the judgments of the CJEU that courts are only one category of national authorities that are obliged to interpret in conformity with EU law; 2) administrative authorities in the Member States are empowered to act in many areas regulated by EU law; 3) according to the case law of the CJEU, administrative authorities are also (along with courts) obliged to respect the principle of primacy of EU law over national law, including refusing to apply national law that is incompatible with EU law; 4) because administrative acts, as well as other actions of administrative authorities, are subject to judicial review, the lack of an obligation on administrative authorities to interpret in conformity with EU law – while simultaneously burdening the courts with it – would result in a double standard for the application of law and a state of legal uncertainty.[35] It has also been noted that consistent interpretation is implemented within the framework of the application of law, and this is not only in the domain of the courts, but also applies to administrative bodies empowered to issue administrative decisions.[36] In the context of EU directives, it should be added that the

33 Case 14/83, *von Colson*, EU:C:1984:153, para. 26.

34 See J. Temple Lang, The Duties of Cooperation of National Authorities and Courts under Article 10 E.C.: Two More Reflections, *European Law Review*, 2001, vol. 26, p. 88; S. Prechal, *Directives…*, pp. 65–66; D. Miąsik, The principle of consistent interpretation of Polish law with EU law, in: M. Domańska, D. Miąsik, M. Szwarc, *National Courts…*, p. 80.

35 See S. Biernat, Wykładnia prawa krajowego w zgodzie z prawem Wspólnoty Europejskiej [Interpretation of national law in accordance with European Community law], in: C. Mik (ed.), *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych* [Implementation of European Integration Law in National Legal Systems], Toruń 1998, p. 131 and the literature cited therein; C. Mik, Wykładnia zgodna prawa krajowego z prawem Unii Europejskiej [Interpretation of National Law in Accordance with European Union Law], in: S. Wronkowska (ed.), *Polska kultura prawna a proces integracji europejskiej* [Polish Legal Culture and the European Integration Process], Krakow 2005, p. 129.

36 See C. Mik, Wykładnia zgodna…, p. 129.

obligation of consistent interpretation is justified in the light of "the Member States' obligation arising from the directive to achieve the result envisaged by the directive". As in the case of the principle of loyalty, the addressee of the obligation is all the bodies of the Member States.[37] It can therefore be argued that administrative bodies – to the extent to which they apply national law within the framework of the regulation of a directive – are obliged to fulfil the "obligation of result" under Article 288(3) of the Treaty on the Functioning of the European Union, in particular by interpreting national law in accordance with the content and purpose of the directive.[38]

The view that the obligation of consistent interpretation also rests with administrative bodies has been confirmed by the case law of the CJEU.[39] Fining proceedings may also serve as an example of this.[40] Although in most cases the CJEU addresses the obligation of consistent interpretation to national courts, this results rather from the context of the preliminary ruling procedure, and – taking into account the factual state of the cases – the CJEU's dispositions in these cases can also be applied to administrative bodies.

Standard of interpretation (EU norm) for consistent interpretation in national fining proceedings

In the preceding comments, attention was drawn to the model of implementing consistent interpretation in the process of applying the law.[41] As has been indicated, it allows for a distinction between the interpretation of a standard of consistent interpretation (the EU norm) and consistent interpretation itself (interpreting a norm of national law in accordance with the EU norm). This distinction is helpful in the analysis of the CJEU rulings, many of which concern the interpretation of a standard of consistent interpretation – a norm of EU law which is the subject of reference for the interpretation of national law. In fining proceedings, this often concerns the norms of regulations which require the establishment of sanctions in the event of their violation. The CJEU interpretation here has often been restrictive, by invoking the principle that offences and penalties must have a proper legal basis, set out in the first sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union (CFR), which requires the law to give a clear definition of offences and the penalties which they attract. It is worth noting that such a

37 Case 14/83, *von Colson*, EU:C:1984:153, para. 26.

38 See S. Prechal, *Directives…*, p. 65.

39 Cases C-218/01, *Henkel*, EU:C:2004:88, para. 60; C-53/10, *Land Hessen*, EU:C:2011:585, joined cases C-444/09 and C-456/09, *Rosa María Gavieiro Gavieiro*, EU:C:2010:819, paras 72–73; C-523/13, *Larcher*, EU:C:2014:2458, para. 45; C-573/17, *Popławski*, EU:C:2019:530, para. 94; C-582/22, *Die Länderbahn GmbH et al. v. Federal Republic of Germany*, EU:C:2024:213, para. 63.

40 Joined cases C-870/19 and C-871/19, *MI TB*, EU:C:2021:233, discussed above.

41 See the section "Overview of the principle of consistent interpretation and its elements".

restrictive interpretation of a standard of consistent interpretation (the EU norm) determines the scope of application for sanctions specified at the level of national law.

For example, in case C-906/19 concerning the result of a roadside check in France, it was found that a commercial vehicle had been driven without the driver card having been inserted into the tachograph. The defence argued that the French criminal courts did not have territorial jurisdiction to hear the matter, since Article 19(2) of Regulation 561/2006 does not permit the French authorities to prosecute a person who committed alleged offences on the territory of another Member State of the European Union.[42] The key issue to be resolved by the CJEU was whether the express derogation from the principle of territoriality as regards prosecution, laid down in Article 19(2) of Regulation 561/2006, covered not only the provisions of the regulation but also those of Regulation 3821/85. The CJEU's response was that Article 19(2) of Regulation 561/2006 must be interpreted as precluding the competent authorities of a Member State from imposing a penalty on the driver of a vehicle or on a transport undertaking for an infringement of Regulation 3821/85, as amended by Regulation 561/2006, that was committed on the territory of another Member State or of a third country, and later detected on its own territory, and for which a penalty has not already been imposed. It followed that the competent authorities of a Member State could not impose penalties in a situation involving infringements of Regulation 3821/85 detected on the territory of that Member State but committed on the territory of another Member State. In the CJEU's view, that interpretation was the only one which was consistent with the principle that offences and penalties must have a proper legal basis, set out in the first sentence of Article 49(1) of the CFR.[43]

In the context of fining proceedings, the important element is the abovementioned disposition of the CJEU (see "Overview of the principle of consistent interpretation and its elements" above), according to which the national law must be interpreted in a manner consistent with the fundamental rights protected by the EU legal order and with the other general principles of EU law. In the cases under analysis, an example of the concretisation of such a general disposition is case C-570/20, in which – in the light of the CJEU's guidelines – a standard of consistent interpretation was the principle that offences and penalties must be defined by law and follow the principle of *ne bis in idem*. In this case, the CJEU made a detailed interpretation of the above principles for the purposes of the national court interpreting the provisions of national law aimed at combating VAT offences in order to ensure the collection of all the VAT due.[44] As a result the CJEU stated that the fundamental

42 Article 19(2) of Regulation 561/2006 provided that

> a Member State shall enable the competent authorities to impose a penalty on an undertaking and/or a driver for an infringement of this Regulation detected on its own territory and for which a penalty has not already been imposed, even where that infringement has been committed on the territory of another Member State or of a third country.

43 Case C-906/19, *FO*, EU:C:2021:715, see paras 45–46.

44 Case C-570/20, *BV*, EU:C:2022:348, see paras 27–43.

right guaranteed by Article 50 of the CFR, read in conjunction with Article 52(1) thereof, must be interpreted as meaning that (1) it does not preclude a situation whereby the limitation of the duplication of proceedings and penalties of a criminal nature in the event of fraudulent concealment or omissions from a return relating to VAT provided for by national legislation to the most serious cases is based only on settled case law restrictively interpreting the legal provisions laying down the conditions for the application of that duplication, provided that it is reasonably foreseeable, at the time when the offence is committed, that that offence is liable to be the subject of a duplication of proceedings and penalties of a criminal nature, but (2) it precludes national legislation which does not ensure, in cases of the combination of a financial penalty and a custodial sentence, by means of clear and precise rules, where necessary as interpreted by the national courts, that all of the penalties imposed do not exceed the seriousness of the offence identified.[45]

It is worth noting that the above-discussed cases (C-906/19 and C-570/20) are good illustrations of the observation that the interpretative guidelines of the CJEU may concern a norm of EU law or a norm of national law. In the former case, the principle that offences and penalties must be defined by law was a standard of interpretation for a norm of EU law, while in the latter it was for a norm of national law. In both cases, the (restrictive) interpretation of those norms determined the scope of sanctions defined at the level of national law.

In the context of a standard of interpretation in fining proceedings, it is worth noting that EU provisions (provisions of directives or regulations) do not usually provide for a penalty for their infringement, but include a reference in this respect to national law. As has been stated by the CJEU, in such a case, Article 4(3) of the TEU requires the Member States to take all measures necessary to guarantee the application and effectiveness of EU law. For that purpose, while the choice of penalties remains within their discretion, they must ensure that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.[46] It is worth noting that this triad, i.e. "effective, proportionate and dissuasive" for sanctions[47] constitutes a standard of interpretation for the national authority with which to interpret national law (sanctions) established in order to ensure the application and effectiveness of EU law. The criterion of the non-discriminatory nature of sanctions is also mentioned.[48]

45 See Case C-570/20, *BV,* EU:C:2022:348, para. 55.

46 See e.g. cases C-326/88, *Hansen*, EU:C:1990:291, para. 17; C-565/12, *LCL Le Crédit Lyonnais*, EU:C:2014:190, para. 44 and the case law cited therein.

47 These criteria are usually provided in a given regulation or EU directive.

48 See e.g. Article 19 of Regulation 561/2006.

In specifying the proportionate nature of a sanction, the CJEU stated that the principle of proportionality has to be observed, not only as regards the determination of factors constituting an infringement, but also the determination of the rules concerning the severity of fines and the assessment of the factors which may be taken into account in the fixing of those fines.[49] In particular, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary to attain the objectives legitimately pursued by that legislation. In that context, the severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed.[50] In case C-190/17 the CJEU concluded accordingly that EU law (Articles 63 and 65 of the Treaty on the Functioning of the European Union must be interpreted as precluding any legislation of a Member State which provides that failing to comply with an obligation to declare significant sums of cash entering or leaving the territory of that State is punishable with a fine which may be up to double the undeclared amount.

National provisions subject to consistent interpretation in national fining proceedings

As indicated above, the obligation of consistent interpretation concerns the whole body of domestic law; in other words, the subject of consistent interpretation is all provisions (norms) of national law. In the context of fining proceedings, the following regulations of national law should be distinguished: norms establishing obligations (sanctioned norms), norms establishing sanctions in relation to sanctioned norms (sanctioning norms) and procedural provisions. In general, the obligation of consistent interpretation applies to each of these categories of regulations. In this context, it should be noted that the situation is different when norms establishing obligations (sanctioned norms) are included in EU law[51] – then they are not the subject of the "obligation of consistent interpretation". However, their interpretation – made in the light of the principles established for the interpretation of EU law[52] – is important for the scope of sanctions specified in national law.

When noting that the obligation of consistent interpretation applies to each of the above categories of national law provisions (sanctioned, sanctioning and procedural provisions), it should be emphasised that this interpretation should

49 Case C-190/17, *Zheng*, EU:C:2018:357 para. 40. See also the CJEU judgment in case C-210/10, *Urbán*, EU:C:2012:64, paras 53–54.

50 Case C-190/17, *Zheng*, EU:C:2018:357, paras 41–42. See, by analogy, the judgment in case C-255/14, *Chmielewski*, EU:C:2015:475, paras 22–23.

51 See e.g. joined cases C-870/19 and C-871/19, *MI TB*, EU:C:2021:233 as discussed below.

52 See the model of implementing consistent interpretation in the process of applying the law discussed above, the stage: establishing a standard of consistent interpretation (the EU norm) - and comments as to the interpretation of EU law (section "Overview of the principle of consistent interpretation and its elements").

take into account the effect it will have on the legal situation of an individual. This results from the case law of the CJEU that in the event that a sanctioned norm – for reasons of legal certainty – cannot be subject to an interpretation that ensures the greatest possible effectiveness of EU law, the sanctioning norms should not be subject to an interpretation consistent with the imperative of effectiveness of EU law either.[53]

A different question that arises is whether it is permissible – in the light of the EU requirements regarding the limits of consistent interpretation – for an interpretation in conformity with EU law of vague or unclear national provisions that leads to an extension of the obligations incumbent on an individual (a sanctioned rule) which may simultaneously result in the imposition of a penalty on said individual for failing to discharge an obligation understood in this way (sanctioning rule).[54] The first answer would be that the principle that consistent interpretation cannot lead to the establishment or aggravation of criminal liability[55] implies the impermissibility of interpreting a sanctioned norm in such a way. However, the question should be asked whether such a conclusion is valid in the light of the judgments of the CJEU which concerned the interpretation of vague/unclear concepts (formulation) of a sanctioned norm.

In case C-634/18 the referring court asked whether Article 4(2)(a) of Framework Decision 2004/757, read in conjunction with Article 2(1)(c) thereof, and Articles 20, 21 and 49 of the CFR, must be interpreted as precluding Member States from classifying as a criminal offence the possession of a significant quantity of narcotic drugs or psychotropic substances, both for personal consumption and for the purposes of illicit drug trafficking, while leaving the interpretation of the concept of a "significant quantity of narcotic drugs or psychotropic substances" to the discretion of the national courts, on a case-by-case basis. Importantly, national law differentiated the penalty for possession of narcotic drugs or psychotropic substances depending on whether they were in a significant quantity.[56] The interpretation of the courts

53 See the judgment of the CJEU in Joined cases C-870/19 and C-871/19, *MI TB*, EU:C:2021:233, discussed in the section "Fining proceedings and limits of consistent interpretation". The reasoning of the CJEU concerned a case where the sanctioned norm was an EU norm, but it seems that it can be generalised and also applied to situations in which the sanctioned norm is a norm of national law.

54 The comments here refer to sanctions which are criminal or – in accordance with the criteria established in CJEU jurisprudence (see note 71) – of a criminal character.

55 See comments in the section "Overview of the principle of consistent interpretation and its elements" above.

56 Under Article 62(1) of the Law on combating drug addiction of 29 July 2005 (Journal of Laws of 2005, No. 179, item 1485), possession of narcotic drugs or psychotropic substances was punishable by a restriction of liberty of up to three years. Under Article 62(2) of the Law on combating drug addiction, where the possession involved a significant quantity of narcotic drugs or psychotropic substances, the offender was to be liable to a restriction of liberty of one to ten years.

regarding the sanctioned norm (which could be reconstructed as a prohibition on possessing narcotic drugs or psychotropic substances of a significant quantity) was therefore important for determining the penalty for the perpetrator of this crime.

In response to the questions of the national court, the CJEU cited its case law concerning the principle that offences and penalties must be defined by law (the principle of the legality of offences and penalties), as set out in Article 49(1) of the CFR. In particular, it indicated that under that principle, criminal law provisions must comply with certain requirements of accessibility and predictability as regards both the definition of the offence and the sentencing. It follows that the law must clearly define offences and the penalties which they attract. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions would make them criminally liable.[57] Furthermore, as explained by the CJEU, the principle that the applicable law must be precise cannot be interpreted as prohibiting the gradual clarification of rules of criminal liability by means of interpretations in the case law, provided that those interpretations are reasonably foreseeable.[58] In the discussed case, such a position resulted in the conclusion that the principle of the legality of offences and penalties must be interpreted as not precluding Member States from providing for aggravated criminal penalties for the offence of possessing a "significant quantity of narcotic drugs and psychotropic substances" while leaving the interpretation of that concept to the national courts on a case-by-case basis, provided that that interpretation meets the requirements of foreseeability, as recalled by the CJEU. As stated by the CJEU, the regulation of the relevant provision of Framework Decision 2004/757, read in conjunction with Articles 20, 21 and 49 of the CFR, must be interpreted as not precluding Member States from leaving the interpretation of the concept of a "significant quantity of narcotic drugs or psychotropic substances" to the discretion of the national courts, on a case-by-case basis, provided that that interpretation is reasonably foreseeable.[59]

As can be argued, the position of the CJEU expressed in the above discussed case can lead to more general conclusions. It seems that[60] when the interpretation of a sanctioned norm results in a stronger sanction imposed for its violation, this interpretation is permissible if it is reasonably foreseeable, as is required by the principle of the legality of offences

57 See paras 48–49. CJEU recalled here the judgments in Case C-308/06, *Intertanko and Others*, EU:C:2008:312, para. 71 and Case C-42/17, *M.A.S. and M.B.*, EU:C:2017:936, para. 56.

58 Para. 50. See also *Rosneft*, C-72/15, EU:C:2017:236, para. 167 and the case law cited therein.

59 Paras 51–52.

60 This reasoning applies to cases where the sanctions are criminal or of a criminal character.

and penalties. This position of the CJEU can be supported by the Court's earlier statements.[61]

Placing the above jurisprudence in the context of the obligation of consistent interpretation in fining proceedings, it can be argued that it does not render obsolete the principle that consistent interpretation cannot lead to the establishment or aggravation of criminal liability. It may, however, lead to its relativisation. It is true that in case C-634/18 the CJEU referred to judicial interpretation in general, and not to the specific case of the obligation of consistent interpretation. However, it would be difficult to argue that in this latter situation the position of the CJEU – which admits the possibility, when reasonably foreseeable, of determining the meaning of vague/unclear provisions by means of judicial interpretation also when it leads to the establishment or aggravation of criminal liability – does not apply. Imagine a situation where the sanctioned norm in case C-634/18 was the implementation of EU law: would that mean that the CJEU's position would have to be more restrictive? Such a conclusion does not sound plausible.

As can be argued, the reasoning in the judgment of the Polish Supreme Court in case III SK 1/10 can be assessed in the light of the above observations. The case concerned the admissibility of the consistent interpretation of Article 81(1) of the Telecommunications Law,_resulting in covering by the concept of "universal service" also the services listed in Article 103 of the Telecommunications Law. Such an interpretation opened up the possibility of applying sanctions under Article 209(1)(7) of the Telecommunications Law.[62] In light of the above argumentation referring to the CJEU case law, it seems that the Supreme Court's stance is justified when the interpretation applied by the Supreme Court was reasonably foreseeable.[63]

61 See e.g. the judgment in Case C-102/16, *Vaditrans*, EU:C:2017:1012, para 52, where the CJEU stated that

> [t]he principle that offences and penalties must have a proper basis in law cannot therefore be interpreted as precluding the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time.

See also the judgment in Case C-194/14 P, *AC-Treuhand v. Commission*, EU:C:2015:717, para. 41 and the case law cited therein.

62 In this case, however, such a possibility was excluded due to the lack of reference to the latter provision by the regulatory body.

63 It should be noted that the justification provided by the Supreme Court for such an interpretation may raise concerns. The Supreme Court justified the possibility of a consistent interpretation of Article 81(1) of the Telecommunications Law by the fact that such interpretation did not lead to the imposition of sanctions on an entity not provided for in national law, since such sanction is directly established by Article 209(1)(7) of the Telecommunications Law. The consistent interpretation, in view of the Supreme Court, only led to specifying the scope of the concept of universal service. Such a reading seems to have confined the application of

Fining proceedings and limits of consistent interpretation

As indicated above, in its case law the CJEU has set two categories of limits of the obligation of consistent interpretation: general principles of law and interpretation *contra legem*. Generally, when referring to general principles of law as the limit of consistent interpretation, the CJEU refers to the principles of legal certainty and of non-retroactivity. In criminal cases, the implication of such assumptions is the recognition that consistent interpretation cannot lead to the establishment or aggravation of criminal liability. In this context, the question arises whether the limits of the obligation of consistent interpretation developed by the CJEU in relation to criminal cases can/should also apply to fining proceedings.

This issue has been addressed in the CJEU case law. It follows from this jurisprudence that the reasoning adopted by the CJEU as to the limits of consistent interpretation with respect to criminal proceedings and sanctions[64] should be applied to the financial penalties imposed by a national administrative authority. This conclusion is confirmed by cases in which the CJEU referred in fining proceedings to the limits of consistent interpretation, such as the principles of *nulla poena sine lege* and of *nullum crimen sine lege*, as well as to Article 49 of the CFR. The following case may serve as an example.

In joint cases C-870/19 and C-870/19 the national authorities established during roadside inspections that M.I. and T.B. were unable to produce the record sheets of the tachograph installed in their vehicle relating to the current day and several of the previous 28 days. Those authorities therefore imposed several administrative penalties on M.I. and T.B. for a certain number of infringements of Law No. 727/1978.[65] Article 15(7)(a) of Regulation 3821/85 established an obligation under which the driver must be in a position to produce the record sheets relating to the period covering the day of inspection and the previous 28 days. Importantly, Article 19 of Regulation 561/2006[66] provided that

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the *Kolpinghuis Nijmegen* formulation (according to which a consistent interpretation cannot lead to the establishment or aggravation of criminal liability).

64 See comments in the section "Overview of the principle of consistent interpretation and its elements" above.

65 Law No. 727/1978 implemented Regulation (EEC) No. 1463/70 of the Council of 20 July 1970 on the introduction of recording equipment in road transport (OJ, English Special Edition, Series I 1970(II), p. 482). Regulation No. 1463/70 was repealed and replaced by Regulation No. 3821/85, which was itself repealed and replaced by Regulation (EU) No. 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport, repealing Regulation No. 3821/85 and amending Regulation No. 561/2006 (OJ 2014 L 60, p. 1). Nevertheless, given the date of the events in the main proceedings, Regulation No. 3821/85 had to be taken into consideration.

66 Regulation (EC) No. 561/2006 of the European Parliament and of the Council of 15 March 2006 (OJ 2006 L 102, p. 1).

> Member States shall lay down rules on penalties applicable to infringements of this Regulation and Regulation […] 3821/85 and shall take all measures necessary to ensure that they are implemented. Those penalties shall be effective, proportionate, dissuasive and non-discriminatory. No infringement of this Regulation and Regulation […] 3821/85 shall be subjected to more than one penalty or procedure.

The CJEU – in response to the preliminary questions of the Corte suprema di cassazione (Supreme Court of Cassation) – concluded that when, during inspection, the driver of a road transport vehicle is unable to produce the record sheets for the tachograph relating to the current day and the previous 28 days, that conduct constitutes a single infringement that must result in a single penalty.[67] The CJEU also noted that should the amount of the fine applicable to such a breach under the law of a Member State be insufficient to have a deterrent effect, the referring court is required, by virtue of the principle that national law must be interpreted in conformity with EU law, to the greatest extent possible, to interpret national law in conformity with the requirements of EU law.[68] However, the CJEU stated the limits to such an interpretation. It explained that a national court must also ensure that it complies with the principle that offences and penalties must be defined by law, enshrined in the first sentence of Article 49(1) of the CFR. As the CJEU pointed out, according to its case law that principle requires that legislation must clearly define offences and the penalties which they attract. That requirement is satisfied where the individual concerned is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, which acts and omissions will make him or her criminally liable.[69] In the case at hand, the CJEU concluded that even if the national court were to consider that the maximum amount of the fine that can be imposed in the cases in the main proceedings is insufficiently high to have a deterrent effect, the court could not impose a number of fines, each relating to one or several days included within the period covering the day of the inspection and the previous 28 days.[70]

The conclusion of the CJEU is controversial. As can be assumed the case in question concerned proceedings (sanctions) which are neither criminal nor should be regarded as criminal.[71] Nevertheless, the CJEU invoked Article 49(1) of the CFR. Was it the intention of the CJEU to broaden the

67 Joined cases C-870/19 and C-871/19, *MI TB*, EU:C:2021:233, para. 44.

68 Joined cases C-870/19 and C-871/19, *MI TB*, EU:C:2021:233, para. 48.

69 Joined cases C-870/19 and C-871/19, *MI TB*, EU:C:2021:233, para. 49. The CJEU referred here to Case C-194/14 P, *AC-Treuhand v. Commission*, EU:C:2015:717, p. 40.

70 Joined cases C-870/19 and C-871/19, *MI TB*, EU:C:2021:233, para. 50.

71 The latter category should be assessed in accordance with the criteria stated in *Garlsson*. See the CJEU judgment in Case C-537/16, *Garlsson Real Estate and Others*, EU:C:2018:193, para. 28. Recalling its previous case law (judgments in Case C-489/10, *Bonda*, EU:C:2012:319,

application of the CFR to also cover proceedings (sanctions) which are not of a criminal character? If so, it can be argued that such a position of the CJEU would have an adverse impact on the effectiveness of EU law. That is because very often the provisions of EU law contain criteria which have to be complied with when Member States implement sanctions.[72] Improper implementation of such provisions of EU law by a Member State may be corrected by a consistent interpretation. Taking the position that the limit of consistent interpretation in cases which are not criminal or of a criminal character is the principle that offences and penalties must be defined by law would significantly reduce the permissible scope of such application and, as a result, the effectiveness of EU law. In this context one may ask whether the position of the CJEU in case C-870/19 is consistent with its stance in *von Colson*. By adopting in the latter case the restrictive interpretation as employed in case C-870/19, the limits of the obligation of consistent interpretation would prevent the national court seeking compensation in an amount higher than DM 7.20. Thus, it may be argued that the position of the CJEU in case C-870/19 results in a limitation of the effectiveness of EU law and is inconsistent with its previous case law. It seems that a more appropriate position is to maintain the rule established in *Kolpinghuis Nijmegen* as referring only to criminal cases and cases of a criminal character (within the meaning of *Garlsson*). Such a solution would guarantee that an appropriate balance between effectiveness and legal certainty is maintained. As can be argued, in case C-870/19 it would have been sufficient to refer to Article 19 of Regulation 561/2006, which provided that no infringement of this Regulation and Regulation 3821/85 shall be subjected to more than one penalty or procedure. Taking into account the national law,[73] it seemed sufficient to properly establish whether there had been an infringement of Regulation 3821/85.

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para. 37, and in Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para. 35), the CJEU stated that

> as regards the assessment as to whether proceedings and penalties, such as those at issue in the main proceedings, are criminal in nature, it must be noted that, according to the Court's case-law, three criteria are relevant. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence and the third is the degree of severity of the penalty that the person concerned is liable to incur.

As to the analysis of when an administrative sanction is of a criminal character, see Chapter 1.

72 They specify that the sanctions should be effective, proportionate, dissuasive and non-discriminatory.

73 In accordance with Article 19 legge n. 727/1978 – Attuazione del regolamento […] n. 1463/70 […], e successive modificazioni e integrazioni, relativo alla istituzione di uno speciale apparecchio di misura destinato al controllo degli impieghi temporali nel settore dei trasporti su strada of 13 November 1978 (GURI no. 328 of 23 November 1978): "any person infringing Regulation No 1463/70, as amended and completed, or that law and its implementing regulations for which no specific penalty is provided, will receive an administra-

As noted above, one category of limitations on the obligation of consistent interpretation is the general principles of law. In fining proceedings the principle of legal certainty and the principle that offences and penalties must have a proper legal basis – which constitutes the expression of the former – are of key importance. As can be argued, examples where this principle was a standard of interpretation for national law[74] can also serve as examples of this principle determining the limits of consistent interpretation. In this sense, judgments of the CJEU providing a restrictive interpretation (of national law or an EU norm constituting a standard of interpretation for national law) – based on the principle that offences and penalties must have a proper legal basis (an expression of the principle of legal certainty) or based on fundamental rights – can be perceived as a guarantee of maintaining the limits of consistent interpretation expressed in those principles.

The analysis of the principle of consistent interpretation in national fining proceedings also leads to another important conclusion. As can be argued, the wording used by the CJEU in *Kolpinghuis Nijmegen*, according to which consistent interpretation cannot lead to the establishment or aggravation of criminal liability,[75] should be relativised; otherwise, its application would lead to a significant limitation of the effectiveness of EU law and would be difficult to reconcile with the broader CJEU case law (i.e. on issues other than the obligation of consistent interpretation). It is important to reiterate in this context that the wording used in the *Kolpinghuis Nijmegen* judgment constitutes, as has been explained above, the implication of the general principle that the obligation of consistent interpretation "is limited by general principles of law, particularly those of legal certainty and non-retroactivity". Therefore, it seems justified to reconstruct the *Kolpinghuis Nijmegen* formulation in view of the CJEU judgments concerning the interpretation of the principle of legal certainty.

It is worth paying particular attention to the judgment in case C-570/20, issued in the context of the limitations of the principle *ne bis in idem* in a VAT case.[76] In this judgment, the CJEU confirmed that the principle that offences and penalties must have a proper legal basis does not preclude the gradual, case-by-case clarification of the rules of criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time of the offence, especially in the light of the interpretation of the relevant provision

tive penalty". As stated in note 65, Regulation No. 1463/70 was repealed and replaced by Regulation No. 3821/85.

74 See e.g. Case C-570/20, BV, EU:C:2022:348, analysed in the section "Standard of interpretation (EU norm) for consistent interpretation in national fining proceedings" above.

75 As to the CJEU judgment in Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, see the comments in the section "Overview of the principle of consistent interpretation and its elements".

76 The judgment is commented on, although from a different angle, in the section "Standard of interpretation (EU norm) for consistent interpretation in national fining proceedings" above.

in the case law at the time.[77] That conclusion applies to a situation in which the national case law, in its interpretation of the relevant legislative provisions, refers to broad concepts which must be clarified gradually.[78] The CJEU also pointed out that the scope of the foreseeability depends to a considerable degree on the content of the text in question, the field it covers and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person in question has to take appropriate legal advice to assess – to a degree that is reasonable in the circumstances of the case – the consequences which a given action may entail. This is particularly true in relation to persons carrying out professional activity who are used to having to proceed with a high degree of caution when pursuing their occupation. They can therefore be expected to take special care in assessing the risks that such an activity entails.[79] Another CJEU ruling that may be helpful for the proper reading of the *Kolpinghuis Nijmegen* principle is the CJEU ruling in case C-634/18, discussed in the section "National provisions subject to consistent interpretation in national fining proceedings" above. In that judgment the CJEU explained that the principle that the applicable law must be precise cannot be interpreted as prohibiting the gradual clarification of rules of criminal liability by means of interpretations in the case law, provided that those interpretations are reasonably foreseeable.[80] It should be added that in this case the rules of criminal liability which were to be interpreted by the national court were vague/unclear. Their interpretation determined in turn the penalty for the perpetrator of the offence.

In the light of the above rulings – taking into account the need to ensure the coherence of CJEU case law and the effectiveness of EU law – it can be argued that the *Kolpinghuis Nijmegen* formulation should be interpreted so as not to apply to situations in which the individual that would be subject to a sanction (including a sanction in fining proceedings) could have reasonably foreseen, at the time of committing an offence/infringement, the interpretation adopted by the court, in particular in view of the interpretation adopted at that time in the case law concerning the disputed legal provision. It should also be noted that, according to CJEU jurisprudence,[81] the scope of the

77 Case C-570/20, *BV*, EU:C:2022:348. para 41. The CJEU confirmed that this conclusion stems from its jurisprudence, and it referred to the case C-194/14 P, *AC-Treuhand v. Commission*, EU:C:2015:717, para. 41 and the case law cited therein, and case C-634/18, *Prokuratura Rejonowa w Słupsku*, EU:C:2020:455, para. 50.

78 Case C-570/20, *BV*, EU:C:2022:348, para 42.

79 Ibidem, point 43. The CJEU referred here to judgments in joined cases C-189/02 P, C-202/02 P, C-205/02 P–C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others v. Commission*, EU:C:2005:408, para. 219 and the case law cited therein; C-194/14 P, *AC-Treuhand v. Commission*, EU:C:2015:717, para. 42; and C-72/15, *Rosneft*, EU:C:2017:236, para. 166.

80 See the discussion of this judgment in the section "National provisions subject to consistent interpretation in national fining proceedings" above.

81 See the comments above.

foreseeability depends to a considerable degree on the content of the text in question, the field it covers and the number and status of those to whom it is addressed.

Limits of consistent interpretation – a lesson from Poland (Case study of the control proceedings under Article 10(2) of Directive 2002/20)

The application of the obligation of consistent interpretation in fining proceedings is not free from controversies in court decisions. One example is the Polish Supreme Court case III SK 52/10, which provides a good illustration of the application and limits of consistent interpretation in respect of national procedural provisions. In case III SK 52/10, the Supreme Court rejected the position that it is possible, on the basis of Article 209 of the Telecommunications Law in connection with Article 10(2) and (3) of Directive 2002/20 in its original wording, to impose financial penalties without prior control proceedings and without a request to eliminate the identified infringements and setting an appropriate deadline. It considered it inadmissible to derive the opposite stance from the new wording of Article 10 of Directive 2002/20.[82] It is worth looking more closely at the argumentation developed by the Supreme Court.

The Supreme Court, referring to its previous case law,[83] found that in a situation where a regulatory authority has previously conducted control proceedings which revealed an infringement of the Telecommunications Law by a telecommunications undertaking, it may not impose a fine through independent fining proceedings under Article 209(1) of the Telecommunications Law for the infringement without exhausting the procedure referred to in Article 201 of the Telecommunications Law. The Supreme Court noted that Article 10 of Directive 2002/20 in its original wording provided that the national regulatory authority may verify whether telecommunications undertakings meet the obligations arising from the Telecommunications Law or issued decisions (Article 10(1) of Directive 2002/20). However, if the authority finds irregularities, in accordance with Article 10(2) of Directive 2002/20 it should notify the undertaking and should provide it with the opportunity to respond to the allegations or should provide an opportunity to eliminate the infringement within an appropriate period. Only in the event of failure to eliminate

82 Since the amendment stemming from Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ of 2009 L337, p. 37), the amended Article 10 of Directive 2002/20 allowed the national regulatory authority to impose financial penalties in the event of infringements of the obligations arising from the harmonised Telecommunications Law.

83 See the judgment of the Supreme Court of 21 September 2010 (III SK 8/10).

the infringement within the specified time can financial penalties be imposed (Article 10(3) of Directive 2002/20) for the conduct listed in Article 10(2) of Directive 2002/20. As the Supreme Court stated, such an interpretation of Article 10(2) and (3) of Directive 2002/20 in its original wording is additionally supported by paragraph 51 of the preamble to Directive 2009/140. It follows from this that the main reason for changing the wording of Article 10 of Directive 2002/20 was the inadequacy of the previous regulatory framework empowering national regulatory authorities to impose fines on telecommunications undertakings. The Supreme Court noted that the adopted understanding of Article 10 of Directive 2002/20 in its original wording, according to which it was inadmissible to impose a financial penalty without a prior request to eliminate the identified infringements, implies the rejection of the position of the regulatory authority, according to which its procedure in the case was consistent with the new wording of Article 10 of Directive 2002/20. The Supreme Court justified this conclusion by referring to the limits of the consistent interpretation of the provisions of the Telecommunications Law, between the directive entering into force and the deadline for its implementation expiring.[84] As the Supreme Court pointed out, the case under consideration is not about the principle, resulting from the settled case law of the CJEU, that consistent interpretation and the principle of effectiveness cannot lead to the imposition on an individual of criminal sanctions which are not provided for in the national law.[85] According to the Supreme Court, this principle prevents the authorities of a Member State relying on the directive itself in order to hold an individual criminally liable or to increase the sanctions for an infringement of the directive.[86] In the present case, however, it is the provisions of national law implementing Article 10 of Directive 2002/20 that are to be applied. The Supreme Court therefore saw the limitations to the consistent interpretation of the Telecommunications Law in the general principle of EU law, which is the protection of fundamental rights, and in Article 47 of the CFR. As it noted, the EU Courts refer to this provision and the invoked principle in cases concerning severe financial penalties imposed on undertakings for violating competition rules (as in the case at hand).[87] At the same time, the

84 It is worth noting that the Supreme Court referred to the judgment of the CJEU in the *Adeneler* case and accentuated the different – when compared with the obligation of consistent interpretation – guidelines provided by the CJEU in that judgment as to the interpretation of national law before the deadline for implementing the directive. However, in the further part of the judgment the Supreme Court focused on the obligation of consistent interpretation.

85 The Supreme Court referred here to cases 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, and C-60/02, *Criminal proceedings against X*, EU:C:2004:10.

86 The Supreme Court referred here to case C-387/02, *Berlusconi*, EU:C:2005:270.

87 The Supreme Court referred here to cases C-199/92, *Hüls v. Commission*, EU:C:1999:358, paras 149–150, and C-235/92, *Montecatini v. Commission*, EU:C:1999:362, paras 175–176; and to joined cases T-67/00, T-71/00 and T-78/00, *JFE Engineering Corp. and Others*

Supreme Court noted that in the light of the previous case law of the ECHR – which co-shapes the content of the EU principle of protection of fundamental rights and sets the minimum standard of protection of the rights in question, in accordance with Article 53 of the CFR – severe financial penalties imposed on entrepreneurs by administrative bodies are sanctions of a criminal character within the meaning of the ECHR.[88]

The above reasoning of the Supreme Court prompts the following reflections. Firstly, the recognition of the criminal character of sanctions that meet the conditions specified in the case law of the European Court of Human Rights (ECtHR) deserves approval. It is worth noting that these criteria have already been referred to in the case law of the CJEU.[89] Secondly, the Supreme Court correctly reconstructed the meaning of the provisions of the Telecommunications Law in the light of Article 10 of Directive 2002/20 in its original wording, which implied questioning the arguments of the regulatory authority and rejecting the position that it is possible to impose financial penalties without a request to eliminate the identified infringements and setting an appropriate deadline. The interpretation of the Supreme Court was preceded by the correct reconstruction of a standard of interpretation, i.e. Article 10(2) and (3) of Directive 2002/20 in its original wording. Thirdly, the Supreme Court correctly rejected the possibility of consistent interpretation of the provisions of the Telecommunications Law in view of the new wording of Article 10 of Directive 2002/20.[90] The Supreme Court's conclusion provides an example of the application of the limits of consistent interpretation in respect of national procedural provisions. Fourthly, while one can agree that the obligation of consistent interpretation should not be applied in this regard, the reasoning of the Supreme Court in support of the above conclusion raises reservations, in particular the reasoning as to the limits of the obligation of consistent interpretation. To reiterate, the Supreme Court argued that it cannot invoke the rule of the *Kolpinghuis Nijmegen* judgment because this principle does not allow the authorities of a Member State to invoke the directive itself in order to hold an individual criminally liable or to increase the sanctions for an infringement of the directive – and the case in question concerns the application of the national law implementing Article 10 of Directive 2002/20. This reasoning of the Supreme Court is incorrect, although it must be admitted that the unclear wording of the CJEU *Kolpinghuis Nijmegen* judgment contributed greatly to this. As indicated above (see the section "Overview of the principle of consistent interpretation and its elements"), in that judg-

v. Commission, EU:T:2004:221, para. 178 and case T-279/02, *Degussa v. Commission*, EU:T:2006:103, para. 115.

88 The Supreme Court referred here to the judgment of the ECtHR of 24 September 1997 in case 18996/91, *Garyfallou ABBE p. GrCJEUi*; the decision of the ECtHR of 23 March 2000 in case 36706/97, *Ioannis Haralambidis and Y. Haralambidis-Liberpa Ltd p. GrCJEUi.*

89 See Chapter 1.

90 After the amendment stemming from Directive 2009/140/EC.

ment the CJEU – in the context of limitations on the permissible results of consistent interpretation – referred to limitations on the permissible effects caused by a directive.[91] Such a reference is unjustified. A consistent interpretation, being effected in the application of national law, cannot be identified with the operation of a directive "of itself" – this phrase is appropriate in the context of direct effect. In deciding the case at issue, it would have therefore been justified to refer to the limits of the obligation of consistent interpretation established in *Kolpinghuis Nijmegen*, from which it follows that the obligation of consistent interpretation cannot result in determining or aggravating the criminal liability of persons violating the provisions of the directive. Such an interpretative directive should be treated as a concretisation of the general principle of legal certainty indicated by the CJEU as the limit of the obligation of consistent interpretation.[92] A correct reading of the *Kolpinghuis Nijmegen* judgment would make it unnecessary to look to the principle of protecting fundamental rights and Article 47 of the CFR for limitations of the consistent interpretation of the Telecommunications Law.

Conclusions

The above analysis identified specific issues concerning consistent interpretation in national fining proceedings. The elements of the legal construct of consistent interpretation (subjective scope, standard of interpretation, subject matter and limits) help to organise and assess the relevant CJEU case law in this respect. As a result, the following conclusions can be formulated.

Firstly, the obligation of consistent interpretation is binding on national administrative authorities issuing fines. Such an obligation is rooted in the general duty of loyalty, which constitutes the legal basis of the obligation of consistent interpretation, as well as in CJEU case law regarding consistent interpretation. Secondly, many of the CJEU rulings concern the interpretation of a standard of consistent interpretation, i.e. a norm of EU law constituting a reference for the interpretation of domestic law. In fining proceedings, this often concerns the norms of EU regulations which require the establishment of sanctions in the event of their infringement. The CJEU's interpretation here was usually restrictive in nature, by referring to the principle that offences and penalties must have a proper legal basis, as set out in the first sentence of Article 49(1) of the CFR. In this way, the principle of legal certainty has been recognised. It is important to note that such a restrictive interpretation of a standard of consistent interpretation determines the scope of sanctions established in national law.

91 "of itself and independently of a national law adopted by a Member State for its implementation": case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, para 13.

92 Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, cited in note 26 above.

The cases analysed herein[93] illustrate the observation that the interpretative guidelines of the CJEU may concern a norm of EU law or a norm of national law. The general prescription of the CJEU that national law must be interpreted in a manner consistent with the fundamental rights protected by the EU legal order and with the other general principles of EU law is important. In fining proceedings, it has been expressed particularly in the guideline to interpret the provisions of national law in accordance with the principle that offences and penalties must have a proper legal basis, set out in the first sentence of Article 49(1) of the CFR.

In the context of a standard of interpretation in fining proceedings, it is worth noting that in EU law, i.e. in directives or regulations, there are usually no provisions establishing sanctions for their infringement, but there are such references in national law. Without specifying the sanctions themselves, EU law does specify the criteria for such sanctions. In general, they should be "effective, proportionate and dissuasive". These criteria constitute for a national authority a standard of interpretation for sanctions established in national law.

Thirdly, the obligation of consistent interpretation concerns the whole body of domestic law. In the context of fining proceedings, consistent interpretation can refer to norms establishing obligations (sanctioned norms), norms establishing sanctions in relation to sanctioned norms (sanctioning norms) or procedural provisions. Bearing this in mind, it should be noted that the consistent interpretation of the above categories of provisions should take into account what effect such interpretation will have on the legal situation of an individual. In the light of the CJEU case law, consistent interpretation cannot lead to the establishment or aggravation of criminal liability; that conclusion also applies to fining proceedings in which the administrative sanction is of a criminal character.

Fourthly, the CJEU has not yet expressed an explicit stance on the limits of consistent interpretation in national fining proceedings. However, its jurisprudence indicates that the financial penalties imposed by national administrative authorities are criminal sanctions within the meaning adopted in the context of limits on the obligation of consistent interpretation.

As discussed above, the limits of the obligation of consistent interpretation are in particular the general principles of law (see the section "Overview of the principle of consistent interpretation and its elements" and the comments on the *Kolpinghuis Nijmegen* formulation). In the context of fining proceedings the principle of legal certainty and the principle that offences and penalties must be defined by law (the latter being the expression of the former) are of key importance. They counterbalance the interpretative arguments referring

93 See cases C-906/19, *FO*, EU:C:2021:715 and C-570/20, *BV*, EU:C:2022:348, discussed in the section "Standard of interpretation (EU norm) for consistent interpretation in national fining proceedings" above.

to the effectiveness of EU law. As can be argued, the instances where these principles act as standards for interpreting national law can also serve as examples of these principles determining the limits of consistent interpretation. In this sense, judgments of the CJEU providing a restrictive interpretation of national law in view of the principle that offences and penalties must have a proper legal basis, being an expression of the principle of legal certainty, can be perceived as a guarantee of maintaining the limits of consistent interpretation expressed in these principles.

It is also worth noting that in the context of fining proceedings, the protective nature of the general principles of law and in particular the principle that offences and penalties must have a proper legal basis, can be triggered at the stage of identifying the limits of the obligation of consistent interpretation as well as at the stage of establishing a standard of consistent interpretation (i.e. a norm of EU law being a reference for the interpretation of national law). As indicated above, a restrictive interpretation of a standard of consistent interpretation determines the scope of sanctions specified at the level of national law.

Fifthly, as can be argued, the formulation used by the CJEU in *Kolpinghuis Nijmegen*, according to which consistent interpretation cannot lead to the establishment or aggravation of criminal liability,[94] should be relativised; otherwise, its application would lead to results that significantly limit the effectiveness of EU law and would be difficult to reconcile with the broader CJEU case law (i.e. on issues other than the obligation of consistent interpretation). In the light of the CJEU rulings – and taking into account the need to ensure the coherence of the CJEU case law and the effectiveness of EU law – it can be argued that the wording in *Kolpinghuis Nijmegen* should be interpreted so as not to apply to a situation in which the individual that would be subject to a sanction (including a sanction in fining proceedings) could have reasonably foreseen when committing an offence/infringement the interpretation adopted by the court, in particular in view of the interpretation adopted at that time in the case law concerning the disputed legal provision. It should also be noted that, according to CJEU jurisprudence, the scope of the foreseeability depends to a considerable degree on the text in question, the field it covers and the number and status of those to whom it is addressed.

Sixthly, the analysis of CJEU case law and the jurisprudence of Polish courts in fining proceedings leads to the conclusion that, in practice, the obligation of consistent interpretation (in particular its limitations) is not free of controversy. Clearer and more consistent guidelines from the CJEU seem desirable here, as they could eliminate at least some of the doubts.

94 Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, see the comments in the section "Overview of the principle of consistent interpretation and its elements".

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3 The consequences of the failure to observe European general principles and fundamental rights in national fining proceedings

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Introduction

The chapter presents a synthetic analysis of the consequences of violating standards arising from EU fundamental rights and general principles in national fining proceedings. The study aims to present various EU remedies available to punished entities which national administrative authorities and national courts are obliged to apply in case of a breach of EU standards stemming from the general principles or fundamental rights. The scope of the study does not allow for a detailed analysis of the prerequisites for applying individual remedies, but only for a comprehensive presentation of the possibilities that EU law offers to the individual in this respect, taking into account the most recent case law of the Court of Justice and the systemic relations between individual remedies.

EU standards based on general principles or fundamental rights can be breached by national regulations, both substantive and procedural. These standards may be breached by the conduct of either the administrative authority imposing a pecuniary penalty on their basis or the court hearing the appeal.

Possible contradictions with those principles are removed by national law-applying bodies in the first stage by a pro-EU interpretation of national legislation.[1] Where the full effectiveness of EU law is not thereby achieved, the NAA or the national court is required to refuse to apply national rules contrary to the general principles or fundamental rights. This refusal may lead to 1) the individual going unpunished; 2) another penalty provided for by national law being imposed; or 3) the same penalty being applied, but to a different extent. The refusal to apply a provision of national law because it conflicts with the general principles or fundamental rights is the most important EU remedy

1 See Chapter 2; case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2012:33, para. 27; A. Sołtys, Relacja zasady bezpośredniego skutku i zasady pierwszeństwa prawa Unii Europejskiej w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości [The Relationship Between the Principle of Direct Effect and the Principle of Primacy of European Union Law in the Light of the Recent Case Law of the Court of Justice], *Europejski Przegląd Sądowy*, 2022, vol. 6, p. 13.

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(the so-called remedy of disapplication[2]). Its use allows a fining decision that is compatible with EU law to be adopted, or a wrongful decision to be amended so as to make it compatible with EU law in appeal proceedings. This rules out the need to use other EU legal remedies, such as the re-opening of administrative or judicial proceedings, the refusal to enforce a fining decision or claims for damages against the Member State, all of which are referred to below.

Incompatibility of the national law with EU law in the area of fines

National rules imposing obligations on individuals, fining rules and procedural rules regarding the imposition and enforcement of penalties must comply with not only the secondary law of the Union,[3] but also with EU general principles or fundamental rights.[4] The application of these provisions in specific cases must also respect these rights and principles. For example, national provisions on the type and amount of a fine, when assessed *in abstracto*, may indeed be compatible with EU law, but the amount of the fine imposed based on those provisions in a given decision may not respect the principle of proportionality.[5] A national law that violates EU standards resulting from general principles or fundamental rights leads to a conflict between national legislation and EU law. The contradiction between national law and EU law can be contextual or absolute. The essence of contextual contradiction is that it only exists in certain factual situations and therefore only appears in certain fining proceedings. This is the case where it is not possible to vary the amount of the financial penalty according to the circumstances of the case.[6] For example, the CJEU found that the Polish legislation on the possibility for the tax authorities to impose a 20% penalty in VAT proceedings did not take into account the circumstances of the case and the taxpayer's intention. The sanction provided for by national law used to be imposed automatically. Such an approach does not enable the tax authorities to tailor the penalty being imposed in order to ensure, in accordance with the principle of proportionality, that it does not exceed what is necessary to achieve the objectives of ensuring the correct collection of the tax and preventing tax evasion.[7] As a consequence, in certain situations,

2 See M. Dougan, Primacy and the Remedy of Disapplication, *Common Market Law Review*, 2019, vol. 56, p. 1464 et seq.

3 Cases C-230/18, *PI v. Landespolizeidirektion Tirol*, EU:C:2019:38 and C-557/23, *SPAR Magyarország*, EU:C:2024:737.

4 Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner*, EU:C:2011:865; C-279/09, *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v. Federal Republic of Germany*, EU:C:2010:811; and C-399/11, *Stefano Melloni v. Ministerio Fiscal*, EU:C:2013:107.

5 For further details see Chapter 6.

6 Case C-935/19, *Grupa Warzywna sp. z o.o. v. Dyrektor Izby Administracji Skarbowej we Wrocławiu*, EU:C:2021:287, paras 24 and 28.

7 Ibidem, para. 35.

a national provision providing for a fixed fine or a minimum amount thereof will be incompatible with the EU principle of proportionality. In other cases (e.g. where fraud or abuse was found as a result of the proceedings), a fine in a fixed amount or with a high minimum threshold can be imposed, as the provisions setting them do not conflict with the requirements of the EU principle of proportionality. Sticking to the principle of proportionality, an example of absolute conflict between national law and EU law can be provided by a penalty of imprisonment for a failure to provide a valid passport if the identity of a European citizen could have been established on the basis of its identity card.

The assessment of national legislation's compatibility with EU law must be carried out independently by the body running the fining proceedings, or by the court adjudicating the appeal against the fining decision.[8] The principle of procedural autonomy does not apply here.[9] In the case of courts, such incompatibility may be found with the assistance of the Court of Justice as the result of a preliminary reference. Incompatibility between national legislation and EU law may also be found in a judgment of the CJEU delivered in response to a question referred for a preliminary ruling by another court of the same Member State or another Member State. These questions may concern the same or only similar rules about pecuniary sanctions. This is because the interpretation provided for in a judgment of the Court of Justice determines the meaning of EU law, which binds all national law-making and law-applying bodies.[10] Failing to comply with that interpretation and failing to take it into account when assessing the compatibility of national fining provisions applied by an authority or court leads to an infringement of EU law by adopting a decision or judgment contrary to it.

The remedy of disapplication of national law

If it is impossible to interpret national regulations in a pro-EU manner so as to ensure that the national norm is compliant with the Union model, national law has to be disapplied. The principle of a pro-EU interpretation is limited by the inability to hold an individual criminally liable and the need to abide by the principle of legal certainty. It aims to guarantee the predictability of

8 P. Brzeziński, *Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej* [The EU Obligation for a National Court to Refuse to Apply a Law That Is Incompatible with a European Union Directive], Warszawa 2010, p. 254.

9 Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, EU:C:1978:49, paras 22–23.

10 Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, para. 53; S. Verstraelen, The Temporal Limitation of Judicial Decisions: The Need for Flexibility Versus the Quest for Uniformity, *German Law Journal*, 2013, vol. 14, no. 9, p. 1713; K. Lenaerts, The Rule of Law and the Coherence of the Judicial System of the European Union, *Common Market Law Review*, 2007, vol. 44, no. 6, p. 1642.

legal relationships that arise under EU law. In the area relevant to this study, a pro-EU interpretation could therefore not lead to an individual being imposed with a sanction that is not explicitly provided for in national law,[11] despite such a sanction being consistent with the principle of effectiveness of EU law, or the individual being surprised (through a lack of legal certainty) by a procedural solution that would be unfavourable to them.[12] The principle of primacy does not have such restrictions, i.e. if national rules and norms resulting from them are found to be in conflict with EU law, national administrative authorities and courts are obliged to disapply these rules, after having checked whether a possible restriction of a fundamental right (e.g. the *ne bis in idem*[13] principle) was plausible under Article 52 CFR.

Direct effect of EU law as a precondition of the disapplication of national law

The non-compliance of national law with EU standards or rules activates the obligation for national authorities and courts to use the *Simmenthal* rule. According to this rule, the principle of primacy entails the obligation to refuse to apply national law that is contrary to EU law only if the norm of EU law is directly effective.[14]

The principle of direct effect of EU law allows individual entities, whether private or public, e.g. local and regional government units, to acquire rights or obligations under it and to rely on underlying subjective rights in proceedings before national authorities.[15] It is irrelevant for what purpose an individual relies on directly effective EU provisions, i.e. whether it is to directly assert the specific rights arising from those provisions or merely to uphold the objection that national law is incompatible with them.[16] In this way, the principle of direct effect guarantees the application and effectiveness of EU law in EU Member States. The national authorities are required to apply such

11 Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, para. 13; Case C-60/02, *X*, EU:C:2004:10, para. 61.

12 See the judgment of the Polish Supreme Court of 7 July 2011 in Case III SK 52/10, *Baza Orzeczeń SN*.

13 See Chapter 8.

14 Case C-573/17, *Criminal Proceedings against Daniel Adam Popławski*, EU:C:2019:530, paras 51–63 and the case law of the Court of Justice cited therein. See also D. Miąsik, M. Szwarc, Primacy and Direct Effect – Still Together: Popławski II, Case C-573/17, Criminal Proceedings against Daniel Adam Popławski, Judgement of the Court of Justice (Grand Chamber) of 24 June 2019, EU:C:2019:530, *Common Market Law Review*, 2021, vol. 58, no. 2, pp. 571–589.

15 Case C-425/12, *Portgás - Sociedade de Produção e Distribuição de Gás SA*, EU:C:2013:829, para. 24; D. Miąsik, *Zasady i prawa podstawowe. System prawa Unii Europejskiej. Tom 2* [Principles and Fundamental Rights: The Legal System of the European Union. Volume 2], Warszawa 2022, pp. 92–98 and the literature and case law referred to therein.

16 A. Wróbel, *Stosowanie prawa Unii Europejskiej przez sądy* [Application of European Union Law by Courts], Warszawa 2010, p. 90.

provisions of EU law as the norms governing the case and as a standard of legal assessment.[17] Consequently, in all cases where EU law and the resulting principles or rules on fining are unconditional and sufficiently precise in their content, individuals may rely on them before national authorities and courts.[18] It should be pointed out that in proceedings concerning the imposition of a financial penalty, irrespective of national procedures there is always the relationship between the individual and the state, and thus there is a direct effect in the vertical relationship.

The EU's general principles and fundamental rights under Articles 47–50 of the Charter must, as a rule, be considered directly effective. From the perspective of applying the primacy principle, it should therefore be recognised that the protection standards resulting from EU general principles or fundamental rights have the characteristics of standards that are directly effective in national legal systems. This is not changed by the need to balance the sometimes conflicting general principles (e.g. legal certainty vs proportionality) or the possibility to justify a restriction of a fundamental right under Article 52(1) of the CFR.[19] In its existing case law, the CJEU has explicitly recognised as directly effective only certain provisions of the Charter.[20] However, the provisions of the Charter applicable to fining proceedings must be regarded as clear, precise and unconditional.[21] Indirectly, the CJEU acknowledged that general principles are directly effective by ordering the national court to use the general principle of non-discrimination on grounds of age to grant a right to an employee who could not rely on the direct effect of Directive 2000/78[22] in a dispute with the employer because of the Directive's lack of direct effect in vertical relationships.[23] The general principles must also be considered unconditional

17 S. Prechal, Does the Direct Effect Still Matter?, *Common Market Law Review*, 2000, vol. 37, p. 1048.

18 Case C-205/20, *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, EU:C:2022:168, paras 17–19.

19 See A. Wróbel, Komentarz do art. 51 [Commentary on Article 51] in: A. Wróbel (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz* [Charter of Fundamental Rights of the European Union: Commentary], Warszawa 2020, pp. 1252–1256.

20 The Court of Justice has so far recognised the direct effect of Article 47 of the Charter in Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others*, EU:C:2020:367, para. 140; C-414/16, *Egenberger*, EU:C:2018:257, para. 78; and C-556/17, *Torubarov*, EU:C:2019:626, para. 56, as well as of Article 50 of the Charter in Case C-537/16, *Garlsson Real Estate and Others*, EU:C:2018:193, para. 68.

21 D. Leczykiewicz, Horizontal Application of the Charter of Fundamental Rights, *European Law Review*, 2013, vol. 38, pp. 490–491. The author aptly assumes that most of the provisions underlying the rights regulated in the CFR meet the prerequisites of direct effect.

22 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 02 December 2000, pp. 16–22.

23 Case C-144/04, *Werner Mangold v. Rüdiger Helm*, EU:C:2005:709, paras 75–78; D. Schiek, The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation, *Industrial Law Journal*, 2006, vol. 35, no. 3, p. 329 et seq.; M. Schmidt, The Principle of Non-discrimination in Respect of Age: Dimen-

and sufficiently precise, as they clearly present the pattern of behaviour that parties to such national proceedings may expect from the authority imposing the fine. This is confirmed by the reasoning of the Court of Justice in *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*. Admittedly, the CJEU in that case ruled directly on the matter of direct effect of Directive 2014/67,[24] requiring Member States to introduce in their legal system proportionate sanctions for infringements of the provisions implementing that directive, but the starting point for the CJEU's arguments was the assumption that this provision implemented the requirements of the principle of proportionality at the level of secondary law. According to the reasoning of that judgment, the requirement of penalty proportionality resulting from that principle is unconditional, as (1) it is absolute, since a disproportionate penalty cannot be justified in any manner because such regulation would not pass the proportionality test, an inherent part of the justification for restrictions of FRs or derogations from the GPs, and (2) compliance with the prohibition on imposing disproportionate penalties does not require any legislative action by the Union or the Member States; it is sufficient to refrain from acting by establishing or imposing such penalties.[25]

It should be noted that the Court of Justice generally applies general principles or fundamental rights relevant to this study in a manner characteristic of directly effective provisions of EU law, and it quite often indirectly assesses the compatibility of national fining regulations with EU law as part of the procedure under Article 267 of the TFEU.[26] For example, the CJEU decided in *DELTA STROY 2003* that Article 48 of the CFR

> "must be interpreted as precluding national legislation under which a national court may impose on a legal person a criminal penalty for an offence for which a natural person who has the power to bind or represent that legal person is allegedly liable, where that legal person has not been put in a position to dispute the reality of that offence."[27]

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sions of the ECJ's Mangold Judgment, *German Law Journal*, 2006, vol. 7, no. 1, p. 505 et seq.; J.H. Jans, The Effect In National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law, *Legal Issues of Economic Integration*, 2007, vol. 34, no. 1, p. 53 et seq.; A. Zawidzka-Łojek, *Zakaz dyskryminacji ze względu na wiek w prawie Unii Europejskiej* [Prohibition of Age Discrimination in European Union Law], Warszawa 2013, p. 56.

24 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation") text with EEA relevance (OJ L 159 of 28 May 2014, pp. 11–31).

25 Case C-205/20, *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, EU:C:2022:168, paras 23 and 24.

26 Treaty on the Functioning of the European Union, *OJ C 326 of 26 October 2012, pp. 47–390 (hereinafter: "TFEU")*.

27 Case C-203/21, *DELTA STROY 2003*, EU:C:2022:865, para. 67.

It is worth noting that the CJEU prefers to assess indirectly the compliance of national regulations with EU law. It declares that a specific provision of national law is incompatible with a specific provision of EU secondary law interpreted in the light of a general principle or a fundamental right. For example, in *Chmielewski* (Case C-255/14), Article 3 of Regulation 1889/2005 of 26 October 2005 on controls of cash entering or leaving the Community[28] established the obligation for a person bringing cash in excess of EUR 10,000 into the Union to declare that fact. The implementation of this obligation should be ensured by Member States through the establishment and imposition of appropriate financial penalties.[29] The wording of this provision is typical of EU law, being reproduced in many acts of secondary law. The CJEU found that this provision was contradicted by national legislation which penalised infringements of this obligation by means of an administrative fine equivalent to 60% of the amount of undeclared funds, if that amount exceeds EUR 50,000.[30] Pursuant to the CJEU's arguments, the national sanction was disproportionate. Although the Court of Justice used the principle of proportionality as a general principle of EU law[31] in its reasoning, it eventually found the national sanction contrary to the requirement of proportionality of the sanction provided for in the Regulation, and not directly contrary to the general principle itself. The CJEU argued the same way in *"Schenker" EOOD*,[32] where it considered the national legislation to be contrary to Article 42(1) of Regulation 952/201[33] insofar as the national legislation obliged the holder of the authorisation for customs warehousing to pay, in addition to a pecuniary penalty, an amount equivalent to the value of the goods removed from customs supervision as a result of the theft of those goods and the vehicle transporting them. In both cases, the national legislation was found to be in contradiction with the general provisions of the regulations on the obligations of Member States to introduce pecuniary penalties to implement these acts of EU secondary legislation. The source of the EU model against which the national rules were assessed was the provisions of the regulations interpreted in accordance with the principle of proportionality,

28 Regulation (EC) No. 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community, OJ L 309, 25 November 2005, pp. 9–12.

29 In accordance with Article 9(1) of Regulation (EC) No. 1889/2005: "Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare laid down in Article 3. Such penalties shall be effective, proportionate and dissuasive".

30 Case C-255/14, *Chmielewski*, EU:C:2015:475, para. 35.

31 Ibidem, para. 21.

32 Case C-655/18, "*Schenker" EOOD*, EU:C:2020:157.

33 Article 42(1) of the Regulation of the European Parliament and of the Council (EU) No 952/2013 of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10 October 2013, pp. 1–101) stipulates that "[e]ach Member State shall provide for penalties for failure to comply with the customs legislation. Such penalties shall be effective, proportionate and dissuasive".

and not the principle of proportionality itself as a GP or FR under Article 49(3) of the CFR.

On the other hand, in Case C-384/17 (*Link Logistik N&N*),[34] the Court of Justice referred directly to the principle of proportionality and Article 49(3) of the CFR when assessing the compatibility with EU law of national legislation providing for a penalty of EUR 500 in the event of a heavy goods vehicle entering a road subject to a toll without having paid that toll, even if the driver unknowingly entered that road without paying the toll and paid it as soon as he became aware of the fact. However, at the very stage of assessing the non-compliance of national regulations with EU law, the CJEU focused on determining whether Article 9a of Directive 1999/62/EC[35] was a directly effective provision. It was worded in the same way as that in Regulation 1889/2005, referred to above. However, it was considered not to be directly effective (paragraph 52 of the grounds of the judgment) and, consequently, individuals could not rely on it to avoid the application of national provisions (paragraph 56 of the grounds of the judgment). At the same time, the CJEU found that the application of the national legislation – without the possibility of reducing the penalty, the amount of which was fixed, or of taking account of the circumstances in which the obligation to pay the toll was infringed – would lead to a result contrary to EU law (paragraph 61 of the grounds of the judgment) and, more specifically, to the principle of proportionality. Consequently, the CJEU ordered the national court to disapply the national provision if its application were to infringe the requirements of proportionality. However, the national court could not disapply the national provision with the directive since Article 9a of Directive 1999/62/EC had no direct effect. Although the Court of Justice did not state this explicitly, the only logical explanation is to assume that the CJEU ordered the national court to disapply the national legislation on the grounds that the penalty was contrary to the requirement of proportionality arising from the principle of proportionality itself.

In this respect, the Court of Justice changed its position in *NE Bezirkshauptmannschaft Hartberg-Fürstenfeld*,[36] taking the view that the proportionality requirement laid down in Article 20 of Directive 2014/67/EU[37]

34 Case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v. Budapest Rendőrfőkapitánya*, EU:C:2018:810.

35 Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures, OJ L 187, 20 July 1999, pp. 42–50 (hereinafter: "Directive 1999/62/EC").

36 Case C-205/20, *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, EU:C:2022:168, para. 21.

37 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation"), OJ L 159, 28 May 2014, pp. 11–31.

meets the prerequisites of unconditionality[38] and sufficient precision.[39] This means that the Court of Justice assumes the direct effect of EU secondary legislation insofar as it requires pecuniary penalties imposed at the national level to be proportionate. The proportional penalty clause is a standard clause in regulations and directives. Consequently, in fining proceedings before national authorities, the individual subject to a penalty may claim that the penalty provided for in national legislation is disproportionate.[40] At the same time, national administrative authorities and courts are obliged to apply in fining proceedings such provisions as Article 20 of Directive 2014/67/EU with respect to the proportionality requirement, amounting to a prohibition against applying national provisions that implement regulations or directives which would provide for disproportionate sanctions.

The Court of Justice adopts the direct effect of EU rules as far as they require pecuniary penalties imposed at the national level to be proportionate. The individual may then, as part of national proceedings, invoke the fact that the Member State has incorrectly transposed the Directive and rely on the directly effective EU provision.[41] As the Court of Justice aptly argues, the EU prohibition on imposing disproportionate fines at the national level does not require any act to be adopted by the EU institutions, nor does it in any way confer on the Member States the power to condition or restrict the scope of that prohibition.[42] In order to assess whether the penalty complies with the principle of proportionality, the nature and gravity of the infringement to be punished by the penalty and the manner in which the amount is determined must be taken into account.[43] The national court or administrative authority assesses whether the amount of the penalty exceeds what is necessary to achieve the objectives pursued by the national or EU legislation and, consequently, whether the penalty complies with the principle of proportionality.[44]

Disapplication of a national provision in whole or in part?

Deeming a particular norm or principle of EU law to be directly effective may lead the national authority to disregard all or only part of a national regulation which conflicts with that norm or principle, and, consequently, to refrain in this respect from using that national provision as the legal basis for a pecuniary penalty.

38 Judgment of the CJ in Case C-205/20, *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, EU:C:2022:168, paras 22–24.

39 Ibidem, para. 27.

40 Ibidem, para. 32.

41 Ibidem.

42 Case C-268/06, *Impact*, EU:C:2008:223, para. 62.

43 Case C-564/15, *Farkas*, EU:C:2017:302, para. 59 and the case law referred to therein.

44 C-935/19, *Grupa Warzywna sp. z o.o. v. Dyrektor Izby Administracji Skarbowej we Wrocławiu*, EU:C:2021:287, para. 28.

From the point of view of the practice of applying the law, disapplying a provision of national law that is contrary to EU law affects the legal basis of a decision or judgement. This effect may take different forms: (1) the provision of national law does not apply and the case is decided as if that provision was non-existent in the legal system at all; (2) one or more provisions of national law which are not in conformity with EU law are not applied and the particular issue or the whole case is resolved on the basis of other provisions of national legislation (those compliant with EU law); or (3) the provision of national law contrary to EU law is disapplied and the issue or the whole case is resolved on the basis of other national rules applied in conjunction with directly effective EU rules which complement the national law.

The first mode of action of the principle of primacy occurs primarily where national provisions providing for a fine for conduct which, under EU law, should not be subject to such a penalty or should not be prohibited at all are considered to be contrary to EU law. It is typical of cases where EU law acts as a shield. An example of such working of the principle of primacy is the CJEU judgment in "*Schenker" EOOD*.[45] Article 234a(1) of the Bulgarian Customs Code provides for a pecuniary penalty for the unlawful removal from customs supervision of goods placed under the customs warehousing procedure. On the other hand, Article 234a(3) of that Code additionally imposed, in the event of a breach of Article 234a(1), the penalty referred to in Article 233(6) of the Code in the form of the equivalent of goods removed from customs supervision. The CJEU found the national legislation contrary to EU law, since under it, "in the event of removal from customs supervision of goods placed under a customs warehousing procedure, the holder of the customs warehousing authorisation is required to pay, in addition to a pecuniary penalty, a sum corresponding to the value of those *goods*." This means that the national court should only apply Article 234a(1) of the Bulgarian Customs Code, but could not apply Article 234a(3) in conjunction with Article 233(6) of that national law. As a result, the decision of the national authority to impose a pecuniary penalty under Article 234a(1) could be upheld, but it should have been amended or revoked as regards the imposition of a penalty under Article 234a(3) in conjunction with Article 233(6). National rules allowing the imposition of the second penalty (the referring provision, Article 234a(3), and the penalty-setting provision, Article 233(6)) would have to be removed from the legal basis of the decision imposing the penalty.[46]

The second mode of action of the principle of primacy most often occurs if national legislation conflicts with EU procedural standards and those resulting from GPs or FRs. An example is the judgment of the CJEU in *HYA and Others*.[47] Since there is an obligation under EU law to state the reasons for

45 Case C-655/18, "*Schenker" EOOD*, EU:C:2020:157, para. 34.
46 Ibidem, paras 42 and 47.
47 Case C-349/21, *HYA and Others*, EU:C:2023:102, para. 65.

using a wiretap, a provision exempting an authority from the obligation to state reasons in a fining decision would be contrary to EU law. By omitting a special provision which excludes the need to state reasons, the national court (or alternatively, the NAA) can apply the national general provisions requiring reasons to be stated for each fining decision.

The third mode of action of the principle of primacy exists where the mere disapplication of the national legislation contrary to EU law is not sufficient to exercise the individual's rights under EU law. It is characteristic of those provisions of EU law which act as a sword, giving an individual a right that is not provided for in national law. Referring to the example mentioned above, the CJEU's judgment in *HYA and Others*, if there were no general provision of national law which could be applied to justify the use of a wiretap, the obligation of the national authority that issued the decision to state its reasons would derive directly from Article 47 of the CFR. Thus, a directly effective provision of EU law would complement other provisions of national law under which a wiretap could be used, insofar as it concerns the statement of reasons.

The *Simmenthal* rule requires national administrative authorities and national courts to disregard a provision of national law which leads to a conflict between national legislation and EU law. The omission of a provision of national law means that it cannot be the legal basis of a decision to impose a penalty, nor can it form the basis of a procedural decision (e.g. admission or rejection of evidence) in the course of fining proceedings. According to the position of the Court of Justice in *Link Logistic N&N*,[48] it is not permissible to apply a national provision if, in the circumstances of the case, it would lead to a result contrary to Union law. The FRs and GPs of the Union thus act as a shield for individuals, protecting them from actions by a Member State and its authorities which conflict with these rights and principles.

The use of the remedy of disapplication is clear in the event of a conflict between a national prohibition of certain conduct and EU law. Where such a prohibition (1) is sanctioned by a pecuniary penalty and (2) falls within the scope of EU law and (3) it is not possible to justify the contradiction of that prohibition with EU law (e.g. as part of Article 36 of the TFEU or the concept of mandatory requirements), then the remedy of disapplication means that in practice the conduct in question cannot be regarded as prohibited. Therefore, the pecuniary penalty cannot be imposed at all. An example of this remedy of disapplication is the CJEU judgment in *Zheng*, in which it expressly held that Articles 63 and 65 of the TFEU "preclude legislation of a Member State, […] which provides that the failure to comply with an obligation to

48 This consequence was a result of the interpretation adopted by the CJEU in Case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v. Budapest Rendőrfőkapitánya*, EU:C:2018:810, para. 62.

declare significant sums of cash entering or leaving the territory of that State is punishable with a fine which may be up to double the undeclared amount".[49]

The same is true for the *ne bis in idem* principle. If both penalties – the one imposed in the first set of proceedings and the one to be imposed (or already imposed by the administrative authority) in the second set of proceedings – are of a criminal nature, and at the same time the conditions for the admissibility of cumulative penalties under Article 52(1) of the CFR have not been met, it is not possible to apply the provisions of national law allowing for the imposition of the second penalty at all.

In the case of GPs and FRs regarding procedural rights, the remedy of disapplication consists in the obligation not to apply provisions providing for a lower standard of procedural guarantees than the EU standard. An example of such a remedy of disapplication is the judgment of the Court of Justice in *DELTA STROY 2003*. The national law made it possible to impose a penalty on a legal person for the conduct of a natural person associated with that legal person before the conclusion of the proceedings concerning that natural person's liability. Furthermore, the national legislation allowed a pecuniary penalty to be imposed on a legal person in criminal proceedings for the financial advantages that it might have obtained as a result of an offence attributable to a natural person who was authorised to assume obligations on its behalf or to represent it. However, the national court deciding on the penalty to be imposed on a legal person was not allowed to assess on its own whether that offence actually occurred. It had to take for granted the findings of another court in earlier proceedings against that natural person. The legal person subjected to the fine was not able to effectively submit its observations in this regard.[50] The national legislation which limits the jurisdiction of the national court, preventing it from assessing on its own whether the natural person associated with the legal person has committed an offence in respect of which the legal person has benefited financially, should therefore have been disregarded.

The above-mentioned examples do not raise any doubts from the point of view of the principle of effectiveness of EU law. The disapplication of a provision of national law in the cases referred to above serves to guarantee the effectiveness of the Union's fundamental rights and general principles. However, a situation may occur where the disapplication of a provision of national law – understood as a certain entire, coherent section of a legal act – undermines the effectiveness of EU law despite respecting the GPs and FRs of the Union. An individual may be exempted from liability for violating EU law (the national provisions implementing EU law) due to legislative errors of the Member State, although the punishment (as such) of an individual for their behaviour would be in conformity with EU law, and even ordered by EU law. This is the case, for

49 Case C-190/17 *Zheng*, EU:C:2018:357, para. 46.
50 Case C-203/21, *DELTA STROY 2003*, EU:C:2022:865, paras 58 and 59.

example, where national legislation providing for a fixed penalty or setting an excessively high minimum penalty is not in line with the principle of proportionality of EU law. In such a case, the provision of national law is contrary to EU law only to the extent that a fixed penalty or a minimum penalty is, in the factual circumstances of the case, disproportionate. The contradiction is therefore only partial and concerns only a part of the provision. Therefore, in *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, the CJEU supplemented the *Simmenthal* rule with an obligation to disapply the provision of national law (a separate section) only to the extent of this contradiction. In the case at issue, this meant that (1) the national court could still punish the individual (whereas in *Link Logistic*[51] it could not do so); (2) the penalty imposed had to be the same type of penalty as that provided for under national law (it could not impose a penalty other than pecuniary); and (3) the national court could impose a penalty lower than that provided for under national law, as the contradiction concerned only the minimum level of the fine. The possibility of disapplying a provision of national law only to the extent that it is contrary to Union law means that not every conflict between national regulation and Union law in the area of fining will lead to the individual avoiding any liability. As a result of the application of the principle of primacy, an individual will avoid liability only if they have not committed an offence under EU law or if the punishment would be contrary to EU law (despite the violation of law). Disapplication of a provision of national law only to the extent that it is incompatible with EU law ensures the effectiveness of EU law: the individual will be punished for the violation only to the extent and in the manner that it is in conformity with EU law. A provision of national law may provide for two different penalties to be imposed in one set of proceedings (e.g. a fictitious provision of national law worded in the following manner: "whoever infringes the ban on the sale of tobacco to minors shall be liable to a fine of EUR 500 to EUR 5000 and shall be prohibited from operating at the point of sale where such transaction was made, for a period of 7 to 70 days"). Where such cumulative penalties have been deemed disproportionate (by considering the fine to be solely proportionate to the protection of the health of minors), a seller who has breached the sales ban will not be punished by a prohibition of operation (as a result of omitting the latter part of the provision), but will only be fined a minimum of EUR 500. Releasing an individual from liability is not necessary at all in order to ensure the effectiveness of the principle of proportionality. This only requires that penalties are not too severe in relation to the gravity of the violation, or the circumstances in which it occurred.

51 Case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v. Budapest Rendőrfőkapitánya*, EU:C:2018:810, para. 62.

Revocation or change of a fining decision

Where the NAA, as the authority of first instance, has adopted a fining decision on the basis of a provision of national law containing norms that are contrary to a Union standard arising from general principles or fundamental rights or has incorrectly applied that EU standard and found the national legislation or decision compliant with it, it is necessary to correct that decision during administrative or judicial review. It is important for the judicial review of administrative fining decisions that the court takes into account, *ex officio*, the non-compliance of national legislation with the standard arising from the GPs and FRs. In this respect, regardless of the nature of the legal proceedings, i.e. civil, administrative or fiscal criminal law, the court should take into account *ex officio* the EU provisions by applying the formula adopted by the Court of Justice in *Peterbroeck*.[52] The CJEU pointed out that EU law does not preclude the presence in the legal systems of the Member States of provisions that prevent taking into account *ex officio* the infringement of an EU norm. Nonetheless, the court should assess on a case-by-case basis whether, in the circumstances of the particular case, the individuals are guaranteed a genuine opportunity to raise objections resulting from GPs and FRs. The assessment of the compatibility of national procedural provisions with the condition of effectiveness is influenced by whether those provisions perform functions related to the fundamental principles of the national procedure. The Court of Justice notes that some of those principles, in particular the right of defence, the principle of legal certainty and the principle of procedural efficiency, may sufficiently justify the adoption of a norm that prevents the national court from taking into account *ex officio* the provisions of EU law relied on by the parties to the proceedings.[53]

The revocation of the decision[54] in the course of an appeal procedure or judicial review will take place when, as a result of the application of national rules which are in line with EU law, there are no grounds for imposing a

52 Case C-312/93, *Peterbroeck*, EU:C:1995:437, paras 12–20; K. Kowalik-Bańczyk, Uwzględnianie przez sąd z urzędu zarzutów opartych na prawie wspólnotowym [Ex Officio Consideration by the Court of Objections Based on Community Law], *Europejski Przegląd Sądowy*, 2007, vol. 13, pp. 12–14; R. Grzeszczak, A. Szmigielski, Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych [Judicial Application of the Charter of Fundamental Rights of the EU in Relation to the Member States – Reflections Based on the Case Law of the Court of Justice and the Practice of National Courts], *Europejski Przegląd Sądowy*, 2015, vol. 12, p. 15; M. Baran, *Stosowanie z urzędu prawa Unii Europejskiej przez sądy krajowe* [Ex Officio Application of European Union Law by National Courts], Warszawa 2014, p. 488.

53 Case C-78/98, *Preston*, EU:C:2000:247, para. 31.

54 Due to the terminological differences in national legislation, the term "revocation" should be understood as different forms of administrative decision resulting in the appeal being upheld. This does not apply to final decisions, which generally require annulment or reopening of proceedings.

pecuniary penalty at all or where EU law makes it necessary to disregard the national legal basis for fining without being able to apply EU rules instead (EU law operating as a shield). On the other hand, the application of provisions of national legislation that are compatible with EU law or directly effective EU rules in their place may result in either partial revocation or modification of the decision as regards the amount of the fine.

As a general rule, the question of how a breach of standards stemming from an EU GP or FR will be reflected in a procedural decision taken by an NAA or national court remains within the procedural autonomy of the Member States. However, it follows from EU law that an individual must be able to exercise their right to an effective remedy against a decision imposing a pecuniary penalty within the meaning of Article 47 of the CFR. Among other things, they have the right to invoke the incompatibility of a national provision with EU law before the NAA of both instances and then the national court. If an appeal is filed against a decision made at first instance, the appellate authority, following a plea of the party or acting *ex officio*,[55] should allow the appeal and, depending on the nature and extent of the nonconformity with the GP or FR, decide as provided for by national law. The national court, in turn, also has the option (or obligation) to refer for preliminary ruling to the Court of Justice. The national court, considering the standard of effective judicial protection under Article 47 of the CFR and the principle of effectiveness of Union law, has the right to correct or disapply a national norm that is not in conformity with Union law.[56] The Union standard under Article 47 of the CFR requires that NAAs and national courts must be capable of fully reviewing the compatibility of the challenged decision with the GPs and FRs, regardless of the procedural requirements or limitations under national law. It is therefore insufficient from the perspective of the individual entity that an infringement of an EU standard by an NAA is treated on an equivalent basis.[57] This is because the principle of effectiveness requires the Member State to provide the procedural means that effectively (efficiently) enable the individual to assert their rights under EU law before the national courts and the NAA. In this respect, the guarantees under EU law for national procedural autonomy must be kept in mind.[58] National

55 Pursuant to case C-224/97 *Erich Ciola v. Land Vorarlberg*, EU:C:1999:212, paras. 30–32, the principle of the primacy of EU law dictates that an administrative decision in breach of EU law must be disregarded, which may result in it having to be removed from legal transactions.

56 C. Lacchi, Multilevel Judicial Protection in the EU and Preliminary References, *Common Market Law Review*, 2016, vol. 53, p. 684; S. Prechal, R. Widdershoven, Redefining the Relationships between “Rewe-effectiveness” and Effective Judicial Protection, *Review of European Administrative Law*, 2011, vol. 2, p. 41.

57 See M. Taborowski, *Konsekwencje naruszenia prawa Unii Europejskiej przez sądy krajowe* [Consequences of Infringement of European Union Law by National Courts], Warszawa 2012, p. 38.

58 Case C-565/11, *Mariana Irimie v. Administrația Finanțelor Publice Sibiu, Administrația Fondului pentru Mediu*, EU:C:2013:250, para. 23.

legislation is subject to assessment in this regard in terms of compliance with the *principles of equivalence and effectiveness*.[59] In the course of judicial and administrative review of fining decisions, the principle of procedural autonomy does not allow national authorities to make arbitrary decisions[60] without providing adequate reasoning justifying the adopted solution.[61]

Reopening of national proceedings

Judicial review of a decision imposing a pecuniary penalty may fail to lead to compliance with GPs and FRs. The national court may misinterpret or misapply the EU standard of protection under GPs and FRs. It is also possible that neither the court nor the punished party would realise that the fining decision has been issued under national provisions within the scope of EU law. At that point, the judgment becomes final, as does the fining decision despite its contradiction with EU law.

The EU legal order distinguishes between the principle of legal certainty and its essential element, the principle of *res iudicata*. The principle of legal certainty is not absolute. It is subject to certain limitations, including those due to the protection of the rule of law (principle of legalism). The Court of Justice, in its judgment in *Rosemarie Kapferer*,[62] addressed the issue of whether EU law can have the effect of overcoming the principle of *res iudicata*. The Court of Justice has found that EU law does not impose an obligation on a national court to disregard national procedural rules conferring on judicial decisions the effect of being final. According to the Court of Justice, such an obligation does not arise even if a judicial authority of a Member State, by refusing to apply the national procedural rules to the case in question, would bring the court's decision into conformity with EU law. The Court of Justice emphasised the importance attached by EU law to the principle of *res iudicata* and the principle of legal certainty that is significantly influenced by it. The Court clearly mitigated the effect of the principle of effectiveness of EU law vis-à-vis the principle of procedural autonomy of the Member States and narrowed the presumptive effect of the *Kühne & Heitz*[63] judgment by reinterpreting the principle of loyal

59 Cases C-78/98 *Preston and Others*, EU:C:2000:247, para. 31 and C-201/02, *Wells*, EU:C:2004:12, para. 67.

60 N. Półtorak, Efektywność prawa Unii Europejskiej, a polska procedura administracyjna i sądowo-administracyjna [The Effectiveness of European Union Law and Polish Administrative and Judicial-Administrative Procedure], *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2014, vol. 11, no. 3, p. 38.

61 Case C-177/20, "*Grossmania*" *Mezőgazdasági Termelő és Szolgáltató Kft. v. Vas Megyei Kormányhivatal*, EU:C:2022:175, paras 51 and 55 and the case law cited therein.

62 Case C-234/04, *Rosemarie Kapferer v. Schlank & Schick GmbH*, EU:C:2006:178.

63 Case C-453/00, *Kühne & Heitz NV p. Produktschap voor Pluimvee en Eieren*, EU:C:2004:17, para. 24.

cooperation resulting from Article 4(3) of the TEU,[64] particularly its relation to the principle of *res iudicata*.

The Court of Justice also considered that the finality of an administrative decision, attained upon expiry of a reasonable period of time for lodging an appeal, contributes to legal certainty. It is in the interests of legal certainty to lay down reasonable time limits for bringing proceedings.[65] Thus, EU law does not, as a rule, oblige the NAA to reconsider a case concluded with an administrative decision which has become final.[66] Compliance with the principle of legal certainty prevents administrative acts which produce legal effects from being called into question indefinitely.[67] However, the particular circumstances of the case may force the NAA to reconsider a case concluded with a final administrative decision. In this context, the specificities of the situations and the interests at stake must be taken into account in order to strike a balance between the requirement of legal certainty and the requirement of legality under EU law.[68] Therefore, the Court of Justice rightly considered in *Grossmania* that the impossibility of challenging a decision which has become final under national law cannot reasonably be justified by the requirement of legal certainty.[69] The infringement of the fundamental rights guaranteed by the Charter of Fundamental Rights constitutes a gross and manifest breach of EU law, which obliges the Member State, in accordance with the principle of sincere cooperation, to rectify the unlawful consequences of a breach of EU law, i.e. to undertake any and all actions to restore compliance with EU law, including the possibility of challenging the durability of final administrative decisions.[70]

It should thus be assumed that under EU law there are various possibilities of revoking a final fining decision if it is inconsistent with general principles or fundamental rights. However, the exercise of this power should be subject to certain restrictions resulting from such GPs as the principle of legal certainty and the principle of the permanence of an administrative decision. This especially applies to cases in which an individual entity had the opportunity to exercise its right to appeal against an administrative decision within a reasonable period of time, but chose not to exercise this right.[71]

64 OJ C 326, 26 October 2012, pp. 13–390 (hereinafter: the "TEU").

65 See also cases 33/76 *Rewe-Zentralfinanz and Rewe-Zentral*, EU:C:1976:188, para. 5 and 45/76, *Comet*, EU:C:1976:191, paras 17 and 18.

66 Case C-2/06, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, EU:C:2008:78, para. 37.

67 Cases C-392/04 and C-422/04, *i-21 Germany and Arcor*, EU:C:2006:586, para. 51.

68 Case C-492/16, *Incyte Corporation v. Szellemi Tulajdon Nemzeti Hivatala*, EU:C:2017:995, para. 48 and the case law cited therein.

69 Case C-177/20, "*Grossmania*" *Mezőgazdasági Termelő és Szolgáltató Kft. v. Vas Megyei Kormányhivatal*, EU:C:2022:175, para. 62.

70 Ibidem, paras 63–64.

71 Case C-249/11, *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti*, EU:C:2012:608, paras 55–56.

The sustainability of final administrative decisions and final judicial decisions serves legal certainty.[72] EU law does not therefore require the administrative authority to be, at all times, obliged to reconsider a case which has become final and which appears to be incompatible with EU law.[73] However, a conflict between a decision and general principles or fundamental rights may form a basis for the national authority to revoke even a final decision imposing a pecuniary penalty if such an obligation or possibility is provided for in national law.[74] Therefore, when analysing the impact of the EU principle of legal certainty on the sustainability of national decisions and judgments contrary to EU fundamental rights and general principles, it is necessary to take into account the broader procedural and judicial context in which the decision was taken and in which it would possibly be challenged.[75]

In accordance with the principle of national procedures (principle of procedural autonomy), it should be assumed that the removal from legal operation of a final fining decision infringing a GP or FR, whether by annulment of such a decision or by reopening administrative proceedings and possibly revoking such a decision, can take place primarily using national procedures. In this respect, the formula from the Court's judgment in *i-21 Germany*[76] should be applied. It assumes that national procedural regulations should protect the rights arising from general principles or fundamental rights in a manner that is no less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).[77] The latter primarily concerns the exercise of procedural powers stemming from EU fundamental rights and general principles that bind national administrative authorities in fining proceedings.

The principle of equivalence requires that an undertaking which has been fined can rely on the lack of conformity of the fining decision with EU law both during the fining proceedings themselves and during the appeal proceedings and possible reconsideration proceedings after the decision has "become final", at least on the same basis as it could raise an objection for a violation of national fundamental rights or procedural rules. The principle of effectiveness,

72 Cases C-620/17, *Hochtief Solutions AG Magyarországi Fióktelepe*, EU:C:2019:630, para 54; C-213/13, *Impresa Pizzarotti*, EU:C:2014:2067, para. 58.

73 Case C-2/06, *Kempter*, EU:C:2008:78, para. 37.

74 Cases C-392/04 and C-422/04, *i-21 Germany GmbH, Arcor AG & Co. KG v. Bundesrepublik Deutschland*, EU:C:2006:586, para. 69.

75 See T. Tridimas, *The General Principles of EC Law*, Oxford 1998, pp. 243–244.

76 M. Maliński, *Konsekwencje niezgodności ostatecznych decyzji administracyjnych oraz prawomocnych orzeczeń sądowych z prawem Unii Europejskiej* [Consequences of the Inconsistency of Final Administrative Decisions and Final Court Rulings with European Union Law], Warszawa 2022, p. 53 et seq.

77 Case C-949/19, *Konsul Rzeczypospolitej Polskiej w N.*, EU:C:2021:186, para. 43 and the case law cited therein.

on the other hand, requires that the entity must have a legal remedy available to it from the date of service of the fining decision which will enable it to invoke its rights under the GP or FR.[78] In the absence of such a remedy, the principle of legal certainty will not favour respecting the definitive character of an administrative decision, since national law did not allow for an effective review of the compatibility of that decision with the general principles or fundamental rights.[79]

In such a situation, it is permissible to challenge the fining proceedings using national procedural solutions. In *i-21 Germany*, this required an examination of whether the condition arising from the national rules of "*gross or manifest illegality*", which justified the annulment of the decision or the reopening of the procedure, was applied differently depending on whether the dispute concerned an EU case or a national case. In the light of the judgment in *i-21 Germany*, if the NAA is required under national law to revoke a final administrative decision which is manifestly or grossly contrary to national law, the same obligation should apply where that decision is to the same extent incompatible with the general principles or fundamental rights.[80] With the national provisions being shaped in a way that allows a final decision (including fining decisions) to be challenged, the NAA should be able to assess whether the national legislation incompatible with a GP or a FR on the basis of which the fining decision was taken is manifestly or grossly contrary to Union law within the meaning of the national provision in question.[81] On the other hand, the principle of equivalence does not require the national legislature to adopt specific procedures for challenging a final decision of a national court or a final administrative decision contrary to EU law. The NAA is bound by all national provisions which define the prerequisites for extraordinary modes of administrative procedure. The disapplication or a pro-EU interpretation of national provisions restricting the possibility of challenging a fining decision contrary to EU law is necessary only where national provisions discriminate against the possibility of relying on a violation of EU general principles or fundamental rights.

Challenging a fining decision due to infringement of the Union's general principles or fundamental rights in the mode of procedure accepted in *i-21*

78 Case C-392/04, *i-21 Germany*, EU:C:2006:586, paras 58–59.

79 Case C-177/20, *Grossmania*, EU:C:2022:175, para. 62.

80 Case C-392/04, *i-21 Germany*, EU:C:2006:586, para. 69.

81 M. Taborowski, Zasada ekwiwalencji a wzruszalność ostatecznej decyzji administracyjnej sprzecznej z prawem wspólnotowym. Glosa do wyr. i-21 Germany [The Principle of Equivalence and the Challengeability of a Final Administrative Decision Contrary to Community Law: Commentary on the Judgment in i-21 Germany], *Europejski Przegląd Sądowy*, 2008, vol. 12, no. 5, p. 56; M. Kamiński, Konstruowanie wzorca legalności decyzji administracyjnej na podstawie prawa UE przez polskie sądy administracyjne cz. I [Construction of the Model of Legality of an Administrative Decision Based on EU Law by Polish Administrative Courts – part I], *Europejski Przegląd Sądowy*, 2011, vol. 15, no. 4, p. 26.

Germany takes place on the basis of national regulations. In this mode, EU law affects only the interpretation of the national reopening rules. By contrast, in *Kühne & Heitz*,[82] the Court of Justice established a measure of protection for an individual, independent of the conditions arising from the judgment in *i-21 Germany* and based on the principles of equivalence or effectiveness. The measure consists of the obligation to reconsider a case already concluded with a final administrative decision if it is incompatible with EU law, in the light of a subsequent judgment of the CJEU. EU law therefore requires that, in certain circumstances, a final administrative decision that has become *res iudicata* following a final judgment of the court may be revoked if that decision has proved to be contrary to EU law. The judgment in *Kühne & Heitz* concerned a conflict with an act of secondary law. It must therefore be assumed that the contradiction with an EU standard resulting from the GP or FR activates also the Member State duty to allow for a challenge of a final fining decision.

In *Kühne & Heitz*, the Court of Justice listed four conditions for the EU requirement to revoke a final decision contrary to EU law.[83] The purpose of this chapter is not to re-examine them, and thus only the most important or typical aspects, which are characteristic of challenging a fining decision, are pointed out. It is essential that the question of EU law, the interpretation of which turned out to be wrong in the light of a subsequent CJEU judgment, was examined in a fining case by a national court adjudicating in the last instance (or at least that it should have been taken into account *ex officio* by that court).[84] It will not be possible to effectively rely on *Kühne & Heitz* without appealing to the court and without exhausting the entire legal avenue and all possibilities to challenge judgments issued in such a case. It should be remembered that the Court of Justice established in *Kühne & Heitz* a minimum level of protection for individuals.[85] EU law does not preclude the

82 Case C-453/00, *Kühne & Heitz*, EU:C:2004:17, para. 24; Ł. Prus, Zmiana i uchylenie aktów administracyjnych organów Unii Europejskiej – modele teoretyczny i normatywny [Amendment and Repeal of Administrative Acts of European Union Authorities – Theoretical and Normative Models], *Rocznik Administracji Publicznej*, 2017, vol. 14, no. 3, p. 109.

83 Firstly, according to national law, the administrative authority is entitled to amend this decision. Secondly, the decision in question has become final by virtue of the judgment of the national court adjudicating in the last instance. Thirdly, this judgment was based on an interpretation of EU law that was incorrect in the light of the Court's subsequent case law, adopted without a reference to the Court for a preliminary ruling under the third paragraph of Article 267 of the TFEU. Fourthly, the person concerned approached the administrative authority as soon as he became aware of this case law. See Case C-453/00, *Kühne & Heitz*, EU:C:2004:17, paras 27–28.

84 P. Brzeziński, Badanie z urzędu przez Naczelny Sąd Administracyjny naruszenia prawa unijnego. Glosa do wyr. NSA z 27.5.2010 r., II GSK 355/10 [The Supreme Administrative Court's Ex Officio Review of the Violation of EU Law: Commentary on the Judgment of the Supreme Administrative Court of 27 May 2010, II GSK 355/10], *Europejski Przegląd Sądowy*, 2011, vol. 15, no. 9, p. 44.

85 M. Maliński, *Konsekwencje*..., p. 97.

obligation to reopen a final administrative decision from also applying in other circumstances, where national procedural rules so allow. From the point of view of a fining decision, an important guarantee is that, in order to satisfy the third condition laid down in the *Kühne & Heitz* judgment, the applicant does not have to rely in the main proceedings on an infringement of the standard resulting from general principles or fundamental rights.[86] At the same time, the Court of Justice established a negative condition for challenging a final administrative decision. The administrative authority is obliged to examine whether the rebuttal of a final administrative decision may (or may not) be detrimental to the interests of third parties. If the amendment or revocation of a final administrative decision is likely to harm the interests of third parties, the authority should refuse to challenge such a decision, in which case the applicant's only resort to assert their rights is by claiming for damages for the liability of the Member State for a breach of Union law.[87] Since the amendment or revocation of fining administrative decisions does not infringe (as a rule) the rights of third parties, there is no reason why those interests (and their protection justified by legal certainty)[88] should prevent the fining decision from being challenged.

As EU law does not require an administrative authority to revoke every administrative decision which has become final after the expiry of reasonable time limits for appeal or as a result of legal remedies being exhausted, despite its inconsistency with general principles or fundamental rights, it follows that the application of the *Kühne & Heitz* mechanism should only be limited to qualified (gross, manifest) infringements of EU law, leaving ordinary infringements outside its scope.[89]

An example of fining decisions to which the *Kühne & Heitz* formula may be applied is the cases covered by the CJEU judgment in *Grupa Warzywna*. It found the practice of charging taxpayers an additional 20% of the value of unpaid VAT to be contrary to the principle of proportionality. Taxpayers, using national rules, might have applied for the reopening of proceedings in which they were charged an additional 20% tax liability.[90] In the case of completed tax proceedings, the application to reopen the proceedings had to be

86 Case C-2/06, *Kempter*, EU:C:2008:78, para. 45.

87 See more in M. Maliński, *Konsekwencje…*, pp. 108–109.

88 T. Tridmas, *The General Principle of EU Law*, Oxford 2006, p. 266.

89 M. Taborowski, Wpływ orzeczeń Trybunału Sprawiedliwości Unii Europejskiej na status krajowych ostatecznych decyzji administracyjnych i prawomocnych wyroków sądowych – uwagi na tle procedury administracyjnej i administracyjno-sądowej [The Impact of Judgments of the Court of Justice of the European Union on the Status of National Final Administrative Decisions and Final Court Judgments – Remarks in the Context of Administrative and Administrative-Judicial Procedures] in: A. Wróbel (ed.), *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym* [Ensuring the Effectiveness of International Court Rulings in the Polish Legal System], Warszawa 2011, p. 786.

90 Article 240 § 1 para. 11, Ustawa z 29 sierpnia 1997 r. - Ordynacja podatkowa, Dz. U. 2023, poz. 2383 [Act of 29 August 1997 – Tax Ordinance, Journal of Laws of 2023, item 2383].

submitted within one month of the publication of the CJEU judgment.[91] If a final judgment of the administrative court had already been issued in the case, the time limit for lodging the application was three months. For pending proceedings, taxable persons could have relied on the judgment in question by requesting the revocation of the tax authorities' decision insofar as it related to the penalty that had already been declared incompatible with EU law by the Court of Justice.

The reopening of proceedings under the terms established in *i-21 Germany* and *Kühne & Heitz* raises no doubt. From the perspective of the issues discussed herein, there is also a third, essential, autonomous possibility of resuming the proceedings concluded with a fining decision. This possibility has been suggested several times in the case law of the Court of Justice, but has not yet been explicitly confirmed. Therefore, we confine ourselves herein to pointing out the possibility of a new measure emerging to protect EU fundamental rights and general principles in fining proceedings: in its judgment in *Skoma-Lux*,[92] the Court of Justice suggested the possibility of challenging final administrative decisions in fining proceedings due to their contradiction with EU GPs and FRs. The main problem in this case was the issue of assessing the legal consequences of EU provisions not being published in the Official Journal in one of the official languages. The Court assumed that EU legislation which is not published in the official language of its addressee cannot be used to establish obligations even with regard to a professional (an undertaking), i.e. an entity required to keep a higher degree of due diligence.[93] Legal certainty therefore ensures that individuals can only become acquainted with the scope of the obligations imposed on them by properly publishing the rules in the official language of the addressee.[94] This especially applies to the provisions under which an individual entity is subject to a pecuniary penalty. The type of approach initiated in *Skoma-Lux* also occurred in *Polska Telefonia Cyfrowa*.[95] It follows from the Court's position in that case that the principle of legal certainty requires that it be established in concrete terms whether a legal remedy imposes obligations on individuals. When the answer is affirmative, the failure

91 Article 241 § 2 para. 2 of the Tax Ordinance.

92 Case C-161/06, *Skoma-Lux*, EU:C:2010:781.

93 G. Wierczyński, Skutki braku publikacji rozporządzenia w języku urzędowym nowego państwa członkowskiego – glosa do wyroku ETS z 11.12.2007 r. w sprawie C-161/06, Skoma-Lux sro v. Celní ředitelství Olomouc [Consequences of the Lack of Publication of a Regulation in the Official Language of a New Member State – Commentary on the Judgment of the ECJ of 11 December 2007 in Case C-161/06, Skoma-Lux sro v. Celní ředitelství Olomouc], *Europejski Przegląd* Sądowy, 2008, vol. 12, no. 3, pp. 55–56; Ł. Prus, *Ochrona uzasadnionych oczekiwań jednostki jako zasada ogólna europejskiego prawa administracyjnego* [Protection of the Individual's Legitimate Expectations as a General Principle of European Administrative Law], Wrocław 2018, pp. 111–114.

94 Case C-161/06, *Skoma-Lux*, EU:C:2010:78, paras 38, 41 and 47.

95 Case C-410/09, *Polska Telefonia Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej*, EU:C:2011:294, para. 30.

to publish such measures in the official language of the addressee prevents them from being applied to individuals who have been unable to read them in their mother tongue.[96]

From the perspective of the subject of this publication, a problem arises in the case of fining an individual who has failed to comply with obligations under EU law that were not translated into the language of a new Member State. In the *Skoma-Lux* judgment, the Court of Justice reaffirmed its earlier position that EU law does not oblige Member States to undermine the validity of final administrative decisions or final judicial rulings based on national provisions that do not comply with the EU standard.[97] At the same time, the Court of Justice stipulated that, exceptionally, a different interpretation could be used where the administrative measures or judicial decisions, in particular those of a repressive nature, would infringe fundamental rights.[98] At the same time, the Court of Justice did not clarify whether this position implies the existence of an avenue for challenging final administrative decisions that would be an alternative to the *Kühne & Heitz* formula. The view in *Skoma-Lux* was not referred to in subsequent case law. Thus, on the one hand, it can be argued that the position expressed in this judgment is limited only to the possibility of reopening fining proceedings if the decision was based on an act of EU law that could not have been applied in the Member State concerned due to requirements arising from the principle of legal certainty. In such a situation, the *Skoma-Lux* rule would be limited only to breaches of EU law concerning the mere possibility of invoking an EU act on the territory of a Member State.[99] Any reopening of a fining procedure would follow the rules arising from *Kühne & Heitz*. On the other hand, it can be argued that in *Skoma-Lux* the Court signalled that it was considering the introduction of a new remedy for the protection of GPs and FRs of the EU. In its further case law, without referring to *Skoma-Lux* or using terminology specific to the resumption of proceedings, it assumed that a breach of EU fundamental rights in a final administrative decision or final judgment of a court may have the effect of depriving such decisions and judgments of their binding force and rendering their enforcement impossible. It has been accepted in the existing case law of the Court that such effects will be produced by a breach of the right to an effective remedy under Article 47 of the

96 See more in K. Kowalik-Bańczyk, The Publication of the European Commission's Guidelines in an Official Language of a New Member State as a Condition for Their Application: Case Comment to the Order of the Polish Supreme Court of 3 September 2009 (Ref. No. III SK 16/09) to Refer a Preliminary Question to the Court of Justice of the European Union (C-410/99 Polska Telefonia Cyfrowa sp. z o.o. v. President of the Electronic Communications Office, *Yearbook of Antitrust and Regulatory Studies*, 2010, vol. 3, pp. 306–315.

97 Case C-161/06, *Skoma-Lux*, EU:C:2010:78, para. 72.

98 Ibidem, para. 73.

99 Ibidem, para. 68.

CFR,[100] the right to property under Article 17 of the CFR[101] and, recently, freedom of the press under Article 11 of the CFR.[102] For fining decisions, accepting the above line of judicial argumentation would mean that the fine could not be enforced. This disturbs the legal certainty for the punished individual. Therefore, the solution in the form of an EU obligation (if any) to reopen the fining proceedings when the fining decision is found to violate the Union GPs and FRs appears preferable. However, it can only be introduced by the CJEU's intervention in response to a question referred by a national court for a preliminary ruling.

Non-execution of fines

Breaching EU law prior to the issuance of the instrument permitting enforcement (final decision imposing a pecuniary penalty) does not exempt the NAA from the obligation to ensure its full effectiveness[103] at the stage of enforcement. Therefore, at this stage as well, administrative authorities or courts (depending on the specific solutions adopted in the Member State concerned) should ensure the effectiveness and primacy of EU legislation, including by refusing to enforce an administrative decision.[104] This also applies to cooperation procedures between Member States for the enforcement of fines adopted to implement EU legislation.[105]

The refusal to enforce a penalty decision contrary to GPs and FRs is an extremely effective remedy, but a very radical one in terms of the effectiveness of EU law and the principle of legal certainty. This remedy has recently been developed in the case law of the Court of Justice. So far, this measure has been authorised twice by the Court of Justice in cases of cross-border enforcement of pecuniary penalties. It was applied for the first time in *Donnellan*[106] in relation to Directive 2014/24.[107] The Court held that the NAA could not enforce a fining decision of an authority of another Member State when that fining decision has not been served to the fined entity. The failure to serve the decision to the person being fined violated Article 47 of the CFR, as the person could not bring a remedy before a court of that Member State. As a

100 Cases C-34/17, *Donnellan*, EU:C:2018:282, paras 58 and 62 and C-487/19, *WŻ*, EU:C:2021:798, paras 155 and 160.
101 Case C-177/20, *Grossmania*, EU:C:2022:175, para. 54.
102 Case C-633/22, *Real Madrid Club de Fútbol*, EU:C:2024:843.
103 Case C-233/08, *Kyrian*, EU:C:2010:11, para. 63.
104 Case C-224/97, *Erich Ciola v. Land Vorarlberg*, EU:C:1999:212, paras 30–32.
105 See Article 14(1) and (2) of Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84, 31 March 2010, pp. 1–12.
106 Case C-34/17, *Donnellan*, EU:C:2018:282, paras 61–62.
107 Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L 84, 31 March 2010, pp. 1–12.

consequence of this failure, the CJEU held that the fining decision was not enforceable.[108] Such a position is supported by the fundamental meaning of the right in Article 47 of the CFR. A prerequisite for the exercise of the right to an effective remedy before a court against an unfavourable decision is that the person concerned is given the opportunity to learn about the content and reasons behind the fining decision addressed to him.[109]

The second time the CJEU applied this measure was in Case C-338/20 (*D.P.*). It held that where the right of defence and the right to effective judicial protection are violated in the fining state, the authorities of another Member State are entitled to refuse to enforce a decision imposing a pecuniary penalty.[110] This time the case concerned the enforcement of a penal decision under Framework Decision 2005/214,[111] specifically a decision imposing a pecuniary penalty for a traffic offence in the amount of EUR 210.[112] The breach of a GP in this case consisted of serving the recipient with a decision imposing a penalty without translating it into a language they could understand, so that they would know the charges against them and be able to fully exercise their right of defence. Unlike in *Donnellan*, the notice of the penalty was sent to an addressee residing in a Member State other than the one imposing the penalty. However, it did not include a translation into the native language of the addressee. The requirement to provide such a translation was not established in Framework Decision 2005/214. However, this obligation did result from the Court's interpretation, which took into account the case law of the European Court of Human Rights and found that the requirement falls within the fundamental rights under Articles 48 and 47 of the CFR.[113] It follows from this judgment that a refusal to enforce a fining decision can be justified by a violation of the right of defence as well as a violation of the right to an effective remedy.

The grounds to defend the thesis that a breach of EU fundamental rights or general principles can justify a refusal to enforce a fining decision are also provided by the judgment of the CJEU in *Grossmania*. It suggests that, in certain special situations, the administrative authority is not bound by a decision of another authority or by its own earlier decision, even if that decision is final and has not been challenged before a national court, i.e. where the national legislation under which the earlier decision was adopted constitutes

108 Case C-34/17, *Donnellan*, EU:C:2018:282, para. 45.
109 Case C-34/17, *Donnellan*, EU:C:2018:282, para. 55.
110 Case C-338/20, *D.P.*, EU:C:2021:805, para. 40.
111 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22 March 2005, pp. 16–30.
112 It follows from the judgment of the CJEU in *D.P.* (para 29) that penalties imposed for traffic offences should be regarded as criminal penalties regardless of their amount. Their classification as criminal offences was decisive.
113 Case C-338/20, *D.P.*, EU:C:2021:805, paras 34–39.

a "manifest and serious infringement" of EU law. In this case, that contradiction was further confirmed by a judgment of the Court of Justice in the Commission's action against a Member State.[114] The standard for assessing that contradiction was Article 17 of the CFR and Article 63 of the TFEU.[115] It appears from paragraph 57 of the grounds of the *Grossmania* judgment that a breach causing such effects can only be found if the national legislation has infringed the provisions of primary law in a systemic and not individual way.[116] In the case of such infringements, the Court takes the view that the principles of procedural autonomy and legal certainty must give way to the principle of legality, understood as the compatibility of national legislation and its decisions with EU law.[117]

In the light of the position of the CJEU in *Grossmania*, the principle of legal certainty speaks in favour of respecting the finality of a decision which is contrary to EU law.[118] However, in fining proceedings, consideration of the principle of legal certainty is not as important as in proceedings in which the decisions of the administrative authorities affect the rights and obligations of other market participants (in *Grossmania*, the rights of those who may have acquired in good faith ownership of real estate, the right to which has been taken). There is only a relationship between the authority and the penalised individual in fining cases. A fining decision does not affect third-party rights. Since in view of the judgment of the Court of Justice in *Grossmania* the means for remedying an infringement of Union law should be, in the factual and legal circumstances of this case, to make another entry in the land and mortgage register despite the final nature of the decision declaring the right of ownership to be extinguished.[119] This means that the binding force of the authority's earlier decision, which remains in force, must first be ignored. However, it should be noted that ignoring an earlier administrative decision which has become final only serves as a legal remedy if national law does not allow such a decision to be challenged.[120]

The remedy may be relevant where an individual has the possibility under national law to challenge a fining decision before a court, but from the EU law perspective that authority is not an independent court previously established by law within the meaning of the second subparagraph of Article 19(1) of the TEU in conjunction with the second paragraph of Article 47 of the CFR.[121] In

114 Case C-235/17, *Commission v. Hungary (Usufruct Over Agricultural Land)*, EU:C:2019:432, paras 81, 86, 124, 125 and 129.

115 Case C-177/20, *Grossmania*, EU:C:2022:175, paras 55–56.

116 According to the *Grossmania* judgment, approximately 5,000 citizens of other Member States were affected by the national regulation.

117 Case C-177/20, *Grossmania*, EU:C:2022:175, para. 58.

118 Ibidem, para. 62.

119 Ibidem, para. 65.

120 Ibidem, para. 2.

121 Case C-326/23 *C.W. S.A., C.O. S.A., D. sp. z o.o., G. S.A., C. sp. z o.o., C.1 S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów*, EU:C:2024:940, para. 37 and the case law cited therein.

such a case, there is clearly an infringement of the right to a fair trial (Article 47 of the CFR), which according to the cases *Donellan* and *D.P.* referred to above, may give rise to the NAA refusing to enforce the final administrative decision.

Damages

The legal remedy to which the punished individual may ultimately resort is a claim for damages caused by a fining decision that is contrary to the general principles or fundamental rights. The principle of Member State liability for damages caused to individuals by an infringement of EU law is an integral part of the system of the Treaties.[122] The Court of Justice points out that the possibility for an individual who feels adversely affected by the application of a national provision contrary to European Union law to seek compensation from a Member State constitutes a right that is independent of the obligation of the national authorities to interpret national law in a manner consistent with European Union law and to disapply the provisions of national law as necessary.[123]

The conditions under which Member State liability for damages caused to individuals by breaches of EU law may arise were specified by the Court of Justice in joined cases *Francovich and Bonifaci*.[124] Injured individuals have a right to reparation if three conditions are met: the rule of law infringed confers rights on individuals; the breach is sufficiently serious; and there is a direct causal link between the breach and the damage sustained by these individuals.[125] In the judgment in question, the Court of Justice justified the principle of the liability of a Member State for a breach of European Union law by the requirement of full effectiveness of EU law.[126] In the judgment in *Brasserie du Pêcheur*, the Court of Justice additionally confirmed that liability for damages applies in every case of a breach of EU law by a Member State, regardless of the nature of the body whose act or omission caused the breach.[127] The Court has reiterated that the conditions for such liability depend on the nature of

122 Case C-571/16, *Kantarev*, EU:C:2018:807, para. 92 and the case law cited therein.

123 Case C-441/14, *Dansk Industri (DI) v. Sucession Karsten Eigil Rasmussen*, EU:C:2016:278, para. 43.

124 Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and Others v. Italy*, EU:C:1991:428, para. 35.

125 Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1996:79, para. 51; Case C-420/11, *Leth*, EU:C:2013:166, para. 41.

126 See N. Półtorak, Odpowiedzialność odszkodowawcza państwa za naruszenie prawa UE po 20 latach od orzeczenia w sprawie Francovich [State Liability for Breaches of EU Law 20 Years after the Francovich Judgment], *Europejski Przegląd Sądowy*, 2014, vol. 11, no. 1, p. 78.

127 Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1996:79, paras 32–33.

the infringement.[128] In *Köbler*,[129] the Court added that in order to determine whether the breach of law is sufficiently serious, the competent national court, considering the special nature of judicial authority, must decide whether the judge clearly/manifestly breached the law.[130]

Whether a breach of EU law is sufficiently serious (substantial) depends on a determination of whether the Member State concerned grossly and seriously exceeded the margin of discretion entrusted.[131] Likewise, account must also be taken of the degree of clarity and precision of the provision that was infringed, the scope of discretion that it granted to the national authorities, the nature of the breach committed or the damage caused and the excusable or non-excusable nature of the possible breach of law.[132]

Claims for damages related to the non-conformity of the final administrative decision imposing a pecuniary penalty with general principles or fundamental rights may be supplementary in nature if an administrative decision is challenged, or alternative in nature if it is inadmissible to challenge the decision. Undoubtedly, an administrative decision contrary to the general principles or fundamental rights may cause damage to a party to the proceedings. The penalty will constitute damages, but only to the extent that respecting the EU standard would lead to the imposition of a lower penalty (e.g. taking into account the principle of proportionality) or to exemption from liability in general (e.g. violation of the *ne bis in idem*). The EU case law adopts the right to full compensation within the limits of legally relevant property damage. Therefore, both actual losses and lost profits are subject to compensation.[133] The maximum amount of damages awarded for infringements of EU law may not be limited by national legislation, nor can the possibility of awarding interest be excluded.[134]

128 Ibidem, para. 38

129 The CJEU in Case C-224/01 *Köbler v. Republik Österreich*, EU:C:2003:513, para. 5 held that the principle pursuant to which Member States are obliged to compensate for damages caused to individuals as a result of an infringement of Community law attributed to them also applies where the infringement in question is the result of a decision of a court of last instance, if the infringed rule of Community law is a source of entitlement for individuals, the infringement is sufficiently important and there is a direct causal link between the infringement and the damage suffered by the injured party.

130 Apart from the examples identified in the *Brasserie du Pêcheur* judgment, there has also been a failure by the court concerned to refer to question for a preliminary ruling.

131 Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1996:79, paras 56–57.

132 Case C-168/15, *Milena Tomášová v. Slovenská republika – Ministerstvo spravodlivosti SR and Pohotovosť s.r.o.*, EU:C:2016:602, paras 25 and 35.

133 Joined cases C-104/89 and C-37/90, *Mulder and Others v. Council of the European Communities and Commission of the European Communities*, EU:C:1992:217, paras 32–33.

134 Case C-271/91, *M. Helen Marshall v. Southampton and South-West Hampshire Area Health Authority*, EU:C:1993:335, paras 31–32.

The conditions for liability where a fining decision is issued in breach of EU law and causes damages to an individual do not differ from the standard conditions adopted in the case law, as confirmed by the Court of Justice in the judgment in *Grossmania*.[135] There is no doubt that general principles or fundamental rights applicable to fining proceedings are intended to grant individuals certain procedural rights. The same applies in the case of a conflict between EU law and national provisions providing for financial penalties for violating the resulting orders or prohibitions (especially the freedoms of the internal market).

It follows from these conditions that the breach of an EU standard regarding general principles or fundamental rights must be sufficiently serious. A breach of a GP or a FR always meets this requirement. The EU standard of protection for general principles or fundamental rights is already very well developed, so it is difficult to assume that the condition of a serious infringement is met only if the CJEU has issued a judgment relating directly to national provisions under which a pecuniary penalty was imposed in breach of a GP or a FR. The condition of a direct cause-and-effect relationship will be met if the individual can demonstrate that compliance with EU general principles or fundamental rights would lead to a penalty being imposed in a different amount or to an exemption from liability. A slightly different situation can only arise in the case of infringement of procedural rights, since, according to the position of the CJEU itself, this would lead to the revocation of the decision only if it significantly affects the content of the fining decision.

EU law sets out the substantive prerequisites for claims for damages arising from violations of general principles or fundamental rights. As regards procedural issues related to the manner of seeking these claims and their scope, national law is applicable.[136] The national legislation that sets out the procedure for deciding compensation cases, e.g. admissible evidence, limitation periods or remedies, must comply with the standards established in the CJEU case law, i.e. the principles of equivalence and effectiveness.

Conclusions

The general principles or fundamental rights guaranteed by EU law and relating to fining procedures have a direct or indirect impact on national proceedings, as well as decisions imposing pecuniary penalties. A consequence of the direct application of EU rules may be an amendment of such decisions in whole or in part, to the extent that the national provisions that form the basis for imposing a pecuniary penalty are contrary to general principles or fundamental rights.

135 Case C-177/20, *Grossmania*, EU:C:2022:175, para. 69.

136 Cases C-224/01, *Köbler v. Republik Österreich*, EU:C:2003:513, para. 100 and C-571/16, *Kantarev*, EU:C:2018:807, para. 95.

In view of the foregoing analysis, the national authority should first attempt to interpret national legislation in a manner that is consistent with general principles or fundamental rights. It is only the inability to thereby ensure the effectiveness of EU legislation that will lead to the need to apply directly effective EU standards, which will result in a reduction in the pecuniary penalty following modification of the grounds or conditions for imposing it and the method by which it is calculated. EU law will then act as a shield, i.e. it will block the application of contradictory national legislation. In such a situation, the national authority will be obliged to conclude the proceedings without imposing a pecuniary penalty. This will lead, unfortunately, to the impossibility of fining the individual and to the discontinuation of the national proceedings. As a consequence, the individual will avoid liability despite breaching a particular prohibition or failing to comply with an obligation laid down by national law.

The principle of *res iudicata*, which is the consequence of compliance with the principle of legal certainty, forms an element of EU law. The principle of legal certainty requires that a specific decision becomes impossible to challenge after ordinary remedies available under the relevant procedures have been exhausted. The Court of Justice has pointed out in the judgments in *Kühne & Heitz* and *Kapferer* that only in exceptional cases may a final administrative decision or a final court judgment be challenged, even at the cost of a national decision that is contrary to a GP or a FR functioning in the EU legal order. This does not prevent the possibility of a fining decision contrary to EU law being challenged on grounds other than those laid down in *Kühne & Heitz*, if the national procedural rules so allow (*i-21 Germany*). So far, the CJEU has only signalled that it may consider expanding the catalogue of EU reasons for reopening proceedings in the event of a gross violation of fundamental rights (*Skoma-Lux*).

A relatively new remedy – still under development – available to the fined entity is the refusal to enforce a fining decision that is contrary to general principles or fundamental rights. It is a protective measure that is quite radical from the point of view of the principle of legal certainty and respect for *res* judicata. It can be applied in the event of an infringement of Article 47 of the CFR (*Donellan* or *D.P.*) or a particularly serious infringement of EU law, accompanied by an infringement of a fundamental right protected by the CFR (*Grossmania*).

In the course of administrative-judicial review of an administrative decision containing a pecuniary penalty in its content, both the administrative authorities and courts should consider *ex officio* whether national legislation conflicts with a GP or a FR. This should result in the decision being revoked under an appeal or in the application being upheld by the administrative courts. Upholding decisions that impose pecuniary penalties regardless of their conflict with general principles or fundamental rights should be regarded as a material infringement of EU law, which may lead to the Member State concerned being liable for damages on the grounds resulting from *Francovich and Bonifaci*.

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Part 2

Application of specific general principles of EU law in national fining proceedings

4 Principle of legal certainty – does it really limit the effectiveness of EU law in national fining proceedings?

Dagmara Kornobis-Romanowska

Introduction

The principle of legal certainty (PLC; *sécurité juridique*, *Rechtssicherheit* or *jurídica certezza del diritto*) is a fundamental concept in law and an essential element of the rule of law.[1] It refers to the idea that law should be clear, precise and predictable in all legal operations, such as legislation, interpretation, adjudication and enforcement. Legal certainty can be divided into formal and substantive forms. Formal legal certainty means that the law stays immobile, independent, pre-established and pre-settled, which for criminal law entails the absolute prohibition of retroactivity. But at the same time, in substance it needs the acceptability of those concerned. In this respect, for the individuals the law must be reflexive, fluid and context-sensitive, good in the sense of ethics and morals.[2] Therefore, the function of the PLC is to seek a balance between the features of all formal decisions affecting individuals: stability–flexibility and predictability–substantive acceptability. For this reason, legal scholars refer to the PLC as the guideline principle (*idée-directrice* or *Leitgedanke*) and the cornerstone principle, in the sense that it is the set of the factors that introduces reliability and coherence to the entire legal system.[3] It is the basic

1 A. von Bogdandy, M. Ioannidis, Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done, *Common Market Law Review*, 2014, vol. 51, pp. 59–96; T. Tridimas, *The General Principles of EU Law,* Oxford 2006, pp. 4–7. See also cases C-72/15, *Rosneft*, EU:C:2017:236, paras 161–162 and C-156/21 *Hungary v. Parliament and Council*, EU:C:2022:97, paras 136 and 223.

2 A. Peczenik, *On Law and Reason*, Heildelberg 2009, pp. 24–27.

3 V. Gessner, A.C. Budak (eds.), *Emerging Legal Certainty: Empirical Studies on the Globalisation of Law*, Ashgate 1998; P. Popelier, Legal Certainty and Principles of Proper Law Making, *European Journal of Law Reform*, 2000, vol. 2, no. 2, p. 321; A. von Arnauld, *Rechtssicherheit: Perspektivische Annäherungen an eine idée directrice des Rechts*, Tübingen 2006; T. Piazzon, *La sécurité juridique*, Paris 2009; E. Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse, and Reasoning at the European Court of Justice*, London 2016; J. Raitio, *The Principle of Legal Certainty in EC Law*, Heildelberg 2003, p. 85; D. Kornobis-Romanowska, *Pewność prawa w Unii Europejskiej: pomicdzy autonomią jednostki a skutecznością prawa UE* [Legal Certainty in the European Union: Between Individual Autonomy and the Effectiveness of EU Law], Warszawa 2018; D. Miąsik, *Zasady i prawa podstawowe. System Prawa Unii*

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condition for the stability of every legal system, consisting of coherence, unity and effective norms in their interpretation and application.

The definition of the PLC in EU law was given by the CJEU, stating that the principle requires legal rules to be clear and precise and that it aims to ensure that situations and relationships governed by EU law remain foreseeable.[4] The case law indicates that the clarity and precision of EU law come first, followed by the predictability of their effects, so that interested parties can ascertain their position in situations and legal relationships governed by EU law.[5] Furthermore, although this is not mentioned as a separate condition in the EU case law, it is also evident that the provisions of law need to be publicly available to ensure legal certainty for the subjects of the law.[6]

Legal norms must be recognisable, predictable and credible for the individual parties. The PLC is thus mainly substantiated as the rights of individuals against public authorities because they need to know how to observe and comply with the law and where to look for protection against arbitrary actions of public institutions and bodies. In this regard, the PLC is the source of individual guarantees in the implementation of legal measures or in their enforcement. It is also trust – confidence – in the law and the judicial system, since it serves to ensure that the citizens have clear and predictable legal frameworks and that they can foresee the legal consequences of their actions.[7] In particular, the PLC requires that the EU rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and to take steps accordingly,[8] and rules must be able to be struck down if they do not comply with some formal requirements such as clarity, precision[9] or official publication.[10] The PLC must be observed more strictly in the case of a measure that is liable to have financial consequences.[11] A penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear, unambiguous legal basis.[12] That is

Europejskiej. Tom 2 [[Principles and Fundamental Rights: The European Union Law System. Volume 2], Warszawa 2022.

4 Case T-33/02, *Britannia Alloys*, EU:T:2005:428.

5 Case C-48/14, *Parliament v. Council*, EU:C:2015:91, para. 45.

6 K. Lenaerts, A. Brenninkmeijer, General Principles of EU Law and Audit Practice of EU Funds, *European Review of Public Law*, 2016, vol. 28, no. 3, p. 821.

7 J. van Meerbeeck, The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust, *European Law Review*, 2016, vol. 41, no. 2, p. 275.

8 Case C-345/06, *Heinrich*, EU:C:2009:140, para. 44.

9 Case C-308/06, *Intertanko*, EU:C:2008:312, para. 69; Joined cases C-201/10 and C-202/10, *Ze Fu Fleischhandel*, EU:C:2011:282, paras 35 and 52.

10 Cases C-161/06, *Skoma-Lux*, EU:C:2007:773, para. 38, C-34506, *Heinrich*, EU:C:2009:140, paras 42–46 and especially C-146/11, *Pimix*, EU:C:2012:450, para. 36.

11 Cases C-94/05, *Emsland-Stärke*, EU:C:2006:185, para. 43 and C-248/04, *Koninklijke Coöperatie Cosun*, EU:C:2006:666, para. 79.

12 Cases 117/83, *Karl Könecke*, EU:C:1984:288, para 11 and C-210/00, *Käserei Champignon Hofmeister*, EU:C:2002:440, para 52.

why the PLC is of great importance during national fining proceedings within the scope of EU law.

Legal character

As EU law stands, general principles have a substantive input, and they may be relied upon as self-standing sources of rights.[13] They also continue to have a value as underlying constitutional principles which influence the interpretation and application of the law and provide the grounds for determining the validity of secondary legislation.[14] This applies to the PLC, which was recognised as a general principle of law common to the Member States in the Community's first years.[15] As one of the foundations of a legal order, it is clearly connected to the rule of law[16] and the fundamental rights,[17] and is regarded and classified as the axiomatic and axiological general principle of law.[18] As an umbrella or underlying principle, it is associated with other principles and rights, such as legality, the protection of legitimate expectations, acquired rights, nonretroactivity, procedural autonomy, *res judicata*, *ne bis in idem*,[19] effectiveness and the unity and coherence of EU law.[20] In the administrative context the PLC operates as an objective principle and as an interpretative tool for delegated legislation and administrative rulemaking.[21]

13 Art. 6(3) Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012, pp. 13–390; Cases 294/83, *Les Verts v. European Parliament*, EU:C:1986:16, para 25, C-144/04, *Mangold*, EU:C:2005:709, C-427/06, *Bartsch*, EU:C:2008:517, C-388/07, *Age Concern England*, EU:C:2009:128, C-555/07, *Kücükdeveci*, EU:C:2010:21 and C-282/10, *Maribel Dominguez*, EU:C:2012:33; A. von Bogdandy, Founding Principles, in: A. von Bogdandy, J. Bast (eds), *Principles of European Constitutional Law*, Oxford – Portland 2011, pp. 11–54; J. Schwarze, *European Administrative Law*, London 2006.

14 T. Tridimas, The General Principles of Law: Who Needs Them?, Conclusion, *Les Cahiers de Droit*, 2015, vol. 56, no. 1, pp. 419 and 439.

15 Cases 32/58 and 33/58, *Snupat v. High Authority*, EU:C:1959:18.

16 See also Cases C-72/15, *Rosneft*, EU:C:2017:236, paras 161 and 162 and C-156/21, *Hungary v. Parliament and Council*, EU:C:2022:97, paras 136 and 223.

17 Case 29/69, *Stauder*, EU:C:1969:57; Case 11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114.

18 Together with other principles such as legitimate expectations, proportionality and non-discrimination. E. Castellarin, General Principles of EU Law and General International Law, in: M. Andenas, M. Fitzmaurice, A. Tanzi, J. Wouters (eds.), *General Principles and the Coherence of International Law*, Leiden 2019, p. 132.

19 Cases C-288/05, *Kretzinger* and C-150/05, *van Straaten*, EU:C:2006:614; see also opinions of the Advocate General in Cases C-261/09, *Mantello*, EU:C:2010:501, C-436/04, *van Esbroeck*, EU:C:2005:630, para. 19 and Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, EU:C:2002:516.

20 Cases C-42/59 and C-49/59, *S.N.U.P.A.T. v. High Authority*, EU:C:1961:5, C-63/93, *Duff and Others*, EU:C:1996:51, C-107/97, *Rombi and Arkopharma*, EU:C:2000:253, C-126/97, *Eco Swiss*, EU:C:1999:269, C-224/01, *Köbler*, EU:C:2003:513, C-318/10, *SIAT*, EU:C:2012:415 and C-284/11, *EMS-Bulgaria Transport*, EU:C:2012:458.

21 J. Schwarze, *European Administrative Law*, London 1992, p. 948.

As a general principle, the PLC is binding for the EU institutions and Member States when implementing EU law.[22] The inconsistencies that might arise in the implementation of the various provisions of EU law must be avoided in order to ensure that situations and legal relationships governed by EU law remain foreseeable.[23] In this context the PLC serves as a legal tool for individuals to limit the powers conferred upon the public institutions by EU law, and as a general principle of EU law it may supplement EU fundamental rights acknowledged in the Charter of Fundamental Rights (CFR) if the personal or material scope of the application of a fundamental right is narrower than the general principle of EU law on which it was based.[24]

The three most relevant provisions of the CFR[25] referring to the PLC recognised directly or indirectly in the case law of the CJEU are Arts. 41, 47 and 49. Art. 41 of the Charter provides the right to good administration, comprising both procedural and substantive requirements that provide individuals with tools to invoke in their dealings with public authorities, and encompassing the right to have one's affairs handled impartially, fairly and within a reasonable time by the EU institutions. The more complex the EU administrative procedure becomes, the more essential it is to ensure legal certainty for individuals. In this regard the PLC – although not mentioned in Art. 41 of the CFR – is essential to promote the subjectivisation of the fundamental right to good administration in the EU, which is purely procedural in nature.[26] Steering administrative conduct and having the intended effect on the administration introduces and supports legal certainty in administrative procedure, especially where the timelines and the duties of the administrative authorities are concerned.

Art. 47 of the Charter sets the requirements of the right to an effective judicial remedy and to a fair trial. The CJEU used the PLC in the context of Art. 47 of the CFR when it decided that findings were based commonly on the PLC, the principle of legitimate expectations and the principle

22 Cases C-151/12, *Commission v. Spain*, EU:C:2013:690, para. 28, C-71/92, *Commission v. Spain*, EU:C:1993:890, para. 25 and C-573/12, *Ålands Vindkraft*, EU:C:2014:2037, paras 125–128.

23 Cases T-50/06 and T-69/06, *RENV II*, *Ireland v. Commission*, EU:T:2016:227, paras 59 and 62 and T-612/17, *Google Shopping* (n 6), para. 194. See also Case T-50/06, *Ireland and Aughinish Alumina v. Commission*, EU:T:2012:134.

24 For more on the obligation to state the legal basis grounded in the PLC and conferral, see Cases C-370/07, *Commission v. Council*, EU:C:2009:590, paras 39 and 46 and C-116/17, *Clergeau and Others*, EU:C:2018:651, para. 26.

25 In relation to fundamental rights, see e.g. Case 4/73, *Nold v. Commission*, EU:C:1974:51, para. 13. In the context of limiting the obligation to provide consistent interpretation, see e.g. Cases C-282/10, *Dominguez*, EU:C:2012:33, para. 25 and C-107/23 PPU, *C.I.*, EU:C:2023:606.

26 K. Kańska, Towards Administrative Human Rights in the EU: Impact of the Charter of Fundamental Rights, *European Law Journal*, 2004, vol. 10, pp. 296–326.

of effectiveness.[27] As regards this last principle, the Court held that it is compatible with EU law and in the interests of legal certainty to lay down reasonable time limits for initiating proceedings, which protects both the taxpayer and the authorities concerned. However, to serve their purpose of ensuring legal certainty, the limitation periods must be fixed in advance.[28]

Art. 49 of the Charter encompasses the principle of legality in criminal matters, which was recognised by the CJEU as belonging to the PLC and being one of the most fundamental guarantees in punitive enforcement proceedings.[29] In *Intertanko*, the CJEU observed that the principle of the legality of criminal offences and penalties (*nullum crimen* and *nulla poena sine lege*), which is one of the general legal principles underlying the constitutional traditions common to the Member States,[30] is a specific expression of the PLC. This is also the case with non-retroactivity outside criminal law[31] and the protection of final administrative decisions.[32]

Under Art. 49(1) of the CFR, "a heavier penalty [shall not] be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable". The last sentence of Art. 49(1) of the CFR provides for the retroactivity of the more lenient criminal law or *lex mitior*.[33] The principle of the retroactivity of the more lenient criminal law is also a part of EU primary law[34] and is part of international treaties concluded by the EU Member States.[35] Its scope of application is therefore wider than the scope of the CFR itself.

The components of the PLC that turned into fundamental rights are as follows:

- right to good administration;[36]
- right to an effective judicial remedy and a fair trial;[37]

27 Case C-362/12, *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, para. 33.

28 Case C-62/00, *Marks & Spencer*, EU:C:2002:435, paras 35 and 39.

29 Case C-303/05, *Advocaten voor de Wereld*, EU:C:2007:261, paras 49–50.

30 Ibidem.

31 Case 98/78, *Racke v. Hauptzollamt Mainz*, EU:C:1979:14, paras 15 and 20.

32 Case C-453/00, *Kühne and Heitz*, EU:C:2004:17, para. 24.

33 Case C-116/17, *Clergeau and Others*, EU:C:2018:651, para. 27.

34 The Court has held on previous occasions that that principle followed from the constitutional traditions common to the Member States and therefore had to be regarded as forming part of the general principles of EU law, which national courts must respect when applying national law: Cases C-218/15, *Clergeau and Others*, EU:C:2018:651, para. 26, C-387/02, *Paoletti and Others*, EU:C:2016:748, para. 25 and C-387/02, C-39102 and C-403/02, *Berlusconi and Others*, EU:C:2005:270, paras 68 and 69.

35 See the first sentence of Art. 15(1) of the International Covenant on Civil and Political Rights of 19 December 1966, *UN Treaty Series*, vol. 999, p. 171.

36 Case C-447/13 P, *Riccardo Nencini*, EU:C:2014:2372.

37 Case C-640/13, *Commission v. UK*, EU:C:2014:2457, paras 38–40.

- notification of a measure to the interested parties in a language which they understand so that they can ascertain exactly when the measure takes legal effect;
- respect for the acquired rights.[38]

The obligations for the institutions, public authorities and bodies from the PLC creating the rights for the individuals are as follows:

- providing a statement of the reasons for public acts;[39]
- proper publication of the legal acts imposing obligations on individuals which are not notified to them, especially where financial liability is concerned.[40] The PLC significantly restricts the retroactive operation of the law[41] and forbids a measure from taking effect before it is published, except under limited circumstances;[42]
- the existence of time limits for challenging the administrative acts of the EU;[43]
- *res judicata*;[44]
- the limitation period imposed for the imposition of sanctions.[45]

The PLC also provides individuals with the means to ascertain their rights and freedoms:[46]

- an action seeking to strike down a rule which does not comply with some formal requirements, such as clarity, precision[47] or official publication;[48]
- as protecting predictability, the legal certainty principle may not prevail over a substantive legal choice, but it may prevent its subjective application on the grounds that it would be retroactive[49] or against individuals'

38 Case 2/71, *Günter Henck v. Hauptzollamt Emden*, EU:C:1972:25, paras 4–5.
39 Art. 296(2) Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012, pp. 47–39.
40 Cases C-161/06, *Skoma-Lux*, EU:C:2007:773, para. 38 and C-345/06, *Heinrich*, EU:C:2009:140, paras 42–46.
41 Case T-357/02, *Freistaat Sachsen v. Commission*, para. 98.
42 Case 8/78, *Racke v. Hauptzollamt Mainz*, para. 20.
43 Case C-453/00, *Kühne & Heitz*, EU:C:2004:17, para. 24
44 Case C-2/08, *Fallimento Olimpiclub*, EU:C:2009:506, para. 22.
45 Case 48/69, *ICI v. Commission*, EU:C:1972:70, para. 49.
46 Called "weapons", the list after: P.M. Rodriguez, A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis, *European Constitutional Law Review*, 2016, vol. 12, no. 2, p. 267.
47 Cases C-201/10 and C-202/10, *Ze Fu Fleischhandel*, EU:C:2011:282, paras 35 and 52.
48 Cases C-161/06, *Skoma-Lux*, EU:C:2007:773, paras 38, C-405/06, *Heinrich*, paras 42–46 and *C-146/11*, *AS Pimix, in liquidation*, EU:C:2012:450, para 36.
49 Case C-472/12, *Panasonic Italia SpA*, EU:C:2014:2082, paras 57–58.

legitimate expectations. These might be created by previous legislation[50] and by non-legally binding positions taken by public authorities.[51] It might even lead to a right to compensation;[52]

- as part of the legal system, the PLC operates not only in relation to direct rules, but also to indirect legislation, entitling individuals to claim against a prejudicial application, even at the interpretative level.[53]

The PLC also relates to the right to an effective judicial remedy and to a fair trial, since it requires a prior clear determination of the competent court[54] or may preclude legislative changes which either curtail the period in which legal action can be taken[55] or interfere with pending judicial proceedings.[56]

To sum up, the PLC occupies a very special place in fundamental rights protection because, as an umbrella principle, it creates a link between these rights and the rule of law, one of the fundamental values on which the democratic community is based.

The principle of legality in criminal offences and penalties in Article 49(1) of the CFR

The principle of legality in criminal offences and penalties is enshrined in Art. 49(1) of the CFR. It consists of prohibiting the conduct of any EU proceedings in relation to an offence that is not legally punishable and therefore guaranteeing legal certainty. In consequence, in order to conclude proceedings that impose a penalty, it is necessary under the statutory regulation to set the boundaries by defining the elements of the criminal offence as well as the penalty itself in a clear, precise manner.[57] It is of great importance in relation to acts of EU law that provide for penalties and that require transposition into the national legal order, because these acts cannot contain directly effective rules

50 Case 120/86, *Mulder v. Minister van Landbouw en Visserij*, EU:C:1988:213.

51 Cases C-189/89, *Spagl przeciwko Hauptzollamt Rosenheim*, EU:C:1990:450, C-226/11, *Expedia*, EU:C:2012:795, para 28 and C-439/11 P, *Ziegler v. Commission*, EU:C:2013:513, paras 59–60.

52 Cases C-104/89 and C-37/90, *Mulder v. Council and Commission*, EU:C:2000:38, para 19 and C-104/89 and C-37/90, *Mulder v. Council and Commission II*, EU:C:1992:217.

53 Cases C-91/92, *Faccini Dori v. Recreb*, EU:C:1994:292, para. 27, 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, paras 13–14, C-7/11, *Caronna*, EU:C:2012:396, paras 52–56 and C-105/03, *Pupino*, EU:C:2005:386, paras 44–45.

54 Case C-157/13, *Nickel & Goeldner Spedition*, EU:C:2014:2145, para. 38; Opinion in case C-69/14, *Târşia*, EU:C:2015:269, paras 34–46.

55 Cases C-362/12, *Test Claimants in the Franked Investment Income Group Litigation*, EU:C:2013:834, paras 44–49 and C-640/13, *Commission v. UK*, EU:C:2014:2457, paras 38–40.

56 Judgments of the European Court of Human Rights: *Stefanetti and Others v. Italy*, nos 21838/10, 21849/10 and 21852/10 etc., paras 38–44.

57 And/or prescribed by case law. See case C-189/02 P, *Dansk Rørindustri*, EU:C:2005:408, para. 216.

of a criminal nature. Therefore, it is not the EU legislator but the national legislature who is obliged to establish, through transposition, penalties that are consistent with the national legal order.[58] The principle of legality in criminal offences and penalties also results in a limitation of judicial application of the directives in situations where this could lead to increased criminal liability of persons infringing these acts of EU law, if liability for such infringements has not been provided for in the national legislation transposing EU law.[59] It has been confirmed in several cases concerning specifically directives that they cannot have the effect – distinct and independent of national law – of determining or aggravating liability under criminal law of persons who act in contravention of the law of a Member State.[60]

The principle of the legality of offences and penalties of Art. 49(1) of the CFR in the context of the PLC requires that criminal liability must be clearly defined. This means that it must be consistent with certain conditions of accessibility and predictability as regards both the definition of the offence and the determination of the penalty.[61] This formal necessity is satisfied where the individual can ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, which acts and omissions will make them criminally liable.[62] As follows from the EU case law and was underlined in the opinion of AG Pitruzella in the *G. ST. T.* case,[63] it is also applicable to the cumulation of administrative and criminal proceedings and penalties, and therefore the same requirements must also be met by provisions that allow for double prosecution.[64]

58 Opinion in case C-308/06, *Intertanko*, EU:C:2007:689.

59 M. Szwarc, Zakres związania Państw Członkowskich Kartą Praw Podstawowych Unii Europejskiej w kontekście stosowania prawa karnego (uwagi na tle orzecznictwa TSUE) [The Scope of the Binding of Member States by the Charter of Fundamental Rights of the European Union in the Context of the Application of Criminal Law (Comments in the Context of the Case Law of the CJEU)], *Studia Prawnicze*, 2017, vol. 211, p. 47; M. Szwarc, Zakres związania Państw Członkowskich Kartą Praw Podstawowych Unii Europejskiej w kontekście stosowania prawa karnego (uwagi na tle orzecznictwa TSUE) [The Scope of the Binding of Member States by the Charter of Fundamental Rights of the European Union in the Context of the Application of Criminal Law (Comments in the Context of the Case Law of the CJEU)], in: A. Wróbel (ed.), *Karta Prawa Podstawowych Unii Europejskiej. Komentarz* [Charter of Fundamental Rights of the European Union: Commentary], Warszawa 2019, p. 1277.

60 Cases C-14/86, *Pretore di Salov X*, EU:C:1987:275, paras 18–19, 331/88, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*, EU:C:1990:391, para 43, C-168/95, *Arcaro*, EU:C:1996:363, para. 37, C-60/02, *X*, EU:C:2004:10, para. 61 and C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, EU:C:2005:270, para. 74.

61 Case C-634/18, *JI*, EU:C:2020:455, para. 48.

62 Cases C-194/14 P, *AC-Treuhand v. Commission*, EU:C:2015:717, para. 40, C-634/18, *Prokuratura Rejonowa w Słupsku*, EU:C:2020:455, para. 49 and C-570/20, *BV*, EU:C:2022:348, para. 38.

63 Opinion in case C-655/21, *Criminal proceedings against G. ST.*, EU:C:2023:356.

64 Case C-570/20, *BV*, EU:C:2022:348, para. 37.

Although the principle of the legality of offences and penalties requires that the law clearly defines the offences and the penalties for those offences, this condition is fulfilled if the person is in a position to know – on the basis of the wording of the relevant provision and with the possible help of interpretation given by the courts – for which acts and omissions they would be criminally liable. Furthermore, according to settled case law, the principle of specifying the applicable law cannot be interpreted as prohibiting the gradual clarification, from one case to another, of the rules on criminal liability by means of interpreting case law, provided that the result is reasonably predictable at the time the offence is committed, particularly in the light of the interpretation in force at that time in the case law relating to the legal provision in question.[65]

To conclude, according to Art. 49(1) of the CFR and the principle of the legality of offences and penalties set out therein, the precise scope of the constituent elements of an offence, including administrative offences, may be defined and further clarified by means of interpretation, if it is not inconsistent with the PLC. Thanks to the PLC, the persons concerned are able to know precisely, at the time of an offence, which acts and omissions may render them criminally liable. Respectively, for the national authorities – including the legislature, courts and administration – it introduces limits to the obligation to apply EU law and to interpret domestic law in conformity with it.

In this respect the PLC strengthens the legitimacy of the EU by subjectivising its measures. Such subjectivisation is directly expressed in Art. 49(1) of the CFR, which provides the principle of legality in criminal offences and penalties, recognised by the CJEU as belonging to the PLC and being one of the fundamental guarantees in punitive enforcement proceedings.[66]

Applying the principle of legal certainty to national fining proceedings

As a general principle of EU law, the PLC impacts the interpretation and application of substantive and procedural provisions of national law in fining proceedings. The most problematic question occurs where individual guarantees based on the PLC provided by national law, especially at the constitutional level, differ from those established in EU law, opening the way to double standards.[67] In such a case it is the principle of autonomy of the EU legal system that comes into play. If it is so, then the observation of the EU

65 Ibidem, paras 38 and 41.

66 Case T-279/02, *Degussa AG*, EU:T:2006:103.

67 P. J. Wattel, National Procedural Autonomy and Effectiveness of EC Law: Challenge the Charge, File for Restitution, Sue for Damages?, *Legal Issues of Economic Integration*, 2008, vol. 35, no. 2, pp. 109 and 132.

standard of the PLC is governed by the principles of equivalence and effectiveness. The General Court established in the *Google Shopping* case that the Courts of the European Union cannot be bound by the case law of national courts, be they supreme or constitutional courts. However, there is nothing to prevent the CJEU from being guided by that case law and taking it into account. On the contrary, it is for the national courts and authorities to apply EU law[68] uniformly and in line with the case law of the CJEU, since divergences between the courts and authorities of the Member States as to its application could place in jeopardy the unity of the EU legal order and undermine legal certainty.[69]

When the PLC in national fining procedures is discussed, it ensures that individuals are treated fairly and that any penalties imposed are based on clear, predictable legal standards. The key points in this context are the clarity, precision, creditability and accessibility of legal norms in order to avoid potential injustices. The PLC ensures that the established legal standards are respected, protecting against arbitrary or discriminatory practices and the undermining of public trust in the legal system. It also guarantees judicial review and enforcement of administrative decisions in fines, and their accountability and fairness. In this way, the PLC is an essential condition for effective national fining procedures, the lack of which undermines the effectiveness of procedures and the effectiveness of EU law.

Interpretation of substantive and procedural rules

According to settled case law, national courts and administrative authorities are required to interpret their national law within the limits set by EU law, to achieve the result intended by the EU rule in question.[70] Due to its transversal character, the PLC as a general principle of EU law is relevant in the interpretation of these norms since it limits the obligation of consistent interpretation with the *contra legem* effect and where there is no direct effect of a directive[71] in determining or aggravating criminal liability.[72] As protecting predictability, the PLC may not prevail over a substantive legal choice, but it may prevent its subjective application on grounds such as being retroactive[73] or against individuals' legitimate expectations. These might be created

68 Art. 102 of the TFEU in this case.

69 Case T-612/17, *Google and Alphabet v. Commission (Google Shopping)*, EU:T:2021:763, para. 248.

70 Cases C-106/89, *Marleasing*, EU:C:1990:395, para. 8 and C-262/97, *Engelbrecht*, EU:C:2000:492, para. 39.

71 Cases 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, paras 13–14 and C-573/17, *Popławski*, EU:C:2019:530.

72 The case of a more lenient national law (lex mitior).

73 Case C-472/12, *Panasonic Italia and Others*, EU:C:2014:2082, paras 57–58.

by previous legislation[74] or by non-legally binding positions taken by public authorities.[75] In the latter case, this individual right might even lead to a right to compensation.[76]

To sum up, the PLC, as a general principle of EU law, limits the obligation on a national court to interpret the relevant rules of its national law in the light of EU law. It thus may justify a refusal to give effect to EU law by interpreting a national provision in conformity with EU law. Obviously, the CJEU cannot be satisfied with such a conclusion, because it always seeks, first and foremost, to protect the effectiveness of EU law, avoiding as much as possible an impasse in borderline cases involving the combination of EU law and the domestic law of the Member States. This situation creates challenges in achieving consistent interpretation, particularly of punitive rules, where the Member States have significant discretion in legislation and administration. While some degree of administrative discretion is necessary for the enforcement of laws, excessive discretion can lead to legal uncertainty because of the inconsistent interpretation and unfair application of legal provisions. EU law would be less effective this way, and even the validity of EU rules could be undermined.

Application of substantive and procedural rules

Applying the legal requirements of the PLC at the national level involves the principle of the effectivity of the EU legal system and its primacy and autonomy within national law, including constitutional law, of the Member States when the two collide. In such a case, the national standard that falls within the scope of EU law is generally not applicable, unless the case is about the fundamental freedoms guaranteed in the CFR or the general principles of EU law and the national constitutional principles.

In *Taricco*[77] the CJEU stated that several Italian rules concerning the limitation period for some criminal offences and the mechanism for its interruption can have an adverse effect on the fulfilment of obligations under Art. 325(1) and (2) of the TFEU under specific circumstances. Incidentally, in this judgment, the CJEU also decided that the rules on limitation periods for criminal liability were procedural in nature, as the ECtHR had indicated.[78] However,

74 Cases 120/86, *Mulder v. Minister van Landbouw en Visserij*, EU:C:1988:213 and C-189/89, *Spagl v. Hauptzollamt Rosenheim*, EU:C:1990:450.

75 M. Kärner, Procedural Rights in the Outskirts of Criminal Law: European Union Administrative Fines, *Human Rights Law Review*, 2022, vol. 22, no. 4, pp. 10–15. See e.g. cases C-226/11, *Expedia*, EU:C:2012:795, para. 28 and C-439/11 P, *Ziegler v. Commission*, EU:C:2013:513, paras 59–60.

76 Cases C-104/89 and C-37/90, *Mulder v. Council and Commission*, EU:C:2000:38, para. 19.

77 Case C-105/14, *Taricco and Others*, EU:C:2015:555.

78 Ibidem, paras 55–57.

the CJEU eventually took a different view on limitation periods,[79] stating that in such cases the domestic courts have to disapply the challenged rules, since they would prevent Italy from fulfilling its EU obligations. There would be no violation of Art. 49 of the CFR, although if a national judge disapplies the challenged domestic rules, it could prevent the application of a more favourable provision (for the sentenced party) concerning the limitation period.

Firstly, it is for the national court to ascertain whether the finding that the Criminal Code in Italy prevents the imposition of effective, deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the Union and leads to uncertainty in the Italian legal system as regards the determination of the applicable limitation rules, which would be in breach of the principle that the applicable law must be precise. If that is indeed the case, the national court is not obliged to disapply the provisions of the Criminal Code at issue. Secondly, the requirements mentioned in the *Taricco* judgment preclude a national court in proceedings concerning persons accused of infringing VAT rules – before the delivery of this decision – from disapplying the provisions of the Criminal Code at issue.[80] The CJEU has pointed out in that judgment that, if those provisions were disapplied, penalties might be imposed on those persons which, in all likelihood, would not have been imposed if those provisions had been applied.[81]

The Italian Constitutional Court disagreed with the latter and sent to the CJEU another preliminary ruling request with further doubts about whether the retroactivity that followed from disapplying the Criminal Code would indeed infringe fundamental rights.[82] The reasoning was that, under Italian law, limitation periods are part of substantive, not procedural law. The CJEU entered into dialogue with the constitutional court and accepted the reasoning that if disapplication would lead to uncertainty in the legal system, there is no obligation to disapply, even if it would lead to non-compliance with EU law.[83] With this ruling the superior position of fundamental rights over the EU's financial interests was confirmed.

Lex retro non agit

There is a general principle of law that prevents the retroactive application of legislation[84] when the issues of interpretation may have retroactive effects,

79 Case C-267/20, *Volvo and DAF Trucks*, EU:C:2022:494, para. 46: "unlike procedural time limits, the limitation period, by resulting in the extinction of the legal action, is a matter of substantive law since it affects the enforceability of a subjective right which the person concerned can no longer effectively assert before the courts".

80 Case C-105/14, *Taricco and Others*, EU:C:2015:555, para. 58.

81 Ibidem, para. 53.

82 Case C-42/17, *M.A.S. and M.B.*, EU:C:2017:936.

83 Ibidem, paras 59 and 61.

84 See Opinion 7/76, *Société IRCA v. Amministrazione delle finanze dello Stato*, EU:C:1976:97, *passim*.

in both EU and national law. As a rule, it was clearly indicated in the jurisprudence of the CJEU that the obligation of national courts to refer to EU law when interpreting the relevant provisions of national law is limited by the general principles of EU law, particularly by the PLC and the principle of non-retroactivity.[85] Additionally, on grounds of the PLC, the retroactivity of interpretations is limited in respect of the directives, since this kind of interpretation may not increase criminal liability.[86]

The retroactive application refers to a situation where laws apply to offences that were committed before the enactment of a new law. Retroactive application is such that laws apply prior to their publication and to facts that occurred entirely in the past, and thus adversely affect the legitimate expectations of individuals. The new substantive rules are those that alter the range of conduct or the class of persons that the law punishes, and they generally apply retroactively. Procedural rules which regulate the manner of determining culpability are generally not retroactive albeit with some exemptions.

The prohibition of retroactive legal provisions covers situations where a rule is to be applied to events that have already taken place[87] because the provision is applied to legal situations existing before it entered into force or was published. Procedural rules are generally taken to apply from the date on which they enter into force, while substantive rules will normally be interpreted as applying to situations that existed before their entry into force insofar as it clearly follows from their terms, objectives or general scheme that they must have such an effect.[88] The presumption is against the validity of retroactive measures, and it manifests itself in both interpretive and substantive terms.[89]

However, this presumption may be rebutted in a non-criminal context[90] when the EU purpose to be achieved demands it and the legitimate expectations of those affected by the measure cannot be duly respected. This was confirmed by the GCJ in *Medici Grimm KG*,[91] who admitted that

> [a]lthough, as a general rule, the principle of legal certainty precludes a Community act from taking effect as from a date prior to its publication, the position may exceptionally be otherwise where the purpose to be attained so requires and the legitimate expectations of the persons

85 Case C-105/03, *Pupino*, EU:C:2005:386, para. 44.

86 Case C-168/95, *Arcaro*, EU:C:1996:363.

87 J. Schwarze, *European Administrative*…., 2006, p. 1120.

88 Cases 212-217/80, *Amministrazione delle Finanze dello Stato v. Srl Meridionale Industria Salumi*, EU:C:1981:270, para. 9, C334/07 P, *Commission v. Freistaat Sachsen*, EU:C:2008:709 and C-596/13 P, *European Commission v. Moravia Gas Storage as*, EU:C:2015:203, paras 32–33.

89 P. Craig, *EU Administrative Law*, Oxford Academic, 2018.

90 Case C-331/88, *R v. Minister for Agriculture, Fisheries and Food, ex parte Fédesa*, EU:C:1990:391.

91 Case T-7/99, *Medici Grimm KG v. Council*, EU: T:2000:175, paras 87 and 90–91.

> concerned are properly respected. Consequently, the retroactive application of acts of the institutions is permissible if it is capable of placing the person concerned in a more favorable legal situation and provided that his legitimate expectations are properly respected.

Accordingly, when the prohibition against the retroactivity of criminal measures is absolute, as far as administrative fines are regarded in the context of the PLC, their validity may be upheld because the EU institutions and administrative bodies are obliged to respect the PLC first, so as to ensure that the legitimate expectations of individuals are properly protected and when the retroactivity of new law places them in a lenient position.[92] The latter condition prevails, and it must be met even where the retroactive nature of the provision is not clearly defined in its wording, but arises from the nature of the legal norm it contains.[93] Therefore, even if the PLC seems to contradict the retroactivity, as long as the retroactive legislation confers new rights on individuals, the retroactive application of both substantive and procedural rules may be approved. This effect requires the weighing up and balancing between two colliding interests: the predictability and coherence of the legal system as a whole and the casuistic acceptability of the retroactive effects from an individual's point of view.[94]

Lex mitior

The principle of *lex mitior* implies the right to have the more lenient penalty applied if at the time of the offence a heavier penalty was applicable. It allows for the retroactivity of the more lenient criminal law, either in a change in the classification of the act concerned or in the penalty applied to the offence.[95] It ensures that the defendant benefits from the newly enacted law if it is more favourable to them than the law that was in effect when the offence was committed. In that regard, it should be noted that the application of the more lenient criminal law necessarily involves a succession of laws over time and is based on the conclusion that the legislature changed its position on either the criminal classification of the act or the penalty to be applied to an offence.[96]

92 Cases C-345/88, *Bundesamt für Ernährung und Forstwirtschaft v. Butterabsatz Osnabrück-Emsland eG*, EU:C:1990:22, 98/78, *A. Racke v. Hauptzollamt Mainz*, EU:C:1978:223 and C-99/78, *Weingut Gustav Decker*, EU:C:1979:15.

93 Case C-368/89, *Antonio Crispoltoni v. Fattoria autonoma tabacchi di Città di Castellow*, EU:C:1991:307.

94 J. Raitio, Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law, *Legisprudence*, 2008, vol. 2, no. 1, p. 11.

95 Cases C-115/17, *Clergeau and Others*, EU:C:2018:651, para. 33 and C-218/15, *Paoletti*, EU:C:2016:748, para. 27.

96 Cases C-218/15, *Paoletti*, EU:C:2016:748, para. 27 and C-115/17, *Clergeau and Others*, EU:C:2018:651.

The principle of the more lenient criminal law is a part of primary EU law,[97] enshrined in Art. 49(1) of the CFR, and a general principle of Union law following from the constitutional traditions common to the Member States, which national courts and administrative authorities must respect when applying national law.[98] It is also a part of secondary EU law, for example, in the rules on administrative penalties for irregularities prejudicial to the Community's financial interests.[99]

As a rule in EU law, *lex mitior* does not apply to criminal judgments having the force of *res judicata*,[100] but there are many exceptions. Thus, it is often the case that the retroactive effect *in melius* is extended to such judgments where a provision is made to that effect in new criminal legislation, where conduct is decriminalised or where a constitutional court declares a criminal law to be unconstitutional.[101] In this regard, an amendment to criminal legislation and the case law of a national constitutional court are on the same footing for the purposes of applying *lex mitior*. For final judgments to be reviewed because of *lex mitior*, domestic law must provide a procedural mechanism enabling such review to take place, at the request of the convicted person.[102]

Under the CFR, *lex mitior* applies only to rules of substantive criminal law; it is not applicable to rules of criminal procedure. It concerns the temporal application of substantive penal provisions and so applies to limitation periods for criminal liability and the grounds for interrupting them. In the absence of harmonised rules on limitation periods for criminal liability, the determination of whether the limitation rules are of a procedural or substantive nature belongs to the law of each Member State. In Belgium, Germany and France, limitation rules are regarded as being of a procedural nature, whereas in Greece, Spain, Italy, Latvia, Sweden and Romania, those rules fall under substantive criminal law. In Poland and Portugal, they are both substantive and procedural rules.[103]

The CJEU accords to the latter substantive status since, by extinguishing the legal action, they affect the enforceability of a subjective right, which the person concerned can no longer effectively assert before the courts, unlike

97 Cases C-218/15, *Paoletti*, EU:C:2016:748, para. 25 and C-115/17, *Clergeau and Others*, EU:C:2018:651, para. 26.

98 Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, EU:C:2005:270, paras 68–69.

99 Cases C-115/17, *Clergeau and Others*, EU:C:2018:651, para. 26, C-218/15, *Paoletti and Others*, EU:C:2016:748, para. 25 and C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, EU:C:2005:270, paras 68 and 69. See Art. 2(2) of Council Regulation No. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312, 23 December 1995, pp. 1–4.

100 Case C-650/13, *Delvigne*, EU:C:2015:648, para. 56.

101 Opinion C-107/23 P, *PPU – Lin*, EU:C:2023:532, para. 122.

102 Ibidem, para. 127.

103 Opinion C-107/23 P, *Criminal proceedings against C.I. and Others*, EU:C:2023:532, para. 107.

with procedural time limits.[104] It may justify an exception to the prohibition against retroactively applying criminal provisions and maintain alignment and application of the national constitutional case law in question.[105]

The principle of *lex mitior* is binding for national courts and administrative authorities in the application of national legislation adopted for the purpose of implementing EU law.[106] In this regard it is also placed within the constitutional context of EU law and deals with the enforcement of EU law in Member States, especially whether they can rely upon directives to enforce EU law in domestic criminal proceedings[107] and in cases where national law was introduced and not harmonised with EU law in the field.[108]

It applies when a Member State adopts a new law that reduces the severity of fines or sanctions, allowing individuals to invoke the more lenient law in the fining procedure. This ensures fairness and legal certainty for individuals, but only if the national authorities can determine when a law is more lenient and can ensure that individuals are informed of their rights under the new law. In numerous cases the CJEU has stated that a directive – by itself and independently of any national legislation adopted by a Member State for its implementation – cannot have the effect of determining or increasing an individual's criminal liability.[109] In its ruling in the joined *Berlusconi* cases,[110] the CJEU stated that in a specific situation in which the authorities of a Member State use a directive against an individual within the context of criminal proceedings, the directive cannot independently determine or aggravate the criminal law liability of persons who act in contravention of it.[111] Here the principle of *lex mitior* acts as a limit to direct effect. The CJEU has held that a national authority may not use against an individual a provision of a directive whose necessary implementation in national law has not yet taken place.[112]

The Court of Justice of the EU accepted the above-mentioned limitation, deciding that in this procedure, the national courts and authorities are free to apply national standards for the protection of fundamental rights, provided that offences and penalties must be defined by law[113] and that such application

104 Case C-267/20, *Volvo and DAF Trucks*, EU:C:2022:494, para. 46.

105 Opinion C-107/23 P, *Criminal proceedings against C.I. and Others*, EU:C:2023:532.

106 Cases C-299/95, *Kremzow*, EU:C:1997:254, para. 14 and C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, EU:C:2005:270, para. 69.

107 Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, EU:C:2005:270, para. 45, 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, para. 45 and C-168/95, *Arcaro*, EU:C:1996:363, para. 44.

108 Case 63/83, *Kirk*, EU:C:1984:255, para. 21.

109 Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, EU:C:2005:270.

110 Ibidem.

111 Cases 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, para. 13, C-60/02, *X*, EU:C:2004:10, para. 61 and C-168/95, *Arcaro*, EU:C:1996:363, para. 37.

112 Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, para. 10.

113 The European Court of Human Rights has held in relation to Art. 7(1) of the ECHR that, under that principle, provisions of criminal law must comply with cer-

does not compromise the level of protection established by the CFR, as was interpreted by the Court, or the supremacy, unity and effectiveness of Union law.[114] In this regard, the application of *lex mitior* provides a higher standard under national law than the standard set under EU law to protect a fundamental right and limits the application of the principle of the primacy of EU law. The judicial confirmation was given in the cases *M.A.S. and M.B.*[115] and *Euro Box Promotion*,[116] where the CJEU stated that EU law does not require national courts to give absolute priority to protecting the Union's financial interests to the point that they are given precedence over a fundamental right such as the principle that offences and penalties must be defined by law.[117] It shows that in the case law, the legality principle provided by Art. 49(1) of the CFR prevails over the effectiveness of the protection of the financial interests of the EU. The PLC can thus serve as a limit to the full application of EU law. The same rule allows for a limitation on national courts' obligation to interpret domestic law in conformity with EU law, which means limiting the indirect effect of EU law in cases where it does not necessarily entail direct effect.[118]

Advocate General Campos Sánchez-Bordona, in his opinion in *Criminal proceedings against C.I. and Others*, recommended an interpretation of the principle of *lex mitior*, enshrined in the last sentence of Art. 49(1) of the CFR, that covers the rules governing the interruption of limitation periods for criminal liability where national criminal law accords substantive status to those rules. It also treats amendments to criminal legislation resulting from a national constitutional court's declaration of unconstitutionality in the same way as the succession of criminal laws over time. Finally, it applies to ongoing criminal proceedings and final judgments, where provided for by national law and even generally.[119] If reiterated by the CJEU, the AG's recommendation would potentially build a "golden standard" and resolve the uncertainty as to which case law should be applied in similar cases: *Taricco* or *Euro Box*

tain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty (see judgment of the European Court of Human Rights in *Cantoni v. France*, CE:ECHR:1996:1115JUD001786291, § 29; *E.K. v. Turkey*, CE:ECHR:2002:0207JUD002849695, § 51; *Achour v. France*, CE:ECHR:2006:0329JUD006733501, § 41; *OAO Neftyanaya Kompaniya Yukos v. Russia*, CE:ECHR:2011:0920JUD001490204, § 567–570.

114 Cases C-107/23, *Lin*, EU:C:2023:606, para. 110 and C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para. 29.

115 Case C-42/17, *M.A.S. and M.B.*, EU:C: 2017:936, para. 62.

116 Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion*, EU:C:2021:1034.

117 Case C-105/14, *Taricco and Others*, EU:C:2015:555.

118 Cases 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, para. 13 and C-168/95, *Arcaro*, EU:C:1996:363, para. 42. For more on this point, see S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 2nd ed., London 2021, p. 1729.

119 Case C-105/14, *Taricco and Others*, EU:C:2015:555, para. 128.

Promotion. As AG Sanchez-Bordona admits, this is a difficult choice because the two cases created precedents which *are not easily reconciled*.[120] Despite this difficulty, the AG leans toward the *Taricco* line because, in his opinion, the risk of systemic impunity of offences against the EU's financial interest cannot take precedence over a fundamental right.[121] The Grand Chamber, however, did not follow the AG's opinion in this regard, and took a different view to consider each case separately instead of building standards in the matter.

Consequences of non-observance

The legal consequences of not observing the PLC by the Member States in administrative fining procedures concern the complex issues of responsibility, legal protection and judicial review. At the core of this question is an enquiry about the direct effect of the PLC, as provided by Art. 49(1) of the CFR and/or as a general principle of law in claims for damages based on violations of EU law in the vertical relation between individuals and the public bodies of Member States.

Following the *Poplawski* judgment,[122] the key question is whether Art. 49(1) of the CFR or the PLC as a general principle of law are directly effective. As far as general principles of law are concerned, when being "general", they are far from clear and precise, but they are unconditional because their application at the national level does not require any further EU or national measures. The legal scholarship is consistent on the point that they have a direct effect by their very nature.[123] As for Art. 49 of the CFR, the situation is very complex. The direct effect of this provision depends on whether it is held to contain rights, and therefore is judicially cognisable, or whether it contains principles which make it judicially cognisable only in the interpretation.[124] The latter cannot by itself confer on individuals a subjective right which they may invoke as such. In the absence (so far) of a ruling from the CJEU confirming the legal meaning of Art. 49 of the CFR, it may be presumed that there is a direct effect of this provision; thus, it is clear and precise and unconditionally confers rights on individuals.

But even when this provision is accepted to have direct effect, the risk of violating the PLC is quite low because of at least two reasons. Firstly, because it is a very vague concept of EU law, which makes the legal protection superficial and apparent. In this respect, for the purposes of administrative legal proceedings it is more reasonable to base the claim on the principles of *lex mitior* or non-retroactivity. Their scope is narrower, making them more compact,

120 Ibidem, para. 139.
121 Ibidem, para. 145.
122 Case C-573/17, *Popławski*, EU:C:2019:530, para. 60.
123 B. De Vitte, Direct Effect, Primacy and the Nature of the Legal Order, in: P. Craig, G. de Burca (eds.), *The Evolution of the EU Law*, 3rd. ed., Oxford 2021, p. 198.
124 Art. 52(5) of the Charter.

specific, clear and easier to properly capture in the case of a violation. Secondly, Art. 49(1) of the CFR and the principle of legality in criminal offences and penalties that it confers set the limits of the direct effect of EU legislation[125] and the obligation of national courts to interpret domestic law in conformity with EU law.[126] Therefore, it may limit both effects: direct effect, which entails the application of EU law, and indirect effect, entailing the interpretation of national law in harmony with EU law. Considering that the limits of the consistent interpretation of EU law, as regards overcoming the results of linguistic interpretation, are determined primarily by national law standards[127] the risk of non-observance of the PLC is minimal.

On the other hand, the CJEU seems to treat the PLC as a particularly important general principle of law, especially in criminal proceedings, which is vaguely indicated by the *Skoma-lux* case.[128] Although the CJEU did not refer to it in subsequent case law, it is worth noting that reopening a decision is acceptable when imposing a penalty for violating provisions which were not published in the language of the new Member State where there have been administrative measures or judicial decisions of a coercive nature that would compromise fundamental rights.[129] But the PLC in its broad material scope does not provide administrative authorities with the competence to reopen a decision that has become final if that decision was based on an incorrect application of Union law. As the CJEU made clear in *Kühne and Heitz*,[130] a duty to review an administrative decision which has become final in order to reflect the interpretation of EU law in a CJEU ruling is imposed on national authorities by the legal principle of loyal cooperation laid down in Art. 4(3) of the TEU. Considering the PLC, however, the Court did subject this requirement to the satisfaction of four conditions applicable to other provisions and principles of EU law.[131]

The conclusion is again that there might be harsher and stricter consequences for not observing specific expressions of the PLC, such as the principles of *lex retro non agit* or *lex mitior*, than for the PLC itself. In these cases, the penal decision should be annulled because it cannot be considered legal since it is based on national legislation adopted for the purpose of implementing EU law. The refusal to reopen such a decision under national law should

125 Cases C-14/86, *Pretore di Salo v. X*, EU:C:1987:275, paras 18–19, C-331/88, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*, EU:C:1990:391, para. 43, C-168/95, *Arcaro*, EU:C:1996:363, para. 37, C-60/02, X, EU:C:2004:10, para. 61 and C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, EU:C:2005:270, para. 74.

126 Case 80/86, *Kolpinghuis Nijmegen*, EU:C:1987:431, para. 13.

127 For more details, see chapter 2.

128 Case C-161/06, *Skoma-Lux*, EU:C:2007:773, para. 38.

129 Ibidem, paras 70–73.

130 Case C-453/00, *Kühne & Heitz*, EU:C:2004:17, paras 24 and 27–28.

131 See chapter 3.

result in a claim for compensation for damages caused by the national administrative authority. Obviously, for the individual the award of damages because of a Member State's liability is a replacement for a direct effect or a consistent interpretation, but still of second rank.[132]

Conclusions

The PLC is a constitutional value for the EU. As such, it influences the interpretation and application of all EU measures and provides the grounds for determining the validity of legislation. The CJEU used it to annul the EU measures or to determine their interpretation and scope of application.value of constitutional meaning for the EU. As such, it influences the interpretation and application of all the EU measures and provides the grounds for determining the validity of legislation. In this regard, the PLC should be guaranteed in EU fining proceedings mainly at the stage of lawmaking to ensure that the financial penalties are effective and proportionate and have a deterrent effect. In judicial decision-making on financial penalties, the requirements of the PLC are implemented mostly through uniform interpretation and are applied to cover procedural rights, such as *ne bis in idem*,[133] the prohibition of a *contra legem* interpretation and a coherent interpretation of EU law or the legality principle,[134] including the legality of criminal penalties.

The requirements arising from the PLC in EU fining procedures were established in the case law of the CJEU.[135] The resulting standard consists of the set of corollary principles and key elements:

- the principle of legality, which emphasises that penalties must be grounded in existing law;
- transparency that shows how decisions are taken and on what basis;
- the right to a fair trial with means for legal contestation of fines;

132 S. Prechal, Member State Liability and Direct Effect: What's the Difference After All?, *European Business Law Review*, 2006, vol. 17, p. 301.

133 Cases C-288/05, *Kretzinger*, EU:C:2007:441 and C-150/05, *van Straaten*, EU:C:2006:614; Opinion in cases C-261/09, *Mantello*, EU:C:2010:501, C-463/04, *van Esbroeck*, EU:C:2007:441 and C-187/01 and C-385/01, *Gözütok and Brügge*, EU:C:2002:516.

134 Cases C-303/05, *Advocaten voor de Wereld*, EU:C:2007:261, C-74/95 and C-129/95, *X*, EU:C:1996:491, C-384/02, *Grøngaard and Bang*, EU:C:2005:708 and C-457/02, *Niselli*, EU:C:2004:365.

135 Together with the principle of proportionality and the right to a fair trial – for more details, see M. Szwarc, Zakres związania Państw Członkowskich Kartą Praw Podstawowych Unii Europejskiej w kontekście stosowania prawa karnego (uwagi na tle orzecznictwa TSUE) [The Scope of the Binding of Member States by the Charter of Fundamental Rights of the European Union in the Context of the Application of Criminal Law (Comments in the Context of the Case Law of the CJEU)], *Studia Prawnicze*, 2017, vol. 211, p. 47ff.

- proportionality as a guarantee that penalties are not excessively harsh or unduly lenient.

The PLC plays the key role in justifying time limitations, the obligation on authorities to act within a reasonable time and some rules of interpretation.[136]

The focal point for this standard, despite a lack of common understanding in the EU of what constitutes an administrative sanction, is whether the interests of the party involved are adversely affected. The more intrusive a sanction becomes, the higher the standard of safeguards that needs to be provided. Without this standard the effectiveness of EU law would be decreased, and the validity of EU rules could be even undermined.

The Member States are obliged to give full effect to EU legislation, including ensuring that their fining procedures are transparent and that the criteria for imposing fines on individuals are well defined. In this matter the PLC serves as a guarantor of protection of individuals from arbitrary enforcement, ensures fairness in the application of the law, promotes clarity, predictability and transparency of legal provisions and thus encourages compliance with laws and regulations.

In the context of implementing EU law, particularly with respect to provisions entailing financial consequences, the PLC requires that the rights conferred on individuals by EU law be implemented in a sufficiently precise, clear and foreseeable way so as to enable the persons concerned to precisely know their rights and obligations. For national fining procedures, the review of national administrative measures – whenever they fall within the scope of Union law – is under the competence of national courts, which must provide appropriate mechanisms in accordance with clear legal standards for judicial review.

For the national court it is rather in accordance with national standards, since – particularly in the national proceedings where the penalties for breaches of EU law are imposed on individuals – the EU standard seems to be still incomplete. There are still doubts and the need for clarification as to whether the EU standard is as imperative as downgrading the national standard by virtue of the primacy of EU law and the requirements for effectiveness and equivalence, which may lead to the European standard being lowered by virtue of equivalence and the higher national standard not being applied by virtue of effectiveness.[137] And here again, the PLC plays a crucial role in ensuring the application of the broader standard of protection, either European or national. It is a characteristic of the PLC that it is focussed on the subject matter of the offence and ensures the subjectivisation of liability.

136 Case C-1/02, *Borgmann GmbH & Co KG v. Hauptzollamt Dortmund*, EU:C:2004:202, para. 30.

137 P. M. Rodríguez, The Principle of Legal Certainty and the Limits to the Application of EU Law, *Cahiers de droit européen*, 2016, vol. 52, no. 1, p. 124.

The PLC is an umbrella principle, which means that it is not strict, and a balancing of other principles is necessary, especially of the principle of legality.[138] As the CJEU observed in *SNUPAT*, it cannot be applied in an absolute manner, but it must be applied along with the principle of legality. The question of which of these principles should prevail in each case depends on a comparison of the public interest with the private interests in question.[139]

The overarching PLC has normative refinements in the principles of the non-retroactivity of criminal law,[140] the protection of final administrative decisions[141] and *res judicata*.[142] Above all, the PLC is usually associated with the protection of legitimate expectations.[143] This is called the corollary of the PLC, where the requirements of the latter are more restrictive.[144] In this respect the principle of protecting legitimate expectations appears to be an expression which takes the form of a subjective right, of legal certainty.[145] It is devoted to the protection of individual rights and requires that rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them.[146] The common function of legitimate expectations and the PLC is to protect individuals' interests. For this reason, as far as fining procedures are concerned, the limitation periods must be fixed in advance if they are to serve their purpose; the purpose and the concern are simply ensuring legal certainty.

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138 Cases 42 and 49/59, *S.N.U.P.A.T. v. High Authority*, EU:C:1961:5.
139 Ibidem, para. 87.
140 Case 98/78, *Racke v. Hauptzollamt Mainz*, EU:C:1979:14, paras 15 and 20.
141 Case C-453/00, *Kühne and Heitz*, EU:C:2004:17, para. 24.
142 Case C-224/01, *Köbler*, EU:C:2003:513, paras 37–38.
143 Cases C-112/77, *Töpfer v. Commission*, EU:C:1978:94, para. 19 and C-264/90, *Wehrs v. Hauptzollamt,* EU:C:1992:490.
144 Case T-308/00, *Salzgitter AG*, EU:T:2004:199, para. 166.
145 J. Schwarze, *European Administrative Law*, London 1992, p. 946.
146 Case C-17/03, *VEMW and Others*, EU:C:2005:362, para. 80.

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5 The principle of the protection of legitimate expectations – still more promising than delivering?

Łukasz Prus

Introduction

The aim of this chapter is to uncover standards of guarantees offered to individuals in national procedures by the principle of legitimate expectations as a superior rule of EU law. This is a highly subjective matter. Therefore, the key issue will be examining the conditions that must be met to obtain legal protection under national procedures.

The fundamental function of legitimate expectations is to ensure the predictability of public bodies' conduct. The principles of the rule of law, legal certainty, and legitimate expectations require that individuals – mainly business owners – have stable conditions for running a business and a relatively low legal risk in doing so.[1] An individual who acts in accordance with binding legal rules, administrative acts, administrative practice or even administrative assurances, for example, concerning the policy on not imposing administrative fines, should not suffer harm for this reason. Otherwise, any economic planning would be impossible.

The protection of legitimate expectations has many functions:

- a valid tool for assessing the legality of general legal rules;
- an interpretative role;
- the irrevocability of administrative acts;
- a self-limitation of the exercise of discretion;
- a compensatory role.

Firstly, violating the principle of legitimate expectations gives rise to consequences specific to the general principles of EU administrative law. In other words, a breach of this principle is equivalent to a violation of the Treaties. Therefore, it can cause an EU act to be removed from the legal order. According to Article 263 of the TFUE, the CJEU is competent to rule on

1 J. Englisch, Commission v. Koninklijke FrieslandCampina NV – A Clear Picture of Locus Standi and Legitimate Expectations, *European State Aid Law Quarterly*, 2010, vol. 9, no. 2, p. 403.

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the annulment of EU acts, on the grounds of infringement of the Treaties or any law related to their application.[2] This last term is sufficiently broad to also encompass general principles. Thus, violating the principle of legitimate expectations is an abstractly provided reason to declare an EU act invalid. The principle of legitimate expectations may also be a criterion for the interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union in a preliminary ruling at the request of national courts (Article 267 of the TFEU). Moreover, the principle of legitimate expectation is a part of the EU legal order and is binding on domestic authorities responsible for implementing EU law. In other words, the Member States must comply with the principle of protecting legitimate expectations when they enforce EU law at the national level.[3] Therefore, a national authority is not entitled to impose a fine based on an EU act that violates the principle of legitimate expectations.

Secondly, the principle of legitimate expectations plays a crucial interpretative role. The provisions of EU acts and implementing domestic measures must be interpreted to ensure compliance with the general principles of EU law, especially the principles of legal certainty and protecting legitimate expectations. Those principles require clear, precise legislation that imposes restrictive measures and, in domestic law, involves sanctions for an infringement of those measures so that the persons concerned can unambiguously ascertain their rights and duties and can take measures accordingly. Furthermore, the protection of legitimate expectations in the case of an immediately amended law may require interim measures appropriate to the circumstances. A contrary interpretation would lead to infringements of EU law.[4]

Thirdly, protecting legitimate expectations is not limited to legislative procedures, but also plays a special role in the decision-making in cases. Individuals often plan their lives based on administrative acts. Their revocation may cause instability and damage. For this reason, certain limitations must apply to the deprivation of individual rights acquired by administrative acts.[5]

Fourthly, individuals do not rely solely on administrative decisions. Informal statements, assurances or administrative practices are equally important pieces of information based on which individuals plan and make choices.[6] This includes internal administrative measures and rules such as opinions, guidelines, statements, codes of practice, notes etc. Their role is to share data and ensure the predictable implementation and application of EU law, the cohesion of administrative practice and certain political functions.[7] Thus, internal administrative

2 P. Craig, *EU Administrative Law*, Oxford 2012, p. 251.

3 Case C-120/17, *Ministru kabinets*, EU:C:2018:638, pp. 48–49.

4 Case C-340/08, *M. and Others*, EU:C:2010:232, pp. 64–66.

5 S. Schonberg, *Legitimate Expectations in Administrative Law*, Oxford 2003, p. 64.

6 S. Schonberg, *Legitimate Expectations…*, p. 107.

7 H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union*, Oxford 2011, p. 541.

rules, such as guidelines, have a self-limiting effect on public bodies that apply EU law.

Finally, a breach of the general principle of legitimate expectations raises a duty to compensate for damages caused by the body applying or enacting EU law.[8]

Legal character

The principle of protection of legitimate expectations is a general principle that is among the most oft-invoked by claimants in a judicial review of an administration's activity.[9] However, it is complex and remains an elusive phenomenon. The Court of Justice of the European Union has consistently held that the right to rely on the principle of legitimate expectations extends to any person whom a public body applying EU rules has caused to entertain justified expectations.[10] In other words, "legitimate expectations" mean "justified expectations". Such a definition is an example of a logical error, *ignotum per ignotum*, because it offers an explanation which is harder to understand than what it is meant to explain.

Legitimate expectations result from legal traditions and constructions drawn from the experience of the Member States.[11] Framed in that way, they serve as a criterion for reviewing the legality of EU actions and interpreting

8 Case T-271/04, *Citymo v. Commission*, EU:T:2007:128, p. 108.

9 T. Tridimas, *The General Principles of EU Law*, Oxford 2006, p. 251.

10 C-217/03, *Forum 187 v. Commission*, EU:C:2005:266, p. 147.

11 The first explicit appearance of the principle of protection of legitimate expectations in the case law of European courts was in 1965 in the case *Lemmerz-Werke*, or more clearly later in the 1973 case *Westzucker*. The principle of legitimate expectations was adopted by the Court of Justice of the European Union, accepting the opinions of Advocates General from Germany, who had referred to the principle developed in domestic case law, namely *Vertrauenschutz*. The German Federal Constitutional Court developed the train of thought: "*Rule of Law – Legal Certainty – Legitimate Expectations*" (*Rechtsstaat – Rehsihereit – Vertrauenschutz*). According to this doctrine the decisive component of the rule of law is legal certainty. A citizen should be able to foresee the interference of public bodies so as to prepare for it (*ex ante* protection). In other words, public decisions must be predictable. Moreover, the individual must rely on the fact that when they comply with the law, their behaviour will be under legal protection (*ex-post* protection). In general, it means that the final decision cannot be changed. Therefore, for the individual, legal certainty is primarily the protection of legitimate expectations. Thus, *Vertrauneschutz* (legitimate expectations), which is a concretisation of *Rehsihereit* (legal certainty), elicit its foundation in the value of *Rechtsstaat* (the rule of law). See R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law*, Oxford – Portland 2000, pp. 41–42; A. Brown, *A Theory of Legitimate Expectations for Public Administration*, Oxford 2017, pp. 19 and 887; D. Miąsik, *Zasady i prawa podstawowe. System Prawa Unii Europejskiej. Tom 2* [Principles and Fundamental Rights, System of EU Law. Volume 2], Warszawa 2022, pp. 234–235; E. Schmidt-Aßmann, *Der Rechtsstaat*, in: J. Isensee, P. Kirchof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band I, Grundlagen von Staat und Ve fassung*, Heidelberg 1987, p. 1030; K. Sobota, *Das Prinzip Rechtsstaat. Verfassungs – und verwaltungsrechtliche Aspekte*, Tübingen 1997, p. 157.

EU law. Furthermore, as a general and superior principle of the EU legal order, legitimate expectations are binding on every national authority that enforces EU law. In these circumstances, it is worth examining the protection of legitimate expectations at the domestic level and whether it is as inconclusive as at the EU level.

The general principle of legal certainty and the protection of legitimate expectations are closely connected and even correlated. Legal certainty and the protection of legitimate expectations have a common justification in the need for predictability, which is inscribed in the value of the rule of law. Nevertheless, they are separate – although complementary – principles. Legal certainty means that there can be no doubt as to the content of the legal order at a specific time and place. In this case, predictability is objective, *in genere*, impersonal. Thus, it is the objective side of the rule of law.[12] It concerns the quality of the legal system and its stability, transparency and coherence of rules. In these circumstances, the protection of legitimate expectations complements legal certainty, but does not have a distinctly objective nature since it aims to protect subjective situations (protection *in concreto*). On the one hand, legal certainty is objective in nature and refers to the value of the legal order. On the other hand, the protection of legitimate expectations is subjective by nature and refers to the legal situation of an individual.[13] Thus, it is the subjective side of the rule of law.

There is also another criterion for the division of legal certainty and legitimate expectation: "the time factor".[14] Legal certainty requires that the rules in force at a given time and place ("here and now") have to be clear and precise. The protection of legitimate expectations requires that a public body will not deviate from its previous conduct in a specific case in a manner that could not have been foreseen by a prudent person.[15] Legal certainty is therefore static in nature, whereas legitimate expectations extend over a period of time and are applied for the future.

Content and scope

The general principle of protecting legitimate expectations is determined by sub-principles such as the principle of non-retroactivity, the principle of irrevocable administrative acts and the principle of self-binding public bodies through informal administrative actions and internal administrative rules.[16]

12 Cases C-346/03 and C-529/03, *G. Atzeni and Other v. Regione Autonoma della Sardegna*, EU:C:2005:256, p. 142.

13 R. Thomas, *Legitimate Expectations…*, p. 45.

14 T. Tridimas, *The General Principles…*, p. 252.

15 Case C-63/93, *Duff and Others*, EU:C:1996:51, p. 25.

16 J. Schwarze explains that "the concept of <<self-binding administrative action>> will cover all those circumstances in which the authority in question is bound by its earlier administrative practice, without it being necessary that the binding nature should result from an administra-

The starting point for the principle of non-retroactivity lies in the distinction between actual and apparent retroactivity (immediate application of the law). These two categories constitute model violations of the general principle of legitimate expectations, and they differ in the degree to which the retroactivity of new rules is admissible. The first arises when a new rule applies to acts or transactions that took place under old regulations and were completed when the new regulations were adopted.[17] Actual retroactivity is prohibited in principle and, as such, invalidates the new rule. However, there may be exceptions when the aim to be achieved by the new rule demands it and where the legitimate expectations of the person concerned are duly respected.[18]

Apparent retroactivity occurs when a new rule applies to an act or situation in progress that began under the previous general rule or even an administrative act. In its early case law, the Court recognised the concept of apparent retroactivity and thus adopted the immediate application of new laws. In other words, new rules apply immediately to the future effects of situations in progress that arise under the old law. In principle, the apparent retroactive effect of the law is permitted unless the protection of legitimate expectations overrides the EU interest, especially if the individual was relying on the old law, e.g. licenses issued under it or when the rules for buying-in in the course of intervention on the market were changed during the agricultural cycle.[19]

There is also a distinction between the retroactive effect of procedural and substantive law. If the new law does not contain intertemporal provisions, procedural rules apply to all administrative procedures pending when it enters into force, but that is not the case with substantive rules. In order to ensure compliance with the principle of legitimate expectations, substantive law only takes effect retroactively if it is clear from its content, aim and structure that such effect must be given to it.[20]

The division into penal and administrative measures is also crucial. Because the prohibition against retroactivity in penal measures is absolute, any criminal measures imposed must correspond to the sanctions provided by the law in force when the infringement was committed. Some measures imposing administrative fines are not explicit criminal measures, as in competition law, for example. However, EU administration bodies are obliged to observe the principle of the non-retroactivity of law in any proceedings that may lead to the imposition of such sanctions. Therefore, administrative measures of a penal nature must correspond to the sanctions in force when an act is committed.[21]

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tive measure adopted in relation to the addressee", J. Schwarze, *European Administrative Law…*, p. 1080.

17 T. Tridimas, *The General Principles…*, p. 266.

18 Case C-368/89, *Crispoltoni v. Fattoria Autonoma Tabacchi di Città di Castello*, EU:C:1991:307, p. 17.

19 H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law…*, pp. 185–187.

20 Case T-348/04, *SIDE v. Commission*, EU:T:2008:109, p. 53-54.

21 Case T-23/99, *LR AF 1998 v. Commission*, EU:T:2002:75, pp. 220–221.

Legitimate expectations can also arise from the conduct of public bodies applying EU law. On the one hand, a legitimate expectation of the legality of a favourable decision, once acquired, cannot be subsequently undermined. The rule is that retroactive and prospective revocation of lawful administrative acts benefiting individuals would violate legitimate expectations. Therefore, the prohibition against revoking administrative acts is determined by two conditions: the legality of the decisions and the benefits resulting from them.

On the other hand, retroactive revocation of unlawful administrative acts is generally permissible, and prospective revocation is always possible and not subject to restrictions. Retroactive revocation of an unlawful administrative act that has created subjective rights or granted other benefits is only admissible if the authority observes a reasonable time limit and protects the legitimate expectations of the beneficiaries, who are entitled to rely on the legality of the act.[22]

The above examination concerns the direct enforcement of EU law, i.e. EU administrative bodies revoking decisions. However, it must be remembered that legitimate expectations may arise where administrative bodies indirectly apply EU law. One example is the retroactive revocation of a domestic decision granting unduly paid financial aid from the EU budget. The revocation of domestic administrative acts contrary to EU law must take into account the principle of relative procedural autonomy of the Member States and the effectiveness of EU law.[23] On the one hand, unduly paid financial aid must be recovered according to national procedural law. Consequently, the protection of legitimate expectations should be examined according to domestic rules and standards. On the other hand, national law cannot prevents the full enforcement of unlawful granting of payments from the EU budget. The application of domestic law cannot undermine the effectiveness of EU law. This means that the interests of the EU must also be fully considered when applying the principle of the protection of legitimate expectations recognised by national law.[24]

According to the case law, prospective revocation of an unlawful administrative act is always permissible.[25] However, as Craig claimed, prospective revocation must be preceded by similar a test to retroactive revocation. EU courts must balance the public interest of the EU, expressed in ensuring the

22 Case T-25/04, *González y Díez, SA v. Commission*, EU:T:2007:257, p. 97.

23 J. Raitio, *The Principle*…, p. 232.

24 Case T-25/04, *González y Díez, SA v. Commission*, EU:T:2007:257, p. 39. The beneficiary is entitled to challenge the revocation if they acted in good faith as regards the conformity of the financial aid. Therefore, a beneficiary may challenge the revocation of unduly paid subsidies on the basis of national rules only if they acted in good faith and if the national court fully takes into account the EU interests, Case C-158/06, *ROM-projecten*, EU:C:2007:370, p. 31.

25 Case C-54/77, *Herpels v. Commission*, EU:C:1978:45, p. 38.

legality of the EU administration's actions, with the legitimate expectations regarding the irrevocability of administrative acts.[26]

The protection of legitimate expectations mainly applies to revoking administrative acts that confer benefits to a party. Parallel problems do not arise when withdrawing decisions that impose burdens. The annulment of decisions which adversely affect a party is favourable to that party because it will eliminate burdens previously imposed on them. Therefore, the public body may retroactively withdraw an unlawful administrative act that imposes burdens on individuals.[27] However, if an administrative act which adversely affects a party is lawful, the public body can only revoke such a decision prospectively.

The case law raised the problem of revoking administrative acts with a dual character. This concerns situations in which an unlawful decision to exempt one undertaking from public fees leads to a loss for other producers obliged to pay such fees. For example, in the past, the CJEU faced the challenge of withdrawing unlawful administrative acts which bestowed benefits on Hoogovens while imposing burdens on S.N.U.P.A.T. In such a situation, the public body has to balance the contrary interests of both parties.[28] In other words, it must be examined whether the failure to revoke an unlawful administrative act will lead to discrimination against others on the market and will violate competition rules.

Finally, the principle of self-binding administrative actions is rooted in German law, in the concept of binding public authorities by unitary administrative practice. Where the administration regularly applies certain practices, the individual has a legitimate expectation that the discretionary powers will be exercised in accordance with this practice. The CJEU also accepted this concept.[29] The phenomenon of self-binding of administrative practice in EU administrative law is linked to the issue of internal administrative rules (administrative actions in non-authoritative forms), such as guidelines or individual assurances made by public bodies. It was applied for the first time in 1966 in *Châtillon*, where the Court stated that an EU authority may deviate from its informal statement only if it respects legitimate expectations.[30]

The principle of self-binding administrative actions applies to different situations. The connective element is that these measures lack an authoritative nature. Therefore, the concept of self-binding administrative actions covers all situations in which public bodies applying EU law are bound by their previous actions that do not have an authoritative form. Legitimate expectations must also be protected in the case of changing domestic administrative practices, guidelines or assurances given by national authorities when applying EU law.

26 P. Craig, *EU Administrative Law*…, p. 566.

27 J. Raitio, *The Principle*…, p. 237.

28 J. Raitio, *The Principle*…, p. 237, P. Craig, G. della Cananea, O. Mir, J.-P. Schneider, V.M.Tunsmeyer, M. Wierzbowski, *ReNEUAL Model Rules on EU Administrative Procedures*, Oxford 2017, p. 136.

29 J. Schwarze, *European*…, p. 1079.

30 S. Schonberg, *Legitimate Expectations*…, p. 118.

In what situations does the subjective expectation deserve objective legal protection?

Given their subjective nature, it is problematic to determine when expectations are legitimate. An objective test for defining relevant general conditions for the objective protection of legitimate expectations can be derived from the case law. In order to apply the principle of legitimate expectations, a number of conditions must be met. Firstly, there must be an objective basis for legitimate expectations, that is an act or a conduct of the public body applying EU law.[31] This could be a general legal act, an individual administrative act, informal administrative action or internal administrative rules. Secondly, the person concerned must act in good faith regarding this act or conduct and must not be able to predict a change in the public body's previous conduct.[32] Therefore, if a prudent economic operator could have foreseen the adoption of a new act or conduct likely to affect their interests, they cannot plead legitimate expectations, especially in areas where common policies operate, such as agriculture or competition law.[33] Thirdly, the interests of the person concerned must prevail over the public interest. That condition is satisfied where the balancing test shows that the EU's interests do not prevail over those of the individual.[34] These three conditions must be met cumulatively.

The fundamental problem is identifying the basis for legitimate expectations.[35] Craig pointed out that different grounds for legitimate expectations require appropriate criteria for judicial review tailored to the specific case caused by a deviation from the general act, individual act, or informal assurance.[36] In each of these situations, there are special, additional conditions for protection. First, it is necessary to identify the critical problem for further consideration and then examine the specific condition of the relevant basis for legitimate expectations.

Applying the principle of legitimate expectations to fining proceedings

Where does the problem actually lie?

An individual can rely on the principle of legitimate expectations when a public body applies EU law by giving them precise assurances.[37] The CJEU ruled that a national authority may exceptionally decide not to impose an administrative fine, even if the undertaking had infringed the EU Treaties, e.g. Article 101 of

31 Case C-182/03, *Belgium v. Commission*, EU:C:2006:89, p. 368.
32 P. Craig, *EU Administrative Law*…, p. 570.
33 Hofmann, Rowe, Türk, *Administrative Law*…, p. 186.
34 Case C-182/03, *Belgium v. Commission*, EU:C:2006:89, p. 370.
35 Case C-346/03, *Atzeni and Others*, EU:C:2005:256, p. 145.
36 P. Craig, *EU Administrative Law*…, p. 553.
37 Case T-283/02, *EnBW Kernkraft v. Commission*, EU:T:2005:101, p. 89.

the TFEU. This may be in the case where the general principle of protecting legitimate expectations precludes the imposition of a fine.[38] In such cases, the administrative practice of imposing fines and the guidelines for their application are crucial for protecting legitimate expectations. Two questions arise here: Can administrative policy or practice be an objective basis for protecting legitimate expectations? Does the administrative practice concerning the level of fines create a legitimate expectation for others? To answer these questions, it is necessary to examine the specific conditions for protecting legitimate expectations in the case of self-binding public bodies by administrative practice or internal administrative rules.

For this purpose, several specific conditions must be met. Firstly, administrative assurances must be precise, specific and unconditional. They must originate from authorised and competent authorities. Secondly, a causal link is required. In other words, those assurances must arouse good faith on the part of the person concerned. Thirdly, the assurances must comply with the applicable rules.[39]

Conduct of national administrative bodies as a source of legitimate expectations

It is settled in case law that the protection of legitimate expectations is part of the EU legal order and is binding on each national authority responsible for applying EU law. It follows that national authorities are required to observe the principle of legitimate expectations when they impose fines for breaching EU regulations or domestic rules implementing directives.[40]

Legitimate expectations may be based on assurances from a body applying EU law. Assurance may be defined as explicit or implicit administrative statements of fact, law or intent, which cannot be categorised as general legal acts or individual administrative acts.[41] There are no strict rules as to the form of the assurances; they can arise from emails, guidelines, communications, explanatory notes, policy frameworks, codes of conduct or administrative practice, etc.[42] A legitimate expectation cannot rest on an official's general statements without providing specific assurances for the person concerned.

A good example of precise assurances are internal administrative rules (e.g. guidelines). In general, such administrative rules have an internal effect within the EU administrative structure and are not explicitly addressed to entities beyond this system. However, by adopting internal administrative rules and publishing them, public bodies announce how they will apply EU law to the

38 Case C-681/11, *Schenker & Co. and Others*, EU:C:2013:404, p. 40.

39 Case T-347/03, *Branco v. Commission*, EU:T:2005:265, p. 102.

40 Case C-36/21, *Sense Visuele Communicatie en Hande*, EU:C:2022:556, pp. 26–27.

41 S. Schonberg, *Legitimate Expectations…*, p. 107.

42 P. Craig, *EU Administrative...*, p. 567.

cases to which they relate. Therefore, the authorities limit the exercise of their discretion. This obligation corresponds to individuals' right to expect the body to exercise its power as described in guidelines.[43] If a public body's conduct deviates from such guidelines, it violates the principle of equal treatment and legitimate expectations.[44] If the competent body describes in published guidelines the circumstances in which a procedure will be dismissed, it imposes a limit on the exercise of its discretion. In such a case, if an undertaking acts according to the guidelines, it can expect to not be subjected to a fine.[45] A change in policy from the guidelines would require an announcement within a reasonable time to prepare for it and protect the legitimate expectations of beneficiaries who commenced transactions under the old guidelines.

Legitimate expectations may also arise in the case of a change in administrative policy, even where it is not enshrined in the form of an internal administrative rule. In *Ferriere San Carlo*, the applicant sought the annulment of a fine imposed for exceeding its production quota for steel.[46] However, before that, the Commission had generally tolerated exceeding the limits and did not impose fines on companies as long as the purpose of the sale was to reduce steel inventories.[47] "The fine imposed by the Commission, after abandoning its previous practice of tolerating deliveries in excess of quotas, had infringed the trader's legitimate expectation that the practice would be continued".[48] Therefore, prior administrative practice may give rise to a legitimate expectation that the same rules of the assessment system will be applied.[49]

In other words, the administrative practice of not imposing fines may bind public authorities applying EU law, even domestic bodies. However, self-binding authorities by administrative practice is not an absolute principle. The public body is entitled to departure from administrative practice by generally announcing it or warning undertakings individually within a reasonable time.[50] In that case, the authority must give an adequate statement of its reasons for deviating from the previous policy.

Craig argues that the Court in *Dansk Rørindustri* refused to apply the reasoning from *Ferriere San Carlo*.[51] In *Dansk Rørindustri*, the applicants claimed that they had legitimate expectations that the Commission would continue its practice regarding the method of calculating fines. In their opinion, the Commission never informed undertakings about its intention to apply the new method of calculating fines. However, in *Dansk Rørindustri*, the Court

43 J. Schwarze, *European....*, p. 1080.
44 Case T-374/04, *Germany v. Commission*, EU:T:2007:332, p. 111.
45 Case T-310/00, *MCI v. Commission*, EU:T:2004:275, p. 112.
46 Case 344/85, *Ferriere San Carlo v. Commission*, EU:C:1987:486.
47 Case 344/85, *Ferriere San Carlo v. Commission*, EU:C:1987:486, p. 9.
48 H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law…*, p. 190.
49 Case 344/85, *Ferriere San Carlo v. Commission*, EU:C:1987:486, p. 13.
50 H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law…*, p. 190.
51 P. Craig, *EU Administrative…*, p. 580.

held that the fact that the Commission had previously imposed fines of specific amounts for certain types of infringement does not mean that it cannot raise those amounts within the limits set in the relevant rules.[52] The Commission is entitled at its discretion to increase the fines imposed for an infringement of EU competition law.[53] Therefore, previous practice on calculating fines does not create any legitimate expectation of new fines, mainly because such a change was foreseeable.[54]

The question is whether the verdicts in these two cases are contradictory. The answer has to be "no". On the one hand, *Ferriere San Carlo* follows the conclusion that the administrative practice of not imposing fines can be a basis for legitimate expectations. On the other hand, in *Dansk Rørindustri* the Court held that legitimate expectations could not be based on the assumption that the Commission "will not exceed the level of fines previously imposed". In other words, in the latter case, the Court did not reject the argument that administrative practice may constitute grounds for protecting legitimate expectations, but the amount of previous fines shall not deprive the authority of its discretion in adjusting fines.

Legitimate expectations can only arise when a public body gives express assurance. The assurance must be unconditional, precise and given by an authorised and reliable public body. This latter requirement is very strictly observed. The conduct of those concerned cannot be a source of legitimate expectations;[55] only a competent body is entitled to give such assurances. In the case of a collegial body, an assurance given by a single official cannot create a legitimate expectation.[56] Moreover, assurances given by an administrative body of a Member State cannot constitute a basis for legitimate expectations regarding the actions of the EU authorities.[57] Equally, guidelines published by an EU body are not binding at the national level, as they have a self-binding effect on the body that issued them. Furthermore, legal advice given by a lawyer cannot be grounds for protecting legitimate expectations of an undertaking that it will not be subject to a fine.[58]

Good faith

Precise, specific and unconditional assurance typically creates good faith on the part of the person relying on it. However, this presumption may be rebutted

52 Case C-189/02, *Dansk Rørindustri and Others v. Commission*, EU:C:2005:408, p. 169.
53 Case C-189/02, *Dansk Rørindustri and Others v. Commission*, EU:C:2005:408, p. 152.
54 P. Craig, *EU Administrative Law*, p. 580.
55 H.C.H. Hofmann, G.C. Rowe, A.H. Türk, *Administrative Law…*, p. 188.
56 Joined Cases T-236/01, T-239/01, T-244/01–T-246/01, T-251/01, and T-252/01, *Tokai Carbon Co. Ltd. And Others*, EU:T:2004:118, pp. 152–153.
57 Case T-109/01 *Fleuren Compost v. Commission*, EU:T:2004:4, p. 144.
58 Case C-681/11 *Schenker & Co. and Others*, EU:C:2013:404, p. 41.

in three circumstances.[59] Firstly, the expectation is not legitimate if the individual did not take action while relying on the assurances. Therefore, if the undertaking itself doubted assurance regarding, for example, the inclusion of penalties imposed by another body, there is no legitimate expectation.[60] Secondly, an expectation that rests on assurances obtained by fraud or deception does not deserve legal protection. The protection of legitimate expectations is also excluded where the company has manifestly breached the rules in force.[61] Thirdly, an assurance is not binding on the body applying EU law if a change has occurred that could have been foreseen. Thus, an individual cannot legitimately claim protection of expectations if they had been warned that the assurances would not be respected. A prudent economic operator must verify the content of official journals, legislative proposals, communications or even announcements published in industry journals and must be familiar with trends in trade policy.[62]

Compliance with EU Law and the balancing test

Another condition for the protection of legitimate expectations arising from assurances is their legality. A person cannot claim the protection of legitimate expectations under EU or national law in order to gain an advantage, which is contrary to EU law because it would question the primacy, effectiveness and uniform application of EU law in all Member States and distort competition in the internal market.[63] In other words, only assurances consistent with EU law can form the basis for legitimate expectations. This primarily concerns EU rules, which create a duty that, when it is violated, gives rise to a fine by a national authority.

However, there is no rational reason for completely excluding the protection of legitimate expectations that result from unlawful assurances, guidelines or administrative practice. This is a comparable problem to the withdrawal of unlawful administrative acts. In both situations, there is the same conflict between the public interest of the EU and the individual's interest. When it comes to revoking an unlawful decision, EU courts must balance those contrary interests but in case law we can not find similar standards concerns administrative practice.[64] The solution to this problem may be protection of legitimate expectations under national law. EU law does not preclude an aggrieved party from bringing an action before the national court for compensation of damages caused by the domestic authorities responsible for the irregularities.

59 S. Schonberg, *Legitimate Expectations…*, p. 125.

60 Joined Cases T-236/01, T-239/01, T-244/01–T-246/01, T-251/01, and T-252/01, *Tokai Carbon Co. Ltd. And Others*, EU:T:2004:118, p. 154.

61 P. Craig, *EU Administrative...,* p. 572.

62 S. Schonberg, *Legitimate Expectations…*, p. 127.

63 Case C-36/21, *Sense Visuele Communicatie en Handel*, EU:C:2022:556, pp. 29–30.

64 P. Craig, *EU Administrative...*, p. 588.

The judicial action could be based on a claim that legitimate expectations recognised by national law were breached. In such a case, the national court should take into account legality in ensuring that EU rules are correctly applied and individual interests that were harmed by reliance on unlawful domestic administrative practice.[65] In other words, national the protection of legitimate expectations cannot undermine EU interests or breach the primacy of EU law. This issue is studied in greater depth in the next section.

Consequences of non-observance

An administrative act or conduct that violates legitimate expectations is contrary to EU or domestic law.[66] The test for a breach of legitimate expectations is substantive, not formal in nature. In other words, the crucial aspect is not the impact of the procedural violation on the outcome of the case, but whether there was an act or conduct of a public body that created a basis on which individuals acted in good faith. Another aspect that has to be taken into consideration is the outcome of the balancing test of the interests of the EU and the person concerned.

If domestic authorities breach legitimate expectations, the national public bodies, as an exception, will not impose administrative fines.[67] In specific cases, legitimate expectations enshrined in guidelines or administrative practice, e.g. renouncement of inflicting sanction, may preclude the imposition of fines. However, the limit of protecting legitimate expectations in fining administrative procedures is their compliance with EU law.

Nevertheless, if assurances are given by a national authority that are contrary to EU law and violate legitimate expectations under domestic law, compensation of losses will be permissible under national law, taking complete account of the EU's interest. This does not mean that if, according to EU law, the conditions of protecting legitimate expectations are not met, the national principle of protecting legitimate expectations can substitute for EU law. In other words, assurances, guidelines or practices of national authorities which infringe EU law and establish the basis for a fine do not exempt the person concerned from liability. In such cases, the aggrieved party always has the chance to seek compensation before a domestic court by claiming protection of legitimate expectations under national law.[68] The CJEU recognises action for damages based only on national law that may arise from unlawful assurances given by a domestic authority.[69] However, such compensation must

65 Case C-36/21, *Sense Visuele Communicatie en Handel*, EU:C:2022:556, p. 36.

66 Case C-205/82, *Deutsche Milchkontor GmbH*, EU:C:1983:233, p. 30.

67 Case C-681/11, *Schenker & Co. and Others*, EU:C:2013:404, p. 40.

68 Opinion of Advocate General Median in Case C-36/21, *Sense Visuele Communicatie en Handel*, EU:C:2022:134, pp. 23–35; Opinion of Advocate General Tizzano in Case C-80/99, *Flemmer and Others*, EU:C:2001:57, p. 53.

69 Case C-187/91, *Belgian State v. Belovo*, EU:C:1992:333, p. 20.

not be contrary to the EU's interests. The compensation obtained according to national law cannot be paid from the EU budget. Furthermore, it must not give rise to distortions of competition between Member States.[70] The compensation would be covered by the Member State. Such a solution could improve the system of shared administration between Member States and EU authorities and could ensure more effective enforcement of EU rules.[71] Such indemnity may only cover losses caused by false assurances given by domestic public bodies. Compensation for a harmful event caused by a national authority does not constitute an advantage and is not contrary to competition law.[72]

Conclusions

It is problematic to provide an exhaustive description of the principle of legitimate expectations, taking into account its subjective nature. The case law frames the conditions for protecting legitimate expectations at a very high level. Thus, it is difficult to successfully claim the infringement of this principle before a national court. The key is to objectify the legal protection of expectations. In other words, subjective expectations deserve objective legal protection if they meet relevant conditions. The general principle of legitimate expectations applies when a public body enforcing EU law departs from its previous conduct unless the public interest outweighs the individual interest.

Despite the restrictive conditions for the protection of legitimate expectations, this claim could play an important role in fining procedures. The domestic public body may not even impose administrative fines in the case of a breach of legitimate expectations. However, it may not concern the specific amounts of previously imposed fines or their calculation methods. Economic entities have no grounds for protecting legitimate expectations in maintaining an existing situation that may change within the scope of the discretionary power to determine the amounts of fines and their calculation methods.

If a national authority assures that it will not impose a fine in certain circumstances and then departs from these guarantees, an individual may raise the claim based on legitimate expectations. However, certain conditions must be met cumulatively. First, the administrative assurances must be precise and given by a competent authority. In most cases, such a basis for legitimate expectations may be administrative practice or guidelines regarding the non-imposition of fines in certain circumstances. It refers to the assurances made by a competent national public body. Second, the individual must act in good

70 Case C-36/21, *Sense Visuele Communicatie en Handel*, EU:C:2022:556, p. 40.

71 Case C-36/21, *Sense Visuele Communicatie en Handel*, EU:C:2022:556, pp. 36–40.

72 Opinion of Advocate General Median in Case C-36/21, *Sense Visuele Communicatie en Handel*, EU:C:2022:134, p. 43.

faith. However, good faith does not exist if the individual has not acted on the assurances, if promises were obtained through fraud or deception or if the change was foreseeable. Third, legitimate expectations deserve objective legal protection if the administration's assurances are lawful. In other words, expectations are generally not legitimate if they result from assurances contrary to EU law. However, the illegality of the individual representations made by domestic authority does not entirely exclude the legal protection of the individual. In such a situation, an action for damages is admissible before a national court for damage caused by a national authority which, in implementing EU law, misled an individual with its assurances. In such a case, the domestic court must consider the EU interest when applying the principle of protection of legitimate expectations recognised by national law. Thus, the CJEU allows compensation for loss caused by reliance on administrative assurances rather than imposing procedural or substantive limitations on discretionary power to impose fines. This new concept of compensating harms confirms the role of legitimate expectations as a standard of protection for individuals.

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6 The principles of equality and non-discrimination in fining proceedings

Monika Domańska

Introduction

This chapter is devoted to the impact of the principles of equality and non-discrimination on the national fining proceedings. As a general principle of EU law and a fundamental right, equality essentially requires that comparable situations not be treated differently and that different situations not be treated the same. Applying this rule suggests the need for a degree of equal treatment of persons.[1] When applied, the limitations of the principle of equality on the discretion of the fining authorities must be discussed with regard to the remedies used and the magnitude of the fines imposed. The principle of non-discrimination prohibits less favourable treatment between individuals or groups of individuals who are in comparable situations simply because of a particular characteristic, such as their nationality, sex, race, religion, disability, age or other legally relevant characteristics.[2]

The principle of non-discrimination and the scope of protection it provides do not raise serious issues despite the lack of direct CJEU jurisprudence over national fining proceedings. Breaches of this principle by a national legislature or executive can be easily established by the individuals who are fined and remedied by the principle of primacy.[3] On the other hand, the application of the principle of equal treatment in fining proceedings, at both the EU and the national levels,

1 Strictly formal equality can be called non-discrimination. Etymologically, non-discrimination means the prohibition of differentiating between objects, of distinguishing them based on their distinctive features. Discrimination means any distinction, exclusion, limitation or preference based on a particular feature – A. Moroșteș, N.M. Stoicu, Principle of Non-Discrimination and Equal Treatment, *Journal of Legal Studies*, 2021, vol. 28, no. 42, p. 205.

2 It should be noted that discrimination may also occur when two or more characteristics affect a given entity (so-called multiple discrimination). See M. Domańska, *Zakaz dyskrymiacji ze wzgędu na więcej niż jedno zabronione kryterium* [Prohibition of Discrimination on the Basis of More Than One Prohibited Criterium], Warszawa 2019, pp. 15–433.

3 Case C-43/95, *Data Delecta Aktiebolag and Ronny Forsberg v. MSL Dynamics Ltd.*, EU:C:1996:357; Case 293/89 *Gravier v. City of Liège*, EU:C:1985:69; Joined Cases C-92 and C-326/92, *Phil Collins*, EU:C:1993:847; Case C-1/93 *Halliburton Services BV v. Staatssecretaris van Financiën*, EU:C:1994:127. See also Opinion of Mr Advocate General Tesauro in Case C-63/89, *Les Assurances du Crédit SA and Compagnie Belge d'Assurance Crédit*

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raises several issues requiring further examination. It remains to be validated whether we can speak of a right to equal fines in comparison to other parties in the same fining proceedings, or the right to equal fining treatment in the course of different fining proceedings conducted by the same national authority against different individuals for the same type of infringements. These problems will be analysed through the lens of the European standard developed by the European Commission (EC) in proceedings which impose penalties on companies violating competition law. This approach is justified by the lack of direct CJEU jurisprudence concerning this principle and national fining proceedings.[4] It can be assumed, just as happened with the principle of legitimate expectations, that should a national case concerning the principle of equal treatment arise before the CJEU, the Court will be willing to interpret this principle with the use of the jurisprudence concerning its application in competition proceedings before the EC.

Legal character

The general principles of EU law may fulfil the following functions: 1) provide a constitutional model for the interpretation of the law in order to increase the coherence and consistency of EU law; 2) provide a mechanism for filling gaps in the law; 3) provide a basis for reviewing the conformity of the law; and 4) provide a basis for claims for damages. These mechanisms are actively used to build the unique character of the EU legal order.[5]

The above-mentioned nature of the general principles and their functions does not create an exception to the general principle of equality. The overriding function of this principle is regulatory: in law and economics, it ensures the functioning of the internal market and prevents both state entities and private entities from interfering with free movement. In administrative law, it prevents public authorities of the Member States and the EU from making arbitrary decisions. As an unwritten principle, it has been recognised in the

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SA v. Council of the European Communities and Commission of the European Communities, EU:C:1991:25:

> "It should be pointed out that the principle of equal treatment is fundamental not only because it is a cornerstone of contemporary legal systems but also for a more specific reason: Community legislation chiefly concerns economic situations and activities. If, in this field, different rules are laid down for similar situations, the result is not merely inequality before the law, but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the Common Market".

4 Even the case of C-113/19 *Luxavation SA*, EU:C:2020:228, where the CJEU ruled in para 39 that allowing a national court to vary the amount of the penalty imposed (directly and strictly regulated by EU law) on the operators who failed to fulfil their obligation to surrender emission allowances would be contrary to the principle of equality as it would result in differentiated treatment of undertakings being in the objectively same situation (determined by the failure to comply with an obligation resulting from EU law and implementing legislation), concerns the fining scheme provided expressly and regulated in great detail in a directive.

5 J. Wouters, Conclusions: The Role of General Principles in a Multi-layered Legal Setting, in: M. Andenas and others (eds.), *General Principles and the Coherence of International Law*, Leiden 2019, p. 195.

case law of the CJEU on the basis of Article 119 of the Treaty establishing the European Economic Community,[6] also confirmed by the common agricultural policy[7] and treated as a special expression of the general principle of equality. The CJEU's "recognition" of the general principle translates into its application being extended across the entire system of EU law. It is binding for both EU institutions and Member States. The EC is also bound by this principle, and actions taken by it within its competences cannot violate it. Thus, proceedings to impose fines on entities which violate competition law should comply with the principle of equality. This means that in fining proceedings, the provisions applied should be interpreted in such a way as to not violate the principle of equality or, where necessary, so that the principle of equality constitutes a norm filling a regulatory gap. Furthermore, the EC should consider that the law it applies must comply with the principle of equality, i.e. it cannot treat comparable situations (entities) differently. However, if such a situation occurs, the EC is obliged to ensure the effectiveness of the principle of equality.

It should be noted, however, that the review of compliance with the general principles may differ depending on whether it is applied to the actions of EU institutions or to Member States. The CJEU shows greater tolerance for the legislative competences or regulatory freedom of EU institutions than for the Member States' obligation to implement EU regulations.[8] In its case law it emphasises the importance of the EC's wide margin of discretion and the need to respect this discretion, even during judicial review of the course of proceedings before the EC. It can be assumed that the EC enjoys quasi-immunity in the scope of judicial review, firstly, because not all the decisions of the EC are appealed against – which is why there is no possibility of conducting such a review – and secondly, due to the wide scope of competences in terms of competition market regulation, the EC's actions to ensure the effectiveness of the principle of equality are questioned by the CJEU when there is a grossly disproportionate treatment of similar situations (entities) (which is discussed in more detail in the following chapters).

The EC's proceedings against undertakings for infringements of the competition rules can last as long as necessary to resolve any doubts, make the necessary findings and impose a penalty. While the EC retains a wide margin of freedom as to which cases to decide, with what consequences and on which undertakings to impose specific obligations, it cannot, in the same proceedings, enjoy the same "freedom" in relation to the principle of equality. This principle limits the regulatory choices that an administrative body can make. This means that authorities must 1) justify their actions and 2) not take any

6 Cases 117/76 and 16/77, *Albert Ruckdeschel*, EU:C:1977:160.

7 Cases 201 and 202/85, *Klensch*, EU:C:1986:439.

8 G. Moore, The Principle of Equal Treatment: From Market Unifier to Fundamental Right? in: P. Craig, G. de Búrca (eds.), *The Evolution of EU Law*, Oxford 1999, p. 535.

arbitrary action. In this sense, the principle of equality interacts with other principles of EU law, for example, the principle of legitimate expectations and the principle of proportionality.

The obligation of the EC to respect the principle of equality in fining proceedings has been expressly confirmed in the case law of the EU courts. According to the established case law of the Court of Justice and the Court of First Instance, when imposing penalties, the EC "may not infringe the principle of equal treatment, i.e. the general principle of Community law, i.e. allow for a situation […] where comparable situations are treated differently or different situations are treated in the same way, unless such a difference is objectively justified".[9] Such a position/approach should be considered obviously justified, because when examining the scope of the margin of freedom granted to the EC in the exercise of competition law, one cannot dissociate oneself from the analysis of the factual situation of each of the penalised entities. This, in turn, automatically entails considerations as to whether similar entities are treated similarly or differently in this respect.

The case law of the CJEU shows that the CJEU is more willing to recognise the existence of new general principles of EU law when it can find their concrete anchoring in the constitutional framework of the EU, such as the Charter of Fundamental Rights of the European Union (CFR). The principle of equality is not an exception. Equality as a principle of Article 20 of the CFR (in accordance with the Explanations related to the CFR), which must be taken into account in all EU actions, has a very broad horizontal application which must be applied to all EU legislation. Since the implementation of this principle requires the establishment of specific rights or obligations by the EU or the national legislature, such standards that affect the regulation of the legal situation of natural or legal persons (whether in the substantive or procedural sphere) are assessed through the prism of equality before the law, i.e. the fundamental right contained in Article 20 of the CFR (general equality before the law[10]). In this context, compliance with the principle of equality of Article 20 of the CFR is assessed by the competent authorities, taking into account the guarantees in Article 47 of the CFR. Thus, the EC's fining competences should be analysed in relation to ensuring compliance – in terms of decentralisation of the implementation of treaty provisions – with the standards resulting from the principle of a fair trial (Article 47 of the CFR). This principle, like others contained in the CFR and confirmed by the case law of the EU courts, must be applied at the stage of proceedings before the EC and – if necessary – verified before the EU courts.[11] Thus, the principles contained

9 Case C-411/15 P, *Timab Industries*, EU:C:2017:11.

10 Case C-3/13, *Baltic Agro AS*, EU:C:2018:465.

11 Case T-194/13, *United Parcel Service v. Commission*, EU:T:2017:144. It was assumed that "the UPS case can be seen both as marking the central role of defence rights within the general EU principles and as confirming their applicability to merger proceedings in a man-

in the CFR set the appropriate standard for equal treatment of entities in fining proceedings before the EC.

This conclusion is also confirmed by the analysis of the provisions of EU acts that define the scope of competences for national authorities conducting proceedings to impose penalties on undertakings for infringements of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU). In Directive 2019/1, which aims to empower the competition authorities of Member States to enforce the law more effectively and to ensure the proper functioning of the internal market,[12] Article 3 expressly states that proceedings concerning such infringements and the exercise of powers by national competition authorities must comply with the general principles of EU law and the CFR. While this provision does not introduce anything new in the domain of binding force of general principles of law and the CFR in national fining proceedings, it simply underlines the applicable standard of protection of entities resulting from the principle of equal treatment and the prohibition of discrimination in the sphere of fining proceedings conducted by the national authority.

It should be noted that the principle of equal treatment is usually applied in conjunction with the principle of non-discrimination, as emphasised by the practice of referring simultaneously to Articles 20 and 21 of the CFR as the provisions constituting its basis.[13] In older judgments of the CJEU, the principles of equal treatment and of non-discrimination were considered to be identical.[14] In the European legal system, the fight against discrimination has long been one of the leading policies in the area of law-making, which is still gaining in importance. The prohibition of discrimination finds its normative anchor in Article 2 of the Treaty on European Union (TEU), indicating

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ner equal to the standards of protection applicable in antitrust cases". In Case C-616/13 P, *PROAS SA v. Commission*, EU:T:2013:452, the CJ ruled that

> since the proceedings lasted almost 5 years and 9 months, with a very long period of inactivity on the part of the Court itself (4 years and 2 months), which could not be justified 'by the nature or complexity of the case or its context', the applicant's rights under Article 47 of the CFR were violated.

12 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Text with EEA relevance), OJ L 11, 14/01/2019, pp. 3–33 (hereinafter: "Directive 2019/1").

13 Case C-195/12, *IBV & Cie*, EU:C:2013:598; Case C-406/15, *Milkova*, EU:C:2017:198. See also D. Miąsik, *Zasady i Prawa Podstawowe, System Prawa Unii Europejskiej. Tom 2* [Principles and Fundamental Rights, the European Union Legal System. Volume 2], Warszawa 2022, pp. 391–393.

14 Case C-344/04, *International Air Transport Association and Others*, EU:C:2006:10; Case C-248/04, *Koninklijke Coöperatie Cosun UA v. Minister van Landbouw, Natuur en Voedselkwaliteit*, EU:C:2006:666; Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, EU:C:2007:261.

non-discrimination as one of the values common to the Member States of the European Union.[15]

Under Article 21(1) of the CFR, any discrimination based in particular on gender, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation is prohibited. In turn, under Article 21(2) of the CFR, within the scope of application of the Treaties and without prejudice to their specific provisions, any discrimination on grounds of nationality is prohibited.

Under Article 21(2) of the CFR, the prohibition of discrimination on grounds of nationality is a fundamental right exercised on the principles arising from the TFEU. It is most often referred to as an element of EU policy in the scope of the application of the Treaties in relation to nationality. In connection with the fact that discrimination on grounds of nationality is treated separately in EU law and differently from discrimination on other grounds, this is a sign that it also acts in a specific range. The prohibition of such discrimination is an essential element of the structure of EU freedoms and at the same time a fundamental right that extends not only to the economic activity of entities, but also to other spheres of life. The application of Article 21(2) of the CFR is limited in that it cannot be applied to situations covered by the prohibition of discrimination on grounds of nationality by other provisions of the Treaty. In the case of fining proceedings initiated by the EC, there is no such conflict. Therefore, if the principle of non-discrimination on grounds of nationality is infringed upon by the EC, then entities may raise the protection of their right from Article 21(2) of the CFR. These entities are persons belonging to a Member State, i.e. legal persons and other organisational units as well as natural persons, while the addressees of this obligation are the EU and the Member States, and therefore also their bodies exercising authority over these entities. The situation is different when it comes to national fining proceedings, where the fined individual is established in another Member State and the national law (direct discrimination) or the fining practice of national authorities (indirect discrimination) targets "foreign" companies or individuals.

The main structural element of the existing discrimination is treating a given entity less favourably than the way an entity of a different nationality in a comparable or similar situation is, was or will be treated. Such a situation may follow one of two patterns: either the bodies imposing penalties treat foreign

15 As Armin von Bogdandy pointed out, the values of Article 2 of the TEU should be understood as legal norms and fundamental principles, since they were agreed under the procedure of Article 48 of the TEU, they produce legal effects (Articles 3(1), 7 and 49 of the TEU and Articles 258 and 259 of the TFEU) and they have a superior and constitutive character in the EU legal order – A. von Bogdandy, Podstawowe zasady prawa UE – teoria i doktryna (cz. I) [Fundamental Principles of EU Law – Theory and Doctrine (Part I)], *Europejski Przegląd Sądowy*, 2009, vol. 13, no. 8, p. 10.

entities more favourably than domestic entities or quite the opposite. In the case of the EC, the relationship between these entities should be established within the framework of proceedings against entities from different Member States. Such different treatment may involve discrimination even when the decision is taken to initiate proceedings against entities from other Member States, in the context of the amount of the penalty imposed or a different approach to conducting proceedings with given entities – only because these entities have different nationality.

The allegation of discrimination on grounds of nationality may be constructed at various stages of the ongoing fining procedure, may be the basis for an appeal against such a decision and, as a fundamental right, may constitute an individual, separately formulated allegation of such an appeal. Additionally, it should also be noted that the prohibition contained in the provision in question applies to "all" discrimination on grounds of nationality, i.e. this provision also prohibits not only direct discrimination, but also indirect discrimination.

In determining the occurrence of indirect discrimination, three circumstances are important: 1) an apparently neutral provision, criterion or practice exists; 2) the application of such apparently neutral provisions, criteria or practices leads to a particularly unfavourable position for the entities concerned; and 3) there is no rational justification for such treatment. The assessment of whether there are apparently neutral provisions, criteria or practices in a given case should be carried out in isolation from the criteria set out *expressis verbis* and prohibited by the legal order and should rather assess the effects and consequences of applying these instruments to entities. Thus, in the context of fining proceedings before the EC, indirect discrimination may occur through the EC's application of a specific practice in the conduct of a case, which will result in the unfavourable treatment of entities from a specific Member State. In other words, such legal requirements (practices) should be considered indirectly discriminatory if they – despite being applied regardless of nationality – primarily or to a large extent affect entities from a given Member State, as should requirements applied without distinction which can be more easily met by entities from certain other Member States, or such requirements that may act to the detriment of some entities.[16]

Establishing comparison groups in order to determine which group is in a less favourable position (and whether for certain) is generally carried out using statistical methods. This is particularly helpful when it is not obvious that the application of an apparently neutral provision or practice has led to a particular disadvantage for a given group. In the case of proceedings conducted by the EC, making such findings and demonstrating the proportion of adverse effects on a specific group of entities from a given Member State may be difficult because the EC's decisions are not always appealed against and, currently,

16 In the context of migrant workers, see also Case C-124/99, *Carl Borawitz v. Landesversicherungsanstalt Westfalen*, EU:C:2000:485.

there is no sufficiently wide range of comparison groups. Thus, if it were possible to make correct comparative findings, it would be relatively easy to determine whether there is direct or indirect discrimination in fining proceedings and on which criteria entities are unjustifiably differentiated.

The examination of the content and scope of application of the national law imposing fines has another extremely important effect, which was emphasised in *Placanica*.[17] It follows from this judgment that national provisions providing for the imposition of sanctions on entities may not restrict the fundamental rights and freedoms guaranteed by EU law, and that it should be understood as inadmissible to impose sanctions on an entity citing national provisions based on a discriminatory criterion. That statement was reiterated in Case C-35/20 ("*A*"),[18] where the CJEU recalled that national criminal legislation must not lead to discrimination against persons to whom EU law grants the right to equal treatment, nor may it restrict fundamental rights guaranteed by the EU legal order.

Equality as an administrative principle in European fining proceedings and its implications for national fining proceedings

It should be noted that the application of the principle of equality is conditioned by the use of objective justification. The European institutions are given wide discretionary powers in order to ensure the proper functioning of the internal market, including competition law. That is why the predominant objective of market integration permits different treatment between the various operators. It may be safely argued that the essential elements of the procedure before the EC enjoy some immunity from review in the light of the general principle of equality, but it is analysed in terms of compliance with equality as an administrative principle governing proceedings.

The Commission's Guidelines as an instrument for the administration of proceedings

An analysis of the topic may not omit the aspect of non-prescriptive sources of directives associated with fining procedures and the severity of fines. Aside from the area which belongs to adjudicating practice (which will be widely discussed below), these include Guidelines, which influence the policy of applying the law regarding fines. The EC considers normative presumptions as well as the relevant case law of the EC and EU courts when drafting such guidelines. The document specifies grounds and indicates presumptions which shall guide the EC when it considers the severity of a financial penalty. In these

17 Cases C-338/04, C-359/04 and C-360/04, *Placanica*, EU:C:2007:133.
18 Case C-35/20, *A*, EU:C:2021:813.

Guidelines, the EC indicates for what reasons it considers this or another circumstance of the violation and their consequences for the severity of a fine.

Therefore, guidelines are a form of self-limitation of discretionary freedom of the EC, but they also contain quite flexible solutions whose framework allows the EC to maintain a significant degree of freedom.[19] Guidelines may not be considered legal norms to be observed in each case, but should be considered rules of procedure that guide the practice of the authority and from which it cannot deviate in a specific case without justification. Otherwise, there is a risk of infringing the principles of certainty of law and equal treatment of entities.

As the General Court highlighted in the judgment in *Fluorsid and Minmet v. Commission*,[20] "[g]uidelines are an instrument designed to clarify, in compliance with superior rules of law, the criteria that the Commission intends applying when exercising the discretion conferred on it by Article 23(2) of Regulation No 1/2003 for the purpose of setting fines".[21] The Guidelines therefore do not constitute the legal basis of a decision imposing a fine – which is based on Regulation 1/2003 – but determine, generally and abstractly, the method which the EC has bound itself to use in setting the amount of fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings.[22] The CJEU also acknowledged that in setting the amount of fines, the EC is bound to comply with the approach of the 2006 Guidelines, in order to respect the principle of equal treatment and legitimate expectations.[23] However, divergence from this methodology is permitted where it is considered necessary in view of "the particularities of a given case or the need to achieve deterrence".[24]

In the 2006 Guidelines there are no provisions which would establish the principles that the EC should heed while striving to ensure that the principle of equality is respected. The equal treatment of entities has been completely exempted from the indications listed in the guidelines, even though the methodology for the EC's conduct has been repeatedly established for cases where

19 Case T-851/14, *Slovak Telkom v. Commission*, EU:T:2018:929.

20 Case T-404/08, *Fluorsid and Minmet v. Commission*, EU:T:2013:321.

21 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (Text with EEA relevance) (OJ 01 September 2006 C 210/2; hereinafter: "Guidelines"). See also Communication from the EC – Guidance on the EC's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24 February 2009) and EC notice on immunity from fines and reduction of fines in cartel cases (OJ EU 08 December 2006 C 298/17).

22 See also Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich et al. v. Commission*, EU:T:2006:396; Case C-397/03 P, *Archer Daniels Midland and Archer Daniels Midland Ingredients v. Commission*, EU:C:2006:328.

23 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-312/02 P, *Dansk Rørindustri and Others v. Commission*, EU:C:2005:408, para. 211.

24 Admitted in Case C-194/14 P, *Act-Treuhand*, EU:C:2015:717, paras 65–67.

there are multiple undertakings at the same time, or where the severity of a fine should be estimated.

Respecting the principle of equality was also not a topic of the Guidelines on priorities from 2009, nor in the EC notice on immunity from fines and reduction of fines in cartel cases. In the context of the latter act, it should be mentioned that in general it refers to cases when it should be recognised that a given entity – due to special circumstances – should be treated differently from other entities, and more specifically that it deserves better treatment. Such treatment is justified when at least one of the entities participating in a cartel collaborates with the EC's investigation against secret cartels which influence competition in a given market. Aside from establishing what form of collaboration may justify decreasing the fine foreseen for a given entity, there is no relevant information which would indicate that the EC must consider rules governing fair treatment of entities.

EU law stipulates that the undertaking which infringed the law may incur lower punishment for its collaboration with the authority. Instruments that serve the purpose include the programme of mitigating fines (leniency)[25] and voluntary submission to a fine (settlements).[26] The authority's application of these instruments may lead to remission or decrease of the financial penalty imposed on the undertaking. It should also be highlighted that the undertaking may obtain a decision that does not find an infringement of the law. Under this so-called commitment decision,[27] there is only the substantiation of an infringement because the authority accepts the undertaking's commitment to end the infringement or remediate its anti-competitive effects.

These instruments of rewarding undertakings for collaborating with the authority directly affect the circumstances of a given entity with respect to other entities in the context of the assessment of their treatment. Through the use of these options, the entity is placed beyond the "similar circumstances" in which the other parties to the proceedings stand. Such a broad negotiating model of the application of law followed by mitigation or remission of a fine, to a significant degree, impedes the observance of fair treatment of entities. The broad margin of the legal framework established for collaboration between undertakings and authorities, aimed at rewarding the companies for such collaboration, makes such entities stand out from other entities and effectively privileges them with a different treatment. However, it should be noted

25 The legal basis is Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the EC pursuant to Articles 81 and 82 of the EC Treaty (OJ EU 2004 L 123/18; hereinafter: "Regulation 773/2004").

26 Article 10a of Regulation 773/2004; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases (OJ EU 2008 C 167/01).

27 Article 9 of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ EU 2003 L 001/1).

that the policy of the EC concentrates on preventing infringement of such provisions, and thus the instruments aiming to "appreciate" that the entities which admitted infringements and started to collaborate with the EC are by all accounts justified.

An analysis of the topic justifies the view that the EC has space for broadly (exceeding the usual framework of conduct) rewarding undertakings for collaboration with the authority that leads to faster resolution of the proceedings. This may raise the question of the effectiveness of observing established rules and respecting the principle of equal treatment of entities. Nevertheless, the EC tries to justify their practice in the Guidelines, highlighting in Article 29 that an undertaking may collaborate beyond the scope of the leniency procedure and its legal obligations, which – from the EC's perspective – is a mitigating circumstance for the undertaking. One example would be if an undertaking presents evidence of a longer duration of the infringement, in which case the EC may lower the fine in order not to punish the undertaking for the infringement that the EC would not have been able to prove without the collaboration. It should also be noted that item 37 of the Guidelines allows the EC to abandon the methodology of conduct established in the Guidelines when, for example, it is justified by the special circumstances of the case. Such a broad margin of discretionary powers basically precludes the possibility of controlling the equal treatment of entities. It is difficult to find transparency and predictability in the rules which the EC may trigger. It even seems that the undertakings that decide to collaborate with an authority do not have full clarity as to what results such collaboration might bring (such as lowering the sanction). At the same time, this kind of decision causes the undertaking to resign from a court review decision, leaving the rules adopted by the EC in the proceedings unverified.[28] It can be assumed that an entity's recourse to the above specific procedures for cooperation with the EC will lead to a significant reduction in the ability to determine, in the context of whether both the ultimate fine and the entire procedure respected the rights of those entities, including the right to equal treatment.

Similarity of entities – contextual analysis

The scope of (non)similarity of entities, which constitutes the foundation of the (un)equal treatment of entities, requires that the appropriate facts be ascertained by applying economic theories. The mechanism must combine legal and economic analysis and must fulfil requirements characteristic of the sphere of law in question. The "similarity" is in economic and commercial terms. Therefore, carrying out a proper comparison of entities requires a contextual analysis which takes account of groups of coexisting factors characteristic of

28 See e.g. EC Case AT.40181, *PHILIPS*; EC Case AT.40469, *DENON & MARANTZ*; EC Case AT.40182, *PIONEER*.

the given entity. All these factors, in the appropriate context, delineate the extent of the prohibited differentiation.

Carrying out a test that determines whether comparable situations are treated in a similar or different manner can be best visualised by showing an example of an assessment for entities participating in a cartel. The sphere of how the degree of freedom of the EC is limited by the principle of equality stands out clearly in such a configuration of similar entities in a similar situation. In *Alliance One*,[29] the EC decided to hold some of the dominant companies jointly accountable for the participation of their subsidiary companies in a cartel that set the prices of raw tobacco. However, the EC did not assume that owning (almost) 100% of the shares of a subsidiary company means that the dominant company could be held accountable for the actions of its subsidiary. Instead, the EC applied a so-called "dual legal basis" approach, as part of which it also verified whether there was evidence proving factual control of the dominant company over the subsidiary company. As a result of the proceedings, the EC did not hold several dominant companies accountable in such a manner, with the exception of Transcontinental Leaf Tobacco Corp. Ltd. That company was held accountable for the conduct of its subsidiary only because of the fact that it owned almost all the shares in the subsidiary company.

The General Court ruled, and the Court of Justice confirmed, that the decision infringed the principle of equality. While the EC had discretion to decide which businesses to include in its decision by virtue of Article 7 of Regulation 1/2003, it was also obliged to conduct its assessment on equal terms for all parties involved in the cartel, unless it determined that the businesses were not in comparable situations. The above-mentioned conclusions of the courts are undeniably correct. The EC infringed the principle of equal treatment by carrying out a test of equality of the entities according to non-uniform premises, even though the entities were in a similar situation and all circumstances shaping their situation were similar. The legal and economic analysis of these entities did not justify singling out any of them. The courts justifiably recognised that the undertakings participating in the cartel were treated arbitrarily. The example of *Alliance One* justifies the assumption that any action by the EC which leads to a different treatment of one of the parties in a case should be subjected to a detailed investigation in a case pending before an EU court.

In respect to the case above, the issue arising from *Compagnie générale maritime*[30] stands out and indicates that the principle of equality in proceedings before the EC has clearly delineated limits. It can be concluded from the case that the fact that the EC did not impose a fine on the perpetrator of the infringement may not on its own preclude the imposition of a fine on another

29 Case T-24/05, *Alliance One International, Inc. and Others v. Commission*, EU:T:2010:453, paras 13–19.

30 Case T-86/95, *Compagnie générale maritime and Others v. Commission of the European Communities*, EU:T:2002:50.

perpetrator of a similar infringement. Therefore, the principle of equal treatment may not be invoked as an argument to defend the unlawful conduct. It is not a principle that guarantees better treatment in the case of proved unlawful conduct, and it may not be invoked as a basis for a complaint regarding a decision imposing a fine. It should be borne in mind that the similarity of entities (comparability of the situations in which the entities find themselves), which, however, appear in different proceedings conducted by a given authority, may only be illusory. Only a thorough analysis of all the factual and legal circumstances can lead to a determination of whether the entities in question should be treated similarly, or whether there are factors that may allow for their being treated differently.

Although undertakings are in comparable situations, unequal treatment can arise due to variance in sanctions. Surveying fining practices across the national competition authorities and the EC, *Geradin* criticised the absence of "any valid justification" for the imposition of different sanctions for breach of the same prohibitions, depending solely on the enforcement agency involved.[31] This conclusion may be challenged with the point made by Advocate General Kokott: "the calculation of fines is not a mechanical process by which it is possible […] to predict the fine down to the last decimal point".[32] Moreover, continuing the above assessment, it seems necessary to consider that the justification for such in-built uncertainty is the need to counter strategic behaviour by would-be antitrust infringers: that is, if undertakings can make rational *ex ante* calculations of the expected amount of any competition fine should anti-competitive conduct be discovered, fines may be conceived of more readily as a "cost of doing business", and thus their deterrent effect would be diminished.[33]

The purpose of fining proceedings is to impose an unavoidable – in principle – fine on the company. Any entity violating competition rules should take this into account and the mere threat of such a fine should deter them from acting against the law. In this context, fining proceedings before a regulatory authority are similar to the purpose of criminal proceedings resulting from a violation of criminal law. The amount of fine, as in the case of criminal law, will not always be the same for the same violation of the law. This is influenced by various factors related to the proceedings themselves, but also

31 D. Geradin, The EU Competition Law Fining System: A Reassessment (TILEC Discussion, Paper No. 2011-052, October 2011), p. 35, cited in N. Dunne, Convergence in Competition Fining Practices in the EU, *Common Market Law Review*, 2016, vol. 53, no. 2, p. 20.

32 Case C-439/11 P, *Ziegler*, EU:C:2012:800, para. 120.

33 I. Lianos, F. Jenny, F. Wagner-von Papp, E. Motchenkova, E. David, An Optimal and Just Financial Penalties System for Infringements of Competition Law: A Comparative Analysis, CLES Research Paper Series 3/2014 (May 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2542991 (accessed: 15 November 2024), cited in N. Dunne, Convergence in Competition Fining Practices in the EU, *Common Market Law Review*, 2016, vol. 53, no. 2, p. 8.

by the discretion of the authority imposing the fine. However, a slightly different penalty for a similar infringement of the law cannot be equated with a violation of the right to equal treatment or non-discrimination. It may be the basis for verifying a fining decision in subsequent instances. It seems that only a manifestly disproportionate fine in comparison to the established violation of the law can effectively justify an allegation of infringement of the principle of equality (before the law) or its qualified form, i.e. the prohibition of discrimination.

In addition, it should be remembered that a comparable amount of a fine is determined during proceedings differently when there are many parties to the same proceedings and when the authority conducts proceedings concerning the same infringement in several separate cases.

Similarity of entities – temporal analysis

This analysis concerning the observance of the principle of equality in proceedings before the EC must be supplemented with deliberations on the permissibility of comparing entities punished for similar infringements within a certain interval of time. The temporal aspect has general importance for assessing whether the entities are comparable and whether they are in similar circumstances.

The ruling issued by the General Court in *GDF Suez* highlights clearly that "prior decisions of the EC on imposing fines may have significance from the viewpoint of observing the principle of equal treatment [...] if it is found that the facts of cases concerning those other decisions, such as markets, products, countries, businesses and relevant periods, are comparable with facts in the case herein". It seems that the criteria mentioned in *GDF Suez* shall not justify differences in calculating the sum of fines imposed within a period shorter than one year, and that as a result the approach adopted by the EC – which is also compliant with the principle of proportionality – should be applied uniformly, even retroactively at the judicial stage. However, the Court ruling in *Archer Daniels Midland*, while reviewing a complaint against the EC's decisions regarding infringement of the principle of equal treatment, ascertained that the prior decision and settled practice of the EC does not constitute a legal framework for imposing competition fines because the framework was only established in Regulation 1/2003 and the Guidelines. Decisions concerning other cases are only for information purposes when it comes to the potential unequal treatment, considering that it is very unlikely that circumstances characterising these cases – such as markets, goods, industry and the relevant periods – are identical. However, the Court confirmed that the prior decisions of the EC concerning fines may only be significant in the context of the principle of equal treatment if it is proved that the circumstances in cases associated with those decisions – such as markets, products, countries, businesses and relevant periods – are comparable to the circumstances of the case under review. Further deliberations of the Court are significant for carrying out an assessment of the "comparability of the cases", which may decide the severity of the fine. The Court included findings of the EC concerning the occurrence or non-occurrence of infringement of the rules of competition, the occurrence of the infringing conduct within the same sector and period (though this is not sufficient for determining the similarity of situations), the number of decisions concerning territorial limitations in a given sector, the nature of those limitations (vertical/horizontal), the type of practice (unilateral/arising from settlement) and the duration of infringement.

It should be assumed that the prior decision-making practice of the EC does not constitute – by itself – a legal framework for imposing fines on an undertaking that infringes the law, because the framework is only established in the relevant regulations and the Guidelines. Moreover, the EC may in each case increase the amount of fines in order to reinforce their deterring effect. In this respect, if the EC has imposed fines of a specific amount for specific types of infringements, it does not mean that it cannot increase the sum within the limits established in the regulation and in the Guidelines if it is necessary to guarantee realisation of the Union's competition policy.

Therefore, the view that the prior decision-making practice of the EC does not constitute the legal framework for imposing future fines and that decisions concerning other cases are only for information purposes should be deemed as enshrined in the case law of EU courts. The EC has a wide scope of discretionary powers when setting fines, and it is not bound by its prior assessment. Moreover, regarding infringement of the principle of equal treatment, it should be assumed that it is very unlikely for circumstances relevant in different decisions – such as markets, products, businesses and periods covered by the infringement – to be identical and in this way to justify equal treatment of undertakings. If there are certain analogies between cases, as well as significant differences which cannot be ignored, then the EC has a right, or even the obligation, to treat those cases differently when imposing fines.

Such a situation was resolved in *GDF Suez*. According to the EC the circumstances which led to the prior decisions mentioned by the applicant were different from the circumstances of the *GDF Suez* case; therefore, it cannot be said that there is any comparable situation which could have been treated in a different manner. In this respect the EC took into account the nature of the infringement being investigated, as well as its context, the scope of its effect and its duration. Finally, the EC overturned the arguments according to which the undertakings concerned could justifiably expect that the EC would not impose fines on them due to the fact that before the decisions which the applicant invoked were issued, they did not know that they were committing an infringement because the first decision had not imposed a fine on them.

Following this logic, the obligation enshrined in EU competition law, and the possibility of sanctions, are generally known. Thus, it has to be emphasised that the fact that the precise amount of fines that may be levied is unforeseeable for undertakings is not a legal certainty issue, but it is an inherent element of fining practices in competition law cases. As the EU courts acknowledge, the adoption of fining guidelines by many competition agencies has increased certainty and clarity *ex ante* as to the likely fine to be imposed *ex post*. However, compliance with the principle of equality does not mean that a given entity will be punished with a fine similar to that imposed on another entity, in a similar case several years earlier. The span of time, the diversity of markets and other different factual circumstances reduce the certainty as to the estimated amount of the penalty, should that penalty be determined on the basis of the degree of similarity of the cases.

Proportionality of differentiation

The case law of the Court of Justice clearly indicates that different treatment is justified if it is based on a rational, objective criterion, i.e. when it is related to the permissible goal realised by the disputed provisions and when the difference is proportional to the goal realised by the given treatment.[34] Therefore, the expression of equality is equal treatment of the entities as long as it is rational. The rationality in fining proceedings manifests in respecting the principle of proportionality. With collective infringements, it is necessary to investigate what weight should be attributed to each undertaking in respect of the determined infringement of the law. This requirement of equal fairness is a component of the requirement of proportional fairness. Real equal treatment should be the result of a rational assessment of the entities' situation, carried out as part of a proportionality test.

Respecting the principle of proportionality, and through that the equal treatment of entities, not only reflects a retributive view of punishment, but is also crucial for the utilitarian concept of optimal enforcement of the law in the meaning that the effectiveness of the severity of a fine may depend on whether the fine is perceived as justified/just, as well as non-discriminatory (equal because of its proportionality). Such an "ideal" aspect of proportional fairness may constitute a real limitation for setting the severity of a fine to the extent that it precludes imposing fines which significantly exceed the benefit acquired from or damages caused by an infringement in order to compensate for the low probability of detection and punishment. The conclusion arising from the Court of Justice case law is that the necessity of respecting the principle of equal treatment while setting fines for a collective infringement usually does not change the result that would have been achieved anyway by modulating the relative amounts of fines depending on the less or more active role of different members of a cartel in raising the cost of starting a business[35] and

34 Case C-127/07, *Sociéte Arcelor Atlantique et Lorraine and Others v. Premier mistre, Ministre de l'Ecologie et du Developpement durable and Ministre de l'Economie, des Finan ces et de l'Industie*, EU:C:2008:728.

35 Joined Cases T-45/98 and T-47/98, *Krupp Thyssen Stainless and Acciai Speciali Terni v. Commission*, EU:T:2001:288, para. 237; Case C-51/92 P, *Hercules Chemicals v. Commission*,

depending on different undertakings' relative ability to pay, in order to avoid a negative influence on the market structure. This last aspect is also a significant goal expressed in Directive 2019/1.

The Court of Justice also assumes that it is not authorised to substitute its own assessment for one by a General Court which, as part of its unlimited right of adjudication, rules on the amounts of fines imposed on undertakings for their infringements of EU law. Only the General Court is competent to inspect the way the EC assesses the weight of unlawful conduct in each individual case. In turn, the General Court must observe the general principle of equal treatment (stipulated in Articles 20 and 21 of the CFR), not only as part of its inspection of the EC's fine, which imposes the decision's compliance with the law, but also as part of exercising its unlimited right of adjudication. Exercising that right may not lead to discrimination between the undertakings participating in the settlement or to agreed practice when setting the fines which are not compliant with Article 101(1) of the TFEU. An assessment of the weight of infringement which takes into account the differences between undertakings participating in the same cartel – in particular, the geographical range of each undertaking's participation – does not necessarily have to take place when the factors of "the weight of infringement" and "additional sum" are established, but might take place at another stage of calculating the fine, e.g. when adjusting the basic sum of the fine depending on the mitigating and incriminating circumstances on the basis of items 28 and 29 of the Guidelines of 2006.[36] The Court of Justice therefore acknowledged that the EC was not obliged to invoke the principle of equal treatment of entities – in order to take into account the different manner of involvement of each entity – at a given/specific stage of the procedure, only in order to demonstrate the fairness of the established proportion of fines imposed on an undertaking.

A similar approach was also applied in the ruling in *Dornbracht*,[37] in which the General Court confirmed that the conduct of each undertaking is subject to assessment, including the role they played in the established practice, the benefits they could acquire, their sum, the value of property and the extent to which the infringement endangered the goals of the EU, and it influences the fines imposed on each member of the cartel. The argument of the applicant that their right to equal treatment was infringed was rejected. According to the Court the simple fact that "multipliers", which reflected the weight of infringement, and especially its extent, were established at the same level for all participants, even for those whose role had a larger geographic significance, may not be acknowledged as not compliant with the principle of equal treatment. According to the Court's statement, "taking into account […] differ-

EU:C:1999:357, para. 110. See the opinion of Advocate General M. Tizzano of 8 July 2004 in Case C-189/02 P, *Dansk Rorindustri v. Commission*, EU:C:2004:415, paras 107–109.

36 Case C-636/13, *Roca Sanitario v. Commission*, EU:C:2017:56, para. 59.

37 Case T-386/10, *Aloys F. Dornbracht GmbH & Co. KG v. Commission*, EU:T:2013:450.

ences between undertakings which participated in the cartel […] does not have to necessarily take place at the moment of setting the multipliers", but it may take place at another stage in the fining procedure for fines which are meant to be applied to each participant of the cartel.

It can be concluded that the Court, due to its unlimited right of adjudication, applies quite strict conditions which should justify the amount of fines imposed on individual perpetrators of the infringement. These conditions are subject to the Court's review of the legality, including the principle of equal treatment of entities, which is usually expressed in an assessment of the EC's practice of observing the principle of proportionality while imposing fines.

The impact of the EU standard of the principle of equality on the national fining proceedings – the case of fining guidelines of the Polish Office of Competition and Consumer Protection

While analysing the issue in the title, the deliberations concerning the extent to which EU standards are implemented into national legal systems cannot be ignored. In this context, the guidelines in Polish law for setting fines in cases associated with practices limiting competition are essential.[38] The content of these Guidelines presents the manner in which the President of the Office of Competition and Consumer Protection (the national competition authority, hereinafter "NCA") shall approach the issue of the severity of fines and the manner in which decisions regarding practices which limit competition and imposing fines on the participants in infringements are issued. It is clearly stated that the Guidelines are applied in cases for which anti-monopoly proceedings were initiated after 1 January 2024, and that the role of the Guidelines – which should be indicated – is not to equalise the amount of fines in individual categories of cases and to enable their comparison, but to standardise the way they are determined. Then it is highlighted again that the Guidelines describe the method of assessing individual criteria of the severity of a fine and affect neither the level of the risk of fines arising from the provisions of the national legislation nor the premises of the severity of fines stipulated in them. The Guidelines are a reflection of the fining policy of the NCA and do not create powers in the scope of the expected amount of fine.

In view of the above and while adopting the rule, which is also included in the Guidelines, that in cases conducted by the NCA in which an infringement of both EU and national law is found, one fine shall be imposed and the Guidelines should be interpreted and applied in the same manner as the Guidelines set by the EC. It must be admitted that soft law comes with its own set of challenges; guidelines are often written in a general way to cover as many issues as possible. This becomes problematic when the terms of the soft law are

38 Issued by the Office of Competition and Consumer Protection (UOKiK) in March 2024, https://uokik.gov.pl/ograniczanie-konkurencji-wyjasnienia (accessed: 13 November 2024).

too general. However, a well-designed soft-law instrument can help undertakings assess their own conduct and encourage them to cooperate (with the EC or national authorities) in law enforcement situations.

Taking the above perspective into account, the position of the Supreme Court in its judgment in case I NSK 7/18[39] should be subject to partial criticism. It was assumed therein that it is inaccurate to use the amount of a penalty imposed on a given undertaking for a specific infringement as a point of reference for determining fines imposed on other undertakings for similar infringements in other cases. In the Supreme Court's opinion, accepting such a thesis would impose on the NCA and the courts the obligation to analyse penalties imposed in similar cases, which would result in the necessity to analyse all the circumstances of those cases and to become familiar with the files of the proceedings conducted before the NCA, the justification of the decision and the court rulings issued as a result of appeal, at least. It was also stated that it is not clear what the criterion for selecting cases for comparison should be or how the differences in factual situations should be taken into account. Moreover, it would be particularly difficult to avoid the accusation of arbitrarily selecting cases.

Such a position is highly debatable. Imposing a fine on one undertaking that is definitely more severe than on another undertaking in similar circumstances may justify the allegation of unequal treatment of these undertakings. It is obvious that the circumstances distinguishing the situation of each participant have an impact on the amount of the fine, and that the fine should be set separately for each undertaking, using the same premises (factors) for imposing it. However, it is not the case that the body imposing the fine should not rule using a reasonably similar fine for a similar type of undertaking operating in similar circumstances. It was clearly stated in *GDF Suez* and *Archer Daniels Midland* what kind of premises may make cases very similar to each other. These premises should be taken into consideration by national authorities and courts.

In order to examine the similarity of given premises, a meticulous analysis of the files in similar cases is not required. In the vast majority of cases, institutional memory is sufficient, which will translate into a line of case law serving to consolidate certain standards. It is important that the principle of equality is observed in this area, in the sense that the same circumstances related to the conduct of undertakings, or the same conditions shaping the fining proceedings, are considered equally important for all undertakings and will play the same role in the assessment of penalties in relation to each undertaking individually. This approach, which uses a "similarly situated test", corresponds to

39 Judgment of the Supreme Court of Poland of 30 January 2019, I NSK 7/18, LEX no. 2643318. This judgment was delivered by the Chamber of the Polish Supreme Court, which does not constitute a court under EU law, following Case C-718/21, *L.G. v. Krajowa Rada Sądownictwa*, EU:C:2023:1015.

a mere definition of formal/procedural equality. That would also mean that a breach at a certain level of this procedure does not invalidate the whole fining proceedings. National procedures are conducted in accordance with national law, and the outcome of a procedural breach should be settled by national law. Since the penalty has a deterrent function, the regulatory decision should impose one on every undertaking that violates the law. The "similarly situated test" is a measure to strike a balance between the enforcement of the law and a guarantee of the procedural rights of the entity.

Conversely, it has to be remarked that a breach of a fundamental right cannot be founded on an exclusively formal "similarly situated test". This would signify that the fundamental right approach paves the way to something more than a simple comparative approach. This approach is reflected in the progressive concept of substantive equality, which is connected with the protection of individuals' dignity. Therefore, it should be assumed that in relation to an undertaking, a manifest violation of its interests – resulting from unequal treatment – should be required to justify such an allegation.

Consequences of non-observance

The general principle of equal treatment plays a primarily protective function from the perspective of private actors. Accordingly, the principle of equal treatment is breached in fining proceedings when a national authority or the EC does not take into account the function of the general principle in a given case. The same mechanisms should also be applied in proceedings before the national courts or the CJEU. An example of this breach would be if it ignores that a general principle indicates the preferred interpretation of a specific norm, where the general principle acts as a gap-filling mechanism or as the grounds for the review of legality and precludes the application of a specific legislative measure.

Member States (and their bodies) are the addressees of a general equality mandate (Article 20 of the CFR), a general prohibition of discrimination (Article 21(1) of the CFR) and a specific prohibition of discrimination on grounds of nationality (Article 21(2) of the CFR). The fundamental right to non-discriminatory treatment is not only a protective right provided for in the prohibition of differentiation because of a specific criterion, but also a positive obligation, i.e. a public authorities' obligation to take measures to protect entities from discriminatory treatment. Negative obligations consist of not applying discriminatory provisions and abandoning discriminatory practices.

There is no case law so far on whether a breach of the general principle of equal treatment in fining proceedings could constitute grounds for claims of liability for damages or lead to the annulment of a fining decision. However, the significance of the general principle of equal treatment and of the fundamental right to non-discrimination based on nationality supports a positive presumption of such a possibility. Any consequences of annulling a fining decision and the further consequences resulting from such conduct must be determined by law. Following the principle of the primacy of EU law and in order to ensure the effectiveness of the measures guaranteed by EU law, an authority that violates the principle of non-discriminatory treatment is obliged to remedy the effects of the violation or to restore the lawful state, which corresponds with the claims of entities, e.g. a claim for removing a discriminatory measure or for liability for damages.

According to the principle of equality as an administrative principle, which affects the matter of conducting administrative proceedings, it should be underscored that the EC enjoys wide discretion when deciding on the outcome of a case concerning Article 101 or 102 of the TFEU. This discretion is only limited to cases where the parties to the same case should equally be treated in considering a settlement or issuing a decision imposing specific obligations. Thus, although the principle of equality is meant to constrain the EC's actions, it only applies in a limited way to the enforcement of EU competition law. The same impact has that principle on the scope of the discretion granted to national authorities in fining proceedings.

Conclusions

Under EU law, different treatment can be justified if it pursues a legitimate aim and if the means to achieve that aim are appropriate and necessary. In order to determine whether different treatment is proportionate, the authority must be sure that there are no other ways of achieving this objective that interfere less with the right to equal treatment. In other words, the disadvantage must be the minimum possible level of harm caused for the intended objective to be achieved. The objective to be achieved is important enough to justify this level of interference. Finally, when the proportionality analysis involves complex scientific, economic, technical or medical assessments by which it is possible to determine which measures should be chosen, the authority obtains a favouring margin of power. Therefore, by using the doctrine of margin of appreciation (discretion), there is a kind of "weakening" of the principle of equal treatment. The right to equal treatment becomes conditional, because invoking this right is effective when it is possible to compare the situation of entities taking into account the test characteristic of these proceedings. As a general rule, the circumstances affecting the different decisions, such as markets, products, undertakings, periods covered by the infringement or the scope of the effects, are very unlikely to be identical, thus justifying equal treatment of undertakings. If there are certain analogies between the cases, as well as significant differences which cannot be ignored, the EC has the right – and even the obligation – to treat those cases differently when imposing fines.

Compliance with the principle of equality also does not mean that a given entity will be punished with a fine of a similar amount to that imposed on another entity in a similar case several years earlier. The time span, the variety of markets and other different factual circumstances reduce the certainty as to the estimated amount of the penalty, determined on the basis of the degree of similarity of the cases.

The EC has always taken the view that, in order to ensure that a fine has a sufficiently deterrent effect on a rational economic operator, the likelihood that an infringement will go undetected must be compensated by the imposition of fines that are significantly higher than the potential benefits of an infringement of financial services rules. Fines should also be set high enough to "reasonably" be considered to outweigh the potential financial benefits that can be derived from the infringement, even if those benefits are not calculable. In other words, only sanctions that include an appropriate punitive element will increase the deterrent effect, and fines should go beyond the profits made from the unlawful activity. Otherwise, they would only be a cost inherent in running a business. In such circumstances, it would be contrary to the principle of equal treatment to adopt the general assumption that all undertakings should be fined a similar amount for similar infringements.

On the other hand, proceedings for imposing a fine must not lead to discrimination against undertakings, even on the grounds of nationality. The authority imposing the penalty must comply with the prohibition of discrimination under Article 18 of the TFEU, which strengthens the arguments for decisions that are consistent with the provisions on the EU freedoms in the internal market. The principle of non-discrimination on the grounds of nationality is primarily intended to unify the rules of the internal market for all entities wishing to operate in it and to fulfil its regulatory function by obliging all institutions and bodies influencing the regulation of this market to ensure equal treatment of entrepreneurs and to prevent their arbitrary differentiation, i.e. to ensure equal conditions of competition on this market.

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7 The principle of proportionality and assessment of national fines

Dawid Miąsik

Introduction

The principle of proportionality is, by all means, the general principle of EU law with the most significant potential impact on the outcome of national fining proceedings. By definition, it determines the interpretation and application of the fining provisions. Unlike the other general principles and fundamental rights discussed so far, it concerns the material aspect of national fining proceedings: whether a fine to be imposed or already applied is proportionate. The answer to this question requires an analysis of several issues. Therefore, since the philosophical origins of the proportionality principle and its absorption and development within EU law have already been thoroughly discussed,[1] this chapter focuses on the application of the proportionality test in the course of national fining proceedings and on the issues that are relevant for this particular use of that principle.

Proportionality is a legal principle in EU law that is most often relevant to the public acts of the institutions of the EU and the Member States as an important principle of constitutional and administrative law.[2] In national fining proceedings, it serves several different functions corresponding to various stages of administrative or judicial adjudication in cases where a fine is imposed upon an individual. First of all, the principle of proportionality may serve as a

1 G. de Búrca, The Principle of Proportionality and Its Application in EC Law, *Yearbook of European Law*, 1993, vol. 13, pp. 105–150; M. Herdegen, The Relation Between the Principles of Equality and Proportionality, *Common Market Law Review*, 1985, vol. 22, no. 4, pp. 683–696; J.H. Jans, Proportionality Revisited, *Legal Issues of European Integration*, 2000, vol. 27, pp. 239–265; J. Snell, True Proportionality and Free Movement of Goods and Services, *European Business Law Review*, 2000, vol. 11, no. 1–2, pp. 37–56; T. Tridimas, Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny, in: E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford 1999; T. Tridimas, The Principle of Proportionality, in: R. Schutze, T. Tridimas (eds), *Oxford Principles of European Union Law, vol. I: The European Union Legal Order*, Oxford 2018; J. Usher, *General Principles of EC Law*, London 1998.

2 M. Feshti, J. Golemi, The Impact of the European Court of Justice on the Principle of Proportionality, *SEER Journal for Labour and Social Affairs in Eastern Europe*, 2020, vol. 1, p. 127.

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benchmark to test the validity of European secondary law imposing sanctions upon individuals. Here the concept of proportionality limits the EU's competence.[3] However, challenges to the validity of EU acts imposing allegedly disproportionate fines may only be made at the judicial stage of proceedings.

Secondly, the principle of proportionality is applied in the review of national measures' compatibility with EU law on the rules of the internal market. Here the provisions of national law which impose obligations or prohibitions on the grounds of public interest shall be tested against the principle of proportionality independently of whether the national law provides sanctions for their infringement. Should any sanction, including fines, be envisaged in the national legislation for a failure to comply with obligations or prohibitions stemming from internal market rules, such sanction shall be examined independently of the measures introducing the restraint on a particular freedom. Thus, when it comes to national fining proceedings, a national legislature failure to observe the principle of proportionality may result in national measures that impose an obligation or prohibition being inapplicable for failing to adequately justify the restriction of a fundamental freedom. In such a case, the individual who has breached such an obligation or prohibition may not be fined at all. On the other hand, if the national legislation restricting the internal market passes the public interest justification test (which encompasses the test of proportionality), the individual may also invoke the principle of proportionality against the national provisions providing for sanctions against such breaches.

Thirdly, the importance of the principle of proportionality for national fining proceedings results from its extensive scope of application. As with other general principles of EU law and fundamental rights enshrined in the Charter, the principle binds the Member States whenever they act within the scope of EU law or implement that law.[4] Nowadays, the requirement for proportionality is usually embedded in secondary legislation.[5] The Member States have a general duty to respect the principle of proportionality whenever they legislate and impose penalties for failure to comply with the obligations laid down by their national legislation, as most of such obligations stem directly or indirectly from EU law. The principle of proportionality has to be observed as regards (1) the determination of factors constituting an infringement, (2) the determination of the rules concerning the severity (amount) of a fine, (3) the

3 W. Sauter, Proportionality in EU Competition Law, *European Competition Law Review*, 2014, vol. 35, no. 7, pp. 327–332.

4 Cases C-384/17, *Link Logistik N&N*, EU:C:2018:810, para. 40; C-205/20, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, EU:C:2022:168, para. 31 and the case law cited therein; and Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 49.

5 See e.g. Article 42(1) of the Union Customs Code; Joined Cases C-717/22 and C-372/23, *'SISTEM LUX' OOD and VU*, EU:C:2024:1041, para. 48.

assessment of the factors which may be taken into account in the fixing of a fine[6] and (4) the nature of penalties other than fines.[7]

Fourthly, the principle of proportionality applies to the cumulation of sanctions under Article 50 of the Charter of Fundamental Rights of the European Union (CFR)[8] and in the processes of assessing limits placed on any other fundamental right (Article 52(1) of the CFR).

Legal character

The EU principle of proportionality influences national criminal proceedings as a general principle of EU law and as a fundamental right under Article 49(3) of the Charter. The Court of Justice of the European Union (CJEU) sometimes uses the formula that the principle of proportionality "is now enshrined"[9] or "is also guaranteed"[10] by Article 49(3) of the Charter. This, however, does not provide individuals with additional protection, nor does it impose on national administrative authorities (NAAs) or national courts further obligations, extending those that have already resulted from the principle of proportionality as one of the oldest general principles of EU law.

As a general principle of EU law, the principle of proportionality has a broader substantive scope. It is applied to both the national provisions imposing obligations sanctioned by fines or other penalties and to the sanctioning (fining) provisions as well. As a general principle of EU law, the principle of proportionality covers all types of fines and other sanctions. It applies to sanctions that are civil,[11] administrative,[12] administrative but criminal in nature[13]

6 Cases C-190/17, *Zheng*, EU:C:2018:357, para. 40; C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 98; Joined Cases C-717/22 and C-372/23, *'SISTEM LUX' OOD and VU*, EU:C:2024:1041, para. 50; and C-653/22, *J.P. Mali Kerékpárgyártó és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Fellebviteli Igazgatósága*, EU:C:2023:912, para. 33.

7 Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 64.

8 Cases C-570/20, *BV*, EU:C:2022:348, para. 49; C-537/16, *Garlsson Real Estate and Others*, EU:C:2018:193, para. 56; and C-97/21, *MV–98*, EU:C:2023:371, para. 56.

9 Cases C-35/20, para. 58; C-231/20, *MT v. Landespolizeidirektion Steiermark*, EU:C:2021:845, para. 44; C-524/15, *Menci*, EU:C:2018:197, para. 55; and C-534/16, *Finančné riaditeľstvo Slovenskej republiky v. BB construct s. r. o.*, EU:C:2017:820, para. 32.

10 Case C-384/17, *Link Logistik N&N*, EU:C:2018:810, paras 41 and 43.

11 E.g. the provision of a guarantee when registering for VAT – Case C-534/16, *Finančné riaditeľstvo Slovenskej republiky v. BB construct s. r. o.*, EU:C:2017:820, para. 32.

12 E.g. the automatic forfeiture of the provisional security provided by a tenderer – Joined Cases C-403/23 and C-404/23, *Luxone Srl and Sofein SpA*, EU:C:2024:805 – or the automatic termination of the term of office in the event of a conflict of interest and the prohibition on holding any elective public office – Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 51.

13 E.g. a fine of between 100% and 200% of the customs value of the goods and confiscation thereof irrespective of the owner – Joined Cases C-717/22 and C-372/23, *'SISTEM LUX' OOD and VU*, EU:C:2024:1041.

and criminal.[14] It is binding on the Member States in all matters within the scope of Union law, and not only in matters where Member States implement Union law within the meaning of Article 51(1) of the Charter.

Article 49(3) of the CFR demands that criminal penalties be proportionate. Its scope of application is limited in comparison to the general principle of proportionality. First of all, it requires only that the penalty be proportionate.[15] Secondly, and more importantly, Article 49(3) of the Charter applies only to sanctions of a criminal nature.[16] When examining whether a penalty provided for in national law is criminal in nature, the CJEU usually uses the criteria developed in the case law on the interpretation of Article 50 of the Charter,[17] known as the *Engel* criteria; this is discussed in more detail in Chapters 1 and 10. The case law of the European Court of Human Rights is used to aid in the interpretation.[18] Criminal character results from (1) the intrinsic nature of the offence, (2) the degree of severity of the penalties and (3) the repressive function of the penalty.[19] When assessing the qualification of a penalty under national law, the CJEU examines not only the wording of national legislation, but also the national case law and the procedure in which the sanctions are imposed.[20] It seems that for Article 49(3) of the Charter to apply, the national qualification is more important[21] than in cases concerning Article 50 of the Charter, because a criminal qualification of a sanction does not impact the effectiveness of EU law, contrary to the principle of *ne bis in idem*. However, even if a sanction is imposed following a criminal conviction, it is not of a criminal character if it serves the preventive objectives (e.g. a measure prohibiting the holding of elective public office[22]). Therefore, in case the national court has any doubt, it is the punitive purpose that is the most important.[23] A

14 Case C-655/21, *G. ST. T.*, EU:C:2023:791.

15 Cases C-231/20, *MT v. Landespolizeidirektion Steiermark*, EU:C:2021:845, para. 44; C-524/15, *Menci*, EU:C:2018:197, para. 55; and C-534/16, *Finančné riaditeľstvo Slovenskej republiky v. BB construct s. r. o.*, EU:C:2017:820, para. 32.

16 Cases C-524/15, *Menci*, EU:C:2018:197, para. 50; C-544/19, *ECOTEX BULGARIA*, EU:C:2021:803, para. 90; C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 33; and C-384/17, *Link Logistik N&N*, EU:C:2018:810, para, 41.

17 Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 35; Case C-544/19, *ECOTEX BULGARIA*, EU:C:2021:803, para. 91.

18 Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, paras 40 and 43.

19 Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 35; Case C-544/19, *ECOTEX BULGARIA*, EU:C:2021:803, para. 91.

20 Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 37.

21 "[I]t is apparent […] from the order for reference that the fine or financial penalty which can be imposed on a person infringing the prohibition on making a domestic payment in cash […] is an administrative penalty of a criminal nature" – Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 93.

22 Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 39.

23 Cases C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 38; C-439/19, *Latvijas Republikas Saeima (Penalty points)*, EU:C:2021:504, para. 89; and C-544/19, *ECOTEX BULGARIA*, EU:C:2021:803, para. 94.

fine fulfils the repressive function if it seeks to suppress infringements of the prohibition and is not limited to compensation for the harm caused by the infringement.[24] The fact that it also fulfils the preventive function does not alter its criminal character.[25]

One can also point to instances when the CJEU applied Article 49(3) of the Charter without having analysed the *Engel* criteria.[26] On the other hand, in the context of the proportionality test for internal market freedoms, the CJEU does not always examine the proportionality of a sanction in the light of Article 49(3) of the Charter, even if it is criminal in nature, but only in the light of the general principle of proportionality, which is applied during the assessment of whether a restriction of an internal market freedom resulting from national provisions and providing for a sanction constitutes a justified restriction of a given freedom.[27] Thus, the current case law of the CJEU shows an inconsistent approach to Article 49(3) of the Charter. This may be explained by the fact that this provision does not provide individuals with a protection that would be additional in scope or higher in standard than the guarantees offered by the general principle of proportionality. If a measure is not criminal in nature, it cannot be assessed in the light of Article 49(3) of the Charter. Such a measure is reviewed under the general principle of proportionality, as clearly demonstrated by the *T.A.C.* case.[28]

It seems that the CJEU generally prefers to apply the general principle of proportionality instead of Article 49(3) of the Charter. For example, in cases decided so far concerning challenges to the validity of European fining legislation, the CJEU applied the general principle of proportionality as a benchmark to test the validity, even though the preliminary references invoked Article 49(3) of the Charter.[29]

To date, Article 49(3) of the Charter has been applied to the following fines:

- a fine in an amount equivalent to 25% of the total amount of the payment made (if the infringing party is a natural person) or 50% in the case of a repeat infringement, or in an amount equivalent to 50% of the total amount of the payment made (if the infringing party is a legal person) or 100% in the case of a repeat infringement;[30]

24 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 94.

25 A repressive function is realised by assigning penalty points for road traffic offences – Case C-439/19, *Latvijas Republikas Saeima*, EU:C:2021:504, para. 89.

26 Cases C-384/17, *Link Logistik N&N*, EU:C:2018:810, para. 41; C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 35; and C-544/19, *ECOTEX BULGARIA*, EU:C:2021:803, para. 91.

27 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, paras 39 and 49.

28 Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 49.

29 Case C-113/19, *Luxavation SA*, EU:C:2020:228, para. 42.

30 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 92.

- an administrative fine which can be up to 10 times higher than the proceeds or profit obtained from the market manipulation.[31] In a case regarding a toll road, a fine of EUR 500 was imposed on a carrier on the grounds that the vehicle had travelled without the appropriate advance payment; the fine was equivalent to eight times the value of the toll, which the driver did pay immediately after realising that he had entered a toll road;[32]
- a fine ranging from EUR 2,000 to 4,000;[33]
- a fine of EUR 500.[34]

Other sanctions covered by Article 49(3) of the Charter include:

- a custodial sentence from five to eight years' imprisonment with an additional measure of confiscation and destruction of the goods displaying a third party's trademark without the consent of the owner;[35]
- forfeiture of the catch and the prohibited or non-compliant fishing gear found on board a vessel.[36]

Proportionality test(s)

Generally, the purpose of the principle of proportionality is "to determine an appropriate balance between ends and means".[37] To that end, the CJEU developed a test to verify the proportionality of national legislation in cases concerning justifications for restrictions on the functioning of the internal market. It originally consisted of three elements that had to be met cumulatively for the national legislation to be held compatible with EU law. However, the CJEU has also developed the practice of using a two-element test (adequacy and necessity), without distinguishing the less restrictive alternative component, or has analysed the alternative yet equally effective measures under the necessity component of the three-tier proportionality test. Thus, it has been debatable whether the proportionality test truly consists of three elements, or whether the CJEU applies the various modes of the proportionality test inconsistently, or whether all the elements of the proportionality test are always applied.[38] One can clearly see the echoes of this inconsistency in assessing the proportionality of national fining legislation.

31 Case C-537/16, *Garlsson Real Estate SA*, EU:C:2018:193, para. 35.
32 Case C-384/17, *Link Logistik N&N*, EU:C:2018:810, paras 21–22.
33 Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 72.
34 Case C-493/21, *K. M. v. Director of Public Prosecutions*, EU:C:2022:191, para. 18.
35 Case C-655/21, *G. ST. T.*, EU:C:2023:791, paras 60, 61 and 70.
36 Case C-493/21, *K. M. v. Director of Public Prosecutions*, EU:C:2022:191, para. 18.
37 W. Sauter, Proportionality in EU Competition Law, *ECLR*, 2014, vol. 35, no. 7, pp. 327–332.
38 T. Tridimas, *The Principle of Proportionality*, p. 247; W. Sauter, *Proportionality…*, p. 327; O. Saramet, G.-B. Spirchez, Limits of the Discretionary Power Established Through Enforcing

As demonstrated by cases concerning the national fining legislation that falls within the scope of the internal market rules, the most often applied test consists of two elements: national measures which are liable to restrict one of the fundamental freedoms of the internal market (1) must be appropriate for attaining their objective and (2) must not go beyond what is necessary to achieve them.[39] The two-element test is also used in cases concerning national fining legislation that falls outside the scope of the internal market rules.[40] This test is applied by the CJEU to both national measures imposing certain obligations upon individuals and the fines alone (or other sanctions), since a fine must not exceed "the limits of what is appropriate and necessary to achieve the objective".[41] The two-tier test is also used in challenges to the validity of EU fining legislation.[42]

On rare occasions the CJEU pronounces in cases concerning national fining legislation recourse to the three-tier test, under which the penalties not only must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the national legislation in question, but must also meet an additional requirement that "when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued".[43] This element of the proportionality test is called the less restrictive alternative or proportionality *sensu stricto*, and is often assessed together with the concept of necessity of the two-element test.[44]

However, the proportionality test most often used by the CJEU in respect of national fining legislation beyond the scope of the internal market rules consists of one element only – the necessity or suitability of a fine – that is the need to attain the objective pursued by the legislation providing for a fine.[45]

The European Principle of Proportionality, *Perspectives of Law and Public Administration*, 2018, vol. 7, no. 2, p. 265; F. Borriello, Principle of Proportionality and the Principle of Reasonableness, *Review of European Administrative Law*, 2020, vol. 13, no. 2, p. 160; M. Feshti, J. Golemi, The Impact…, p. 128.

39 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 35; Case C-190/17, *Zheng*, EU:C:2018:357, para. 37; Cases C-338/04, C-359/04 and C-360/04, *Placanica*, EU:C:2007:133, para. 49.

40 Case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N*, EU:C:2018:810, para. 40; Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 5; Case C-655/18, *Schenker*, EU:C:2020:157, para. 43; Case C-640/21, *SC Zes Zollner Electronic SRL*, EU:C:2023:457, para. 61.

41 Case C-35/20, *A*, EU:C:2021:813, para. 90.

42 C-203/12, *Billerud Karlsborg and Billerud Skärblacka*, EU:C:2013:664; para. 34.

43 C-210/10, *Urban*, EU:C:2012:64, para. 24.

44 T. Tridimas, *Proportionality…*, p. 144; T. Tridimas, *The Principle of Proportionality*, p. 247; P. Craig, G. de Búrca, *EU Law...*, p. 372.

45 Cases C-231/20, *MT v. Landespolizeidirektion Steiermark*, EU:C:2021:845, para. 45; C-935/19, *Grupa Warzywna sp. z o.o.*, EU:C:2021:287, para. 27; C-487/14, *Total Waste Recycling*, EU:C:2015:780; C-190/17, *Zheng*, EU:C:2018:357, para. 41; and C-77/20, *K.M.*, EU:C:2021:112, para. 37.

This one-element test is used equally by the CJEU when it applies the general principle of proportionality and Article 49(3) of the CFR.[46] It is also applied when assessing the proportionality of administrative measures adopted by a Member State which are sanctioned with a fine.[47]

The recourse to the one-element test can be explained by the CJEU's attitude towards fines imposed for breaches of obligations resulting from EU or national law. Fines, irrespective of their administrative, quasi-criminal or criminal character, are considered by the CJEU to be suitable measures for achieving the goals desired by the European or national legislatures. If the CJEU finds these goals legitimate under EU law, it considers the fines issued for breaching them to be appropriate in order to ensure their effectiveness. Thus, in those cases where the CJEU uses the principle of proportionality, it focuses on the necessity of the fining legislation or the fine actually imposed. On the other hand, the extended variants of the proportionality test are applied by the Court when reviewing the compatibility of national legislation that imposes obligations upon individuals and sanctions for violations thereof in cases within the scope of the internal market rules. Even in such cases, the fines imposed for the breach of obligations legitimately pursued by the national legislation are generally considered suitable to achieve those objectives that are plausible under EU law (e.g. protection of workers). Therefore, when assessing the proportionality of national fines, the CJEU virtually skips the first part of the two- or three-tier test and focuses the proportionality assessment on the necessity of fining legislation or the actual fine imposed upon the individual. This claim is supported by *Maksimovic and Others*, in which the CJEU ruled explicitly that national legislation "which provides for penalties in the event of infringement of labour law obligations intended to achieve those objectives […] may be regarded as appropriate for the purpose of ensuring compliance with those obligations and, accordingly, achieving the objectives pursued".[48] The CJEU then moved on to assess whether "the administrative or punitive measures permitted under national legislation" went "beyond what is necessary in order to attain the objectives legitimately pursued by that legislation".[49] In that case, the national fining legislation failed to pass the necessity test because it went beyond what was "necessary in order to ensure compliance with labour law

46 Cases C-35/20, *A*, EU:C:2021:813, para. 84; C-77/20, *K.M.*, EU:C:2021:112, paras 37 and 38; C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 99; C-231/20, *MT v. Landespolizeidirektion Steiermark*, EU:C:2021:845, para. 45; and C-655/21, *G. ST. T.*, EU:C:2023:791, para. 65.

47 Case C-653/22, *J.P. Mali Kerékpárgyártó és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Fellebviteli Igazgatósága*, EU:C:2023:912; para. 32; Case C-640/21, *ZES Zollner Electronic*, EU:C:2023:457, paras 60 and 61.

48 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 38.

49 Ibidem, para. 39.

obligations in relation to obtaining administrative permits and keeping records on wages".[50]

The test of suitability concerns whether a measure is appropriate to achieve the goals desired by the legislature. It focuses on the relationship between the measure and the aim.[51] The aim under consideration should be possible and reasonably achievable with the use of the measure. The questions to be asked are therefore as follows: is a measure aimed at achieving a goal valid under EU law? Is it possible to achieve this goal with the use of the means under consideration? Should fining legislation fail to pass the suitability test, there is no need to examine further elements of the test. This part of the proportionality test is relatively easy to pass for measures sanctioned by the fining provisions and for the fining provisions themselves,[52] since fines are generally considered to be adequate measures.[53] As the CJEU stated in *MT v. Landespolizeidirektion Steiermark*, "as a matter of principle, the imposition of administrative or criminal penalties for infringing restrictive legislation […] is capable of ensuring compliance with that legislation and […], therefore, that imposition is appropriate for attaining the objective pursued in that respect".[54] Fines encourage the economic operators to undertake all necessary measures that would allow them to avoid being fined.[55] This serves the interests of both the Member States, in cases falling under internal market rules, and the Union, in cases concerning fines imposed for infringements of EU secondary law, in which they definitely serve to secure the effectiveness of EU law. Because of that "quality", this part of the proportionality test is of lesser importance when it comes to assessing the proportionality of fines. On the other hand, it gains much more weight in cases concerning other types of sanctions, such as a prohibition against holding office.[56]

The necessity element of the proportionality test requires further balancing, sometimes at different levels and between different interests or values.[57] Here the NAA or national court must examine three elements, discussed in more detail below: (1) the nature of the infringement, (2) the seriousness of the infringement which that penalty seeks to sanction and (3) the means of establishing the amount of that penalty.

50 Ibidem, para. 48.

51 T. Tridimas, *Proportionality…*, p. 68; J. Snell, *True Proportionality…*, p. 50.

52 T. Tridimas, *The Principle of Proportionality…*, p. 247.

53 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 79; Case C-210/10, *Urban*, EU:C:2012:64, para. 29.

54 Case C-231/20, *MT v. Landespolizeidirektion Steiermark*, EU:C:2021:845, para. 44.

55 Case C-653/22, *J.P. Mali Kerékpárgyártó és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Fellebviteli Igazgatósága*, EU:C:2023:912, para. 31; Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 56.

56 Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 57.

57 T. Tridimas, *The Principle of Proportionality…*, p. 247.

The less restrictive alternative part of the test examines the existence of other, equally effective yet less intrusive or burdensome measures that would allow the Member State to achieve its goals or the goals of the EU legislator and result in the lowest possible burden on the individual. The requirement of necessity demands that, in the case of a choice between several options for solving a given problem, the solution that will be the least burdensome for the addressees is chosen.[58] The assessments of the less restrictive alternative of fining legislation and the fining parts of the proportionality test are usually skipped by the CJEU, unless a fine is found to be manifestly disproportionate, as in *Maksimovic*. The CJEU suggested that the goals of the fining legislation could be achieved by such measures as (1) a lower fine, (2) an upper limit on fines or (3) a restriction on imposing a custodial sentence as an alternative penalty.[59] The less restrictive alternative element of the proportionality test, however, is applied thoroughly if national law provides for other types of sanctions[60] or for cumulating other sanctions with a fine. Fines are considered to be the least restrictive of the measures at the disposal of the national or European legislature.

The necessity of fines

Nature of the infringement

Under the term "nature/character" of the infringement sanctioned by a fine, one should understand the behaviour that led to the offence. For example, in *ECOTEX BULGARIA EOOD*, the penalised infringement consisted of a shareholder and managing director of a company receiving cash dividends in an amount well in excess of the threshold set by the national legislation for payments in cash. This behaviour was not linked to any other fraudulent or unlawful activities. One can therefore consider this conduct as an ordinary infringement of national rules without any malicious intent.[61] In *Grupa Warzywna sp. z o.o.* "the irregularities at issue in the main proceedings are the result of an error of assessment made by the parties to the transaction regarding the taxable nature of that transaction".[62] This shows that the offence can be characterised as a legal assessment error. In *Link Logistik N&N* the nature of the infringement took the form of travelling on a section of toll road in Hungary without a valid toll document and without paying the distance-based charge for that section between hours of 19.34 and 19.52, when the driver

58 Judgment of 30 January 2019 in Case C-220/17, *Planta Tabak-Manufaktur Dr. Manfred Obermann GmbH & Co. KG*, ECLI:EU:C:2019:76, para. 51.

59 EU:C:2019:723, para. 47.

60 See e.g. Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 50.

61 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 101.

62 Case C-935/19, *Grupa Warzywna sp. z o.o.*, EU:C:2021:287, para. 33.

realised that he was travelling on a toll road and paid – on his own initiative and prior to being caught – the required amount due for the whole of the toll section of road he had intended to use[63]. This can be described as an omission. In *Urban* the infringement consisted of a failure to produce one recording disc (out of 15) with the kilometre count on arrival, while this count was set out in other documents.[64]

4.2. Seriousness of the infringement

The seriousness of an offence seems to be the most important element for balancing between the interests of the national legislator and society and the interests of individuals. The importance of this element of the proportionality test is best visible in cases with fines for failing to respect various formalities, such as possessing a passport[65] or having a duty to declare something[66] or to retain certain documents.[67] In all these cases the fines provided for in national legislation were found to be disproportionate, either *in abstracto* or *in concreto*.

When examining the seriousness of an infringement, various elements must be taken into account. First of all, the seriousness of the infringement can be measured by its impact on the values protected by the fining legislation. A fine must therefore correspond to the goal of this legislation and the importance of this goal from the point of view of EU law or the situation of a particular Member State.[68] Among values that may justify severe sanctions, the CJEU listed collecting the appropriate taxes or customs duties,[69] combating tax evasion and tax avoidance,[70] protecting labour law requirements to obtain administrative permits and keep wage records,[71] protecting road safety,[72] protecting the environment and human health,[73] combating corruption[74] and protecting intellectual property.[75] The NAA and national court should also take into account whether the sanctioned behaviour results in "particularly serious

63 Case C-384/17, *Link Logistik N&N*, EU:C:2018:810, paras 20.
64 Case C-210/10, *Urban*, EU:C:2012:64.
65 Case C-35/20, *A*, EU:C:2021:813, para. 86.
66 Case C-788/19, *Commission v. Kingdom of Spain*, EU:C:2022:55, paras 50 and 60.
67 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 46.
68 Case C-190/17, *Zheng*, EU:C:2018:357, para. 42.
69 Case C-653/22, *J.P. Mali Kerékpárgyártó és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*, EU:C:2023:912, para. 36.
70 C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 107.
71 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 40.
72 Case C-210/10, *Urban*, EU:C:2012:64, para. 30; Cases C-870/19 and C-871/19, *Prefettura Ufficio territoriale del governo di Firenze v. MI and TB*, EU:C:2021:233, para. 45.
73 Cases C-487/14, *Total Waste Recycling*, EU:C:2015:780, para. 55; C-69/15, *Nutrivet D.O.O.E.L.*, EU:C:2016:425, para. 55; and C-77/20, *K.M.*, EU:C:2021:112, para. 34.
74 Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 10.
75 Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 77.

harmful effects on society".[76] This assessment may vary from one Member State to another, as not all Member States may suffer from the same problems at the same scale (e.g. corruption),[77] and some situations may call for equally severe sanctions. On the other hand, if the behaviour leading to the offence produces no actual harm to the protected interests, then such a factor calls for a significantly lower fine.[78]

The seriousness of infringement is assessed by examining how the behaviour leading to the offence impacted the value protected by the fining legislation.[79] This entails an analysis of whether it actually infringed this value (e.g. inflicted damage to the natural environment[80]) and produced harmful effects.[81] In cases of offences resulting in no actual harm,[82] one should assess whether they posed a significant risk to this value.[83] One has to examine the scale of the infringement[84] and its duration (e.g. in cases concerning the road safety regulations on the use of tachographs, the longer the period not covered by record sheets, the more serious the infringement).[85]

Likewise, the lack of bad faith has been emphasised on several occasions by the CJEU. This suggests that subjective elements[86] such as all forms of malicious intent or fraudulent or otherwise unlawful activities play a significant role in establishing the seriousness of the offence when assessing the proportionality of national fining legislation[87] or a fine itself.[88]

It is also important to take into account what kind of behaviour triggered the violation of a duty sanctioned by a fine. In *ECOTEX BULGARIA EOOD*, the CJEU pointed out that the restriction at issue was only for cash payments of relatively large sums, and thus should not lead to an individual finding it

76 Case C-231/20, *MT v. Landespolizeidirektion Steiermark*, EU:C:2021:845, para. 46.

77 Case C-40/21, *T.A.C. v. Agenția Națională de Integritate (ANI)*, EU:C:2023:367, para. 25.

78 Cases C-712/17, *EN.SA.*, EU:C:2019:374, para. 42; C-788/19, *Commission v. Kingdom of Spain*, EU:C:2022:55, para. 59; and C-210/10, *Urban*, EU:C:2012:64, para. 57.

79 Case C-487/14, *Total Waste Recycling*, EU:C:2015:780, para. 57.

80 Case C-77/20, *K.M.*, EU:C:2021:112, para. 34.

81 Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 69.

82 Case C-210/10, *Urban*, EU:C:2012:64, para. 57.

83 Case C-487/14, *Total Waste Recycling*, EU:C:2015:780, para. 55; Case C-69/15, *Nutrivet D.O.O.E.L.*, EU:C:2016:425, para. 55.

84 Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 69; Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 103.

85 Case C-210/10, *Urban*, EU:C:2012:64, paras 33–34; Joined Cases C-870/19 and C-871/19, *Prefettura Ufficio territoriale del governo di Firenze v MI and TB*, EU:C:2021:233, para. 45.

86 S. Armella, Customs Sanctions: The Difficult Relationship Between International Harmonisation and Nation Peculiarities Through the Lens of the Proportionality Principle, *Analyses and Studies*, July 2022, vol. 13, no. 1, p. 8.

87 Case C-653/22, *J.P. Mali Kerékpárgyártó és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Fellebviteli Igazgatósága*, EU:C:2023:912, para. 39; Case C-935/19, *Grupa Warzywna sp. z o.o.*, EU:C:2021:287, para. 33.

88 Case C-190/17, *Zheng*, EU:C:2018:357, para. 44; Case C-255/14, *Chmielewski*, EU:C:2015:475, para. 31.

difficult to make their everyday purchases or transactions.[89] One can speak here of a specific case of a *de minimis* rule, under which the offence threshold was set at a sufficiently high level to allow minor infringements to go unpunished.

The degree of seriousness of the offence may be predetermined by EU law.[90] In such a case, a national fine of the same amount imposed for more or less grave infringements will not be proportional.[91] A more detailed assessment of the proportionality of national sanctions, including fines, is required when provisions provide for a certain type of stringent and severe sanctions to be applied to a wide range of unlawful conduct of different character and scale. If various types of infringements of different statutory obligations are subjected to the same severe sanction (or fine), then such fining legislation "does not guarantee that the competent authorities are able to ensure in each individual case […] that the severity of the penalties imposed does not exceed the seriousness of the offence identified".[92] Such a finding does not render the national fining legislation disproportionate *in abstracto* in all cases – only in those where the circumstances of the infringement do not call for such a severe sanction. Thus, the same national fining legislation may be disproportionate only in certain cases. *Total Waste Recycling*[93] serves as an example. The same penalty was established in national law for transporting waste through a different border crossing than the one indicated in the documentation as for transporting waste without prior notification or consent for its transport. The same penalty for a different type of infringement would be proportionate only "if the circumstances of the infringement make it possible to find that they involve equally serious infringements".[94] That would require the national court to determine that the illegal shipment of waste in the country of transit at a border crossing which differed from that provided in the notification document would constitute an equally serious infringement of law as a breach of the requirement to obtain consent and to give prior written notification of the transit of waste.

Severity of the fine

The third element of the necessity component of the proportionality test – the means for establishing the amount of that penalty – actually concerns the severity of the fine. It is the amount of a fine that directly affects the property interest of the individual being fined. At this stage of the proportionality test, one should evaluate the hardship caused to the infringer. When assessing proportionality, one should take into account the relationship between the

89 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, paras 107 and 81.
90 Case C-77/20, *K.M.*, EU:C:2021:112, para. 52.
91 Case C-210/10, *Urban*, EU:C:2012:64, para. 30.
92 Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 81.
93 Case C-487/14, *Total Waste Recycling*, EU:C:2015:780.
94 Ibidem, para 56.

amount of the fine that may be imposed (or that had been already imposed) and the economic benefit derived from the infringement that was committed.[95] The clearest assessment was provided in *K.M.*, where the value of an illegal catch was estimated at EUR 344,000.[96] It follows from this case that a fine which deprives the infringer of all the benefits achieved from the infringement would be proportionate,[97] since such a fine would be effective to deter offenders from committing the offence because they would not expect to retain any gains in case of disclosure.

However, the loss of illegal gains may not be sufficient to meet the requirements of a dissuasive, effective sanction. It is therefore possible to calculate the fine so as to include an extra element which in Chapters 1 and 8 we called an *administrative surplus.* This concept is best demonstrated in cases where the offender being fined is nevertheless obliged to fulfil his duty, usually under the tax law or customs law.[98] Here the CJEU has already questioned the proportionality of fines equivalent to 50%[99] and even 20%[100] of the shortfall in fulfilling one's public duty.

The administrative fines most often tested for their proportionality in the course of preliminary references were usually calculated as a percentage of the value of the infringement.[101] If that percentage was significant (the lowest questioned so far was set at 20%), thus depriving the sanctioned individual of a substantial part of their assets, the fine was either straightforwardly declared disproportionate or the arguments of the CJEU suggested such a finding by the national court hearing the case after the preliminary ruling. The CJEU has also questioned a fine of an amount almost equal to the average monthly net income of an employee in the Member State of reference.[102] All sanctions that exceed the value of the assets of the individual being fined[103] should also be declared disproportionate, as should fines corresponding to a multiple of the value of the public duty which was infringed (e.g. in *Link Logistik N&N*, the fine of approx. EUR 500 was eight times higher than the toll due in advance).[104] Also, the amount of a fine and the mode of its calculation may

95 Case C-231/20, *MT v. Landespolizeidirektion Steiermark*, EU:C:2021:845, para. 47.

96 Case C-77/20, *K.M.*, EU:C:2021:112, para. 49.

97 E.g. the value of the illegal catch – Case C-77/20, *K.M.*, EU:C:2021:112, para. 34.

98 For a review of the application of this principle in custom law see S. Armella, Customs Sanctions…, pp. 260–269.

99 Case C-653/22, *J.P. Mali Kerékpárgyártó és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Fellebviteli Igazgatósága*, EU:C:2023:912, para. 39.

100 Case C-935/19, *Grupa Warzywna sp. z o.o.*, EU:C:2021:287.

101 E.g. a fine equivalent to 100% of the total amount of the payment made – Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803 – 20% of the overstated VAT reimbursement – Case C-935/19, *Grupa Warzywna sp. z o.o.*, EU:C:2021:287 – or 60% of the undeclared cash – Case C-190/17, *Zheng*, EU:C:2018:357.

102 Case C-210/10, *Urban*, EU:C:2012:64, para. 58.

103 Case C-788/19, *Commission v. Kingdom of Spain*, EU:C:2022:55, para. 53.

104 Case C-384/17, *Link Logistik N&N*, EU:C:2018:810, paras 21–22.

not deprive individuals of their rights guaranteed by substantive EU law. An example is provided in the *EN.SA.* case, where the unlawful deduction of VAT was penalised by a fine equal to the amount of the deduction made. This deprived the individual of his right to deduction of VAT and was contrary to the principles of proportionality and VAT neutrality.[105]

The severity of fines provided for in national legislation may vary in the course of time due to natural economic fluctuations. This may result in different outcomes of the proportionality test, since the severity of fines may be assessed differently in different periods of time. However, if a fine was set by EU secondary law at a fixed level (e.g. EUR 100 per tonne of carbon dioxide), the fact that its severity has risen considerably since the provision entered into force due to changes in market circumstances (i.e. lower prices of emission allowances) does not negatively impact the proportionality assessment. Pursuant to the CJEU, the lower cost of meeting a specific obligation sanctioned by a fixed fine makes it easier (less costly) for the addressees to fulfil their duties properly.[106] This is yet another example of a different application of the proportionality test in respect of EU and national fining legislation.

Severe sanctions, even for an infringement of a formal character, may be justified if it is difficult to detect non-compliance with the obligation imposed by national law.[107] In such instances, severe sanctions offset the low risk of detection. Another plausible argument is the ineffectiveness of the previous regime of lower fines.[108] The severity of the fines may also be differentiated between natural persons and legal persons and between first-time and repeat offenders.[109]

Assessment of proportionality i*n abstracto* and *in concreto*

A review of the CJEU case law shows that the proportionality of national fining legislation can be reviewed in two ways: *in abstracto* and *in concreto*. The abstract review concerns national provisions, their wording and the interpretation established in the national jurisprudence. Here, it is generally the construction of the fining (or sanctioning) national regulations that is evaluated. One can argue that when assessing the proportionality of national law *in abstracto*, the NAA or national court should consider whether the fining provision is constructed in a manner that meets the requirements of the principle of proportionality. This question calls for an overall assessment of the national fining legislation, as demonstrated in *Commission v. Kingdom of Spain*.[110] There, the CJEU took into account the fact that (1) the fine was

105 Case C-712/17, *EN.SA.*, EU:C:2019:374, para. 44.
106 Case C-580/14, *Bitter*, EU:C:2015:835.
107 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 107.
108 Case C-418/11, *Texdata Software*, EU:C:2013:588, para. 60.
109 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, paras 95–96.
110 Case C-788/19, *Commission v. Kingdom of Spain*, EU:C:2022:55, paras 60–62.

issued for failing to comply with mere obligations to declare or other purely formal obligations, (2) the flat-rate fines applicable for each missing data item were very high (a minimum of EUR 1,500 or EUR 10,000), (3) the total amount was not capped and (4) the flat-rate fines were applied concurrently with the proportional fine of 150%. This legislation did not pass the proportionality test, since under Spanish law failure to submit other declarations to the tax authorities were met with a fine of EUR 200, which could be reduced by half in the event of late submission by the taxpayer, without prior request to the tax authorities. As can be seen from this example, this overall assessment may entail the analysis of the whole system of sanctions in force in a given area. Lower sanctions for similar offences in areas outside the scope of EU law may serve as a benchmark for disproportionately higher fines provided for in national legislation within the scope of EU law.

When it comes to calculating a fine, it seems that a percentage of the shortcoming in fulfilling a public duty (e.g. 20% of unpaid tax, 50% of unpaid duty or 60% of undeclared cash) should be considered as corresponding with the gravity of the infringement. It grows in absolute terms: the greater the scale of the infringement, the more serious it becomes from the point of view of the protected values and the higher the fine in terms of the value.[111] The same applies to sanctions, the amounts of which vary depending on the number of workers affected by non-compliance with certain labour law obligations.[112] In those instances, the increase "in a linear fashion" of the fine calculated in that manner reflects the extent and the seriousness of the irregularity committed.[113]

If national legislation allows for fines to be scaled or adjusted, it will pass the test of proportionality *in abstracto*.[114] That was the case in *J.P. Mali*, who received a significant sanction of "50% of a shortfall in customs duties caused by the supply of incorrect information in a customs declaration relating to goods imported into the European Union and which [was] imposed notwithstanding the good faith of and precautions taken by the operator concerned". That high standard rate was significantly lower than the 200% rate provided for in the case of bad faith on the part of the operator, and yet the rate could be reduced to 25% in certain situations specified in the legislation (e.g. the operator acts in good faith and corrects its customs declaration before the post-clearance control has been completed).[115] Such a construction of a national fining provision allows for different circumstances of infringements to be taken into account.

111 Cases C-653/22, *J.P. Mali Kerékpárgyártó és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Fellebviteli Igazgatósága*, EU:C:2023:912; C-255/14, *Chmielewski*, EU:C:2015:475, para. 26; and C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 41.

112 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 41.

113 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, paras 103–104.

114 Case C-322/16, *Global Starnet Ltd*, EU:C:2017:985, para. 62.

115 Case C-653/22, *J.P. Mali Kerékpárgyártó és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Fellebviteli Igazgatósága*, EU:C:2023:912, paras 37 and 39.

When applied at the abstract level, the principle of proportionality particularly opposes national fining provisions which call for an identical fine for all cases of non-compliance, without differentiating between malicious (e.g. fraudulent) and non-malicious infringements.[116] National fining systems construed on a "one size fits all" model are therefore usually found to be incompatible with the principle of proportionality, as the fine provided for in national law does not correspond to the nature and seriousness of the infringement. Here one can also see a link between the principles of equality and proportionality.

It may seem from the cases cited above that sufficient flexibility in the wording of the national legislation would suffice to pass the abstract proportionality test. However, once the national legislation passes the proportionality test thanks to its flexibility, the abstract assessment nevertheless assesses whether the fine corresponds to the gravity of the infringements. Take *SISTEM LUX*[117] as an example: the national legislation provided for a fine for the offence of smuggling amounting to between 100% and 200% of the customs value of the goods in question. The merchant was fined for having failed to comply with the obligation to declare the goods transported into the territory of the EU. In that case the NAA imposing a fine could vary its amount and could take into account all the facts and circumstances of the case. However, the CJEU found that particular sanction to be disproportionate, as it did not appear "to be commensurate with the seriousness of all the offences for which it is imposed".[118]

The national fining legislation will also fail to pass the abstract proportionality test if there is no cap limit.[119] This claim is supported by *Maksimovic*, where the national fine was initially set at between EUR 1,000 and EUR 10,000 or (depending on the number of workers employed) EUR 4,000 and EUR 50,000 in respect of each worker employed unlawfully.[120] Therefore, when assessing the proportionality of sanctions *in abstracto*, the NAA and national courts should question heavy fines resulting from a combination of a large fine for a single infringement (failing to provide certain documents for each worker) and the unlimited cumulation of individual fines (multiplied by the number of missing documents for each worker).

What works in favour of the proportionality assessment is the presence of transitional solutions concerning both the obligations imposed on individuals and the fines provided for their infringement. The Court took into account the fact that Directive 2003/87 initially provided for a fine of EUR 40 per tonne, giving the industries concerned sufficient time to adjust to the new reporting

116 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 101.

117 Joined Cases C-717/22 and C-372/23, *SISTEM LUX OOD and VU*, EU:C:2024:1041.

118 Case C-655/18, *Schenker*, EU:C:2020:157, paras 44 and 46; Joined Cases C-717/22 and C-372/23, *'SISTEM LUX' OOD and VU*, EU:C:2024:1041, para. 52.

119 Case C-35/20, *A*, EU:C:2021:813, para. 58.

120 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 42.

and purchasing obligation. The fine was to be raised only after the first three years of the new scheme introduced by Directive 2003/87.[121] It follows that providing the fined undertakings with a reasonable time to adjust to the new and costly obligations imposed by the Member States implementing the EU Directive serves the proportionality assessment of any fine.[122] Adopting a lower fine for the learning period of the addressees of a new obligation supports the finding of its proportionality. The same applies for the introduction of various mechanisms for warnings and reminders to allow good-faith operators to be fully informed in advance of their obligations.[123] As a consequence, if national law sanctions the first infringement at a lower rate, then such a legal solution helps that legislation to pass the *in abstracto* test.[124] The same applies to a higher fine in the case of recidivism.[125] This corresponds to certain requirements resulting from the principle of legal certainty discussed in Chapters 4 and 12.

National law provisions may pass the proportionality test when assessed *in abstracto*, yet fail the proportionality test when assessed *in concreto*. An example of such an operation of the principle of proportionality is the *Farkas* case. Hungarian regulations provided for a penalty of 50% of the VAT that the taxpayer is obliged to pay to the tax authorities. At the same time, they allowed for a reduction or even cancellation of the penalty in special circumstances.[126] This construction of national provisions means that the statutory rules for determining the amount of the penalty "ensure that it does not go beyond what is necessary to achieve the objectives of ensuring the correct collection of tax and preventing tax fraud".[127] At the same time, the sanction imposed on the taxpayer was deemed disproportionate *in concreto*,[128] because "the seller paid the VAT to the State Treasury, so that the State Treasury did not suffer any loss". The application of national law provisions that were consistent with EU law in principle turned out to be defective from the point of view of the principle of proportionality.

121 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63).

122 Case C-203/12, *Billerud Karlsborg and Billerud Skärblacka*, EU:C:2013:664, paras 40 and 41; Case C-580/14, *Bitter*, EU:C:2015:835, para. 29.

123 Ibidem.

124 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 105.

125 Case C-35/20, *A*, ECLI:EU:C:2021:813, para. 89.

126 Case C-564/15, *Tibor Farkas v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Adó Főigazgatósága*, EU:C:2017:302, para. 63.

127 Case C-564/15, *Tibor Farkas przeciwkov. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Adó Főigazgatósága*, EU:C:2017:302, para. 64.

128 Case C-564/15, *Tibor Farkas v. Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Adó Főigazgatósága*, EU:C:2017:302, para. 66.

The *in concreto* assessment entails an examination of the penalties actually imposed.[129] It usually takes place at the stage of national fining proceedings before a national court. However, such an assessment should also be conducted at the administrative level during fining proceedings when the NAA applies the national legislation and calculates the amount of the fine to be imposed in its decision.

The requirement of taking "all circumstances under consideration"

The necessity component of the proportionality test demands that fines or other sanctions be commensurate with the gravity of the infringement. The NAA or the court should evaluate whether the burden resulting from the sanctions provided for in the national legislation is "manifestly excessive in the light of the conduct" of the infringing party.[130] It should not be surprising, then, that the principle of proportionality requires from the national fining legislation that the individual circumstances of a given case are taken into account.[131] These circumstances have to be taken into account both when the penalty is determined (if there is a choice of penalties) and when the amount of the fine is set.[132]

Under the principle of proportionality, the national fining legislation should therefore provide the NAAs with the possibility to consider various aspects of the behaviour of the fined individual. Thus, sanctions should be set at a threshold which can be lowered or raised, depending on the circumstances of the infringement. In *ECOTEX* the national law provided that "in determining the penalty, regard shall be had to the seriousness of the offence, the reasons for its commission, and other mitigating or aggravating circumstances, as well as the financial situation of the offender".[133] That sufficed to pass the abstract proportionality test, as the national fining legislation allowed the fining authority to take into account all the circumstances of the infraction and of the burden resulting from the planned fine. In similar fashion, in *Farkas*[134] the CJEU found national fining legislation to be proportionate (at the abstract level) since a national fine set by default at 50% of the amount of the VAT which the taxable person is required to pay to the tax authority could

129 Cases C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 109; C-190/17, *Zheng*, EU:C:2018:357, para. 42; and C-255/14, *Chmielewski*, EU:C:2015:475, para. 23.

130 Joined Cases C-403/23 and C-404/23, *Luxone Srl and Sofein SpA*, EU:C:2024:805.

131 Cases C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 106; C-210/10, *Urbán*, EU:C:2012:64, para. 54; C-487/14, *Total Waste Recycling*, EU:C:2015:780, paras 53–54; C-69/15, *Nutrivet D.O.O.E.L.*, EU:C:2016:425, para. 55; and C-935/19, *Grupa Warzywna sp. z o.o.*, EU:C:2021:287, para. 32.

132 Case C-384/17, *Link Logistik N&N*, EU:C:2018:810, para. 45; Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 67.

133 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para 19.

134 C-564/15, *Farkas*, EU:C:2017:302, paras 62–64.

be reduced on the basis of the circumstances of the case. On the other hand, in *Grupa Warzywna sp. z o.o.* a fine taking the form of an additional tax penalty equivalent to 20% of the amount of the overstated VAT reimbursement (or unpaid VAT) was found by the CJEU to be disproportionate because that amount could not be reduced according to the specific circumstances of the case at issue.[135] A fine example is also provided in *Link Logistic*: the company was fined approximately EUR 532 because one of its vehicles had entered a section of toll road in Hungary without a valid toll document and without the distance-based charge for that section having been paid, notwithstanding the fact that the driver paid the required charge (approx. EUR 63) on his own initiative just 15 minutes afterwards, that is, immediately after discovering that he was travelling on the toll road.[136] While the CJEU refrained from making a direct or indirect proportionality assessment of this fine, it is obvious that such fining legislation could only be found to be disproportionate, as the "infringement" of national law did not result in any harm to the interests protected by Directive 1999/62/EC[137] and the national implementing legislation. Another example is provided by *G. ST. T.*,[138] in which a fine ranging from EUR 2,000 to 4,000 was provided together with other criminal sanctions, for all instances of the use in the course of trade of a trademark without the consent of the holder of the exclusive right, irrespective of the type of the use, the circumstances of that use and whether this infringement has been committed repeatedly or has caused significant harmful effects. Faced with such national legislation, the CJEU ruled that such severe sanctions (a custodial sentence of a minimum of five years coupled with the above-mentioned fine) would be proportionate when punishing for only certain infringements, particularly those that have been committed wilfully, repeatedly or involving significant effects in the course of trade.[139] On the other hand, such a sanction would be disproportionate in the case of other types of infringements or violations of IP rights on a minor scale.

Therefore, the principle of proportionality requires the fining authority to carry out a specific and individual assessment of the conduct of the entity concerned.[140] Circumstances of the case encompass "all the relevant information":[141]

135 Case C-935/19, *Grupa Warzywna sp. z o.o.*, EU:C:2021:287, para. 32.

136 Case C-384/17, *Link Logistik N&N*, EU:C:2018:810, paras 20.

137 Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ 1999 L 187, p. 42), as amended by Directive 2011/76/EU of the European Parliament and of the Council of 27 September 2011 (OJ 2011 L 269, p. 1).

138 Case C-655/21, *G. ST. T.*, EU:C:2023:791.

139 Ibidem, paras 82–83.

140 For more in respect of sanctions imposed in public procurement, see Case C-465/11, *Forposta and ABC Direct Contact*, EU:C:2012:801, para. 31; Joined Cases C-403/23 and C-404/23, *Luxone Srl and Sofein SpA*, EU:C:2024:805, para. 66.

141 Case C-640/21, *SC Zes Zollner Electronic SRL*, EU:C:2023:457, para. 62.

wilfulness of the infringement,[142] frequency of the infringement,[143] the effects on the protected good (value),[144] "the good faith" of the infringer,[145] "the risks which may be caused by that infringement in the field of protection of the environment and human health"[146] and whether the infringement by the fined individual was the first[147] or a repeat offence.[148]

Given the high frequency with which the CJEU has emphasised the need to take into account various aspects of the infringement, it may seem self-contradictory when the Court rules from time to time that "it does not mean that authorities must always take account of the specific individual circumstances of each case or that they necessarily have to take account of intention or recidivism".[149] This seemingly contradictory statement may be understood entirely in cases concerning the breach of formal duties,[150] such as an obligation to declare, where infringements should be punished in a simple, effective and efficient way. In such instances, the nature of the infringement may justify a lower scrutiny standard. On the other hand, factors such as intention or recidivism need not be taken specifically into account when the seriousness of the offence is clear due to the value protected by fines being severely harmed and where the intention to infringe is undisputable. This was the case with *K.M.*, as one cannot unintentionally install and use prohibited fishing gear due to its high cost and technical complexity.[151]

Peculiarities of the application of the proportionality test in practice

Proportionality of fines determined by EU secondary law

The different degrees of the proportionality review of fining provisions are best demonstrated when EU law not only imposes obligations upon individuals, but also provides directly for fines when they are infringed. While EU law generally leaves it to the Member State to provide adequate but proportionate sanctions in national law for any infringement of the implementing legislation,

142 Case C-655/21, *G.ST. T.*, EU:C:2023:791 para. 83.
143 Ibidem.
144 Ibidem.
145 Case C-640/21, *SC Zes Zollner Electronic SRL*, EU:C:2023:457, para. 62.
146 Cases C-210/10, *Urbán*, EU:C:2012:64, para. 54; C-487/14, *Total Waste Recycling*, EU:C:2015:780, para. 54; and C-69/15, *Nutrivet D.O.O.E.L.*, EU:C:2016:425, para. 55.
147 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 106.
148 Case C-35/20, *A*, EU:C:2021:813, para. 89.
149 E.g. Case C-255/14, *Chmielewski*, EU:C:2015:475, paras 28–29; Case C-77/20, *K.M.*, EU:C:2021:112, para. 55.
150 On the importance of the distinction between formal and substantive obligations see S. Armella, Customs Sanctions…, p. 9.
151 Case C-77/20, *K.M.*, EU:C:2021:112.

from time to time acts of secondary law contain specific rules on the type of sanction and the amount of a fine, as well as the circumstances which may be taken into account when determining its actual scope. In such instances, irrespective of whether such fines are provided for by a regulation or a directive (and then transposed directly into national legislation), the review of their proportionality can only take the form of a challenge to the validity of the EU act of secondary law containing such fines. This has certain implications for the national fining proceedings, as the NAA is not allowed to challenge the proportionality of a fine regulated by such an act of EU law. Thus, it may also not challenge the proportionality of national implementing legislation and must impose a fine provided for in the national legislation which directly transposed the fine established in EU law. The proportionality of such fining legislation may only be challenged at the judicial stage of national fining proceedings. Should a national court hearing an appeal against a fining decision want to refrain from upholding the NAA's fining decision on the grounds of disproportionate fines, it must make a preliminary reference under the *Foto-Frost* doctrine.

However, the challenges of validity based on the principle of proportionality in general, not only those that concern the proportionality of fines or other sanctions, are not successful.[152] The CJEU demands a manifest disproportionality to be established in order to question the validity of EU secondary fining legislation.[153] While the proportionality test applied in challenges to validity is constructed the same as in other instances of the application of this principle,[154] when challenged with a claim of disproportionality of a piece of EU legislation, the CJEU adopts a cautious approach. The Court accepts that the EU legislature must be allowed broad discretion[155] and that the Court itself "cannot substitute its own assessment for that of the EU legislature" except for the cases when the legislative choice "appeared manifestly incorrect or if the resultant disadvantages for certain economic operators were wholly disproportionate to the advantages otherwise offered".[156] The proportionality of an EU sanctioning measure is also not dependent on a retrospective assessment of its

152 See examples discussed by M. Feshti, J. Golemi, The Impact of the European…, pp. 130–132.

153 W. Sauter, Proportionality…, pp. 327–332; O. Saramet, G.-B. Spirchez, Limits…, p. 266.

154 Case C-580/14, *Bitter*, EU:C:2015:835, para. 24 – "[T]he principle of proportionality […] requires that measures implemented through EU law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them".

155 Case C-189/01, *Jippes and Others*, EU:C:2001:420, para. 80; C-580/14, *Bitter*, EU:C:2015:835, para. 25.

156 Case C-580/14, *Bitter*, EU:C:2015:835, para. 25; Case C-203/12, *Billerud Karlsborg and Billerud Skärblacka*, EU:C:2013:664, para. 35 ; for a detailed review of the principle of proportionality and this case see A.-M. Čičak, The Principle of Proportionality and the *Billerud* Ruling, *Croatian Yearbook of European Law and Policy*, 2017, vol. 13, pp. 255–290.

efficacy.[157] The Court simply reviews the goals of the EU legislature. When it finds that its goal was legitimate, even very strict penalties provided for in acts of EU secondary law are considered proportionate, even ones that deprive a national court of the possibility to adjust the amount of a fine.[158] This relaxed approach to the fines envisaged in EU law can be explained by the long-standing position of the CJEU, according to which fines constitute a very effective measure that secures the effectiveness of EU law.

The above claims are supported by a series of cases[159] concerning fines for failing to fulfil the obligations of reporting and surrendering carbon dioxide equivalent allowances under Directive 2003/87. This act not only obliges the Member States to introduce a sanction in the form of a fine, but also stipulates the method for its calculation and fixes the amount at a flat rate of EUR 40 per tonne of carbon dioxide equivalent emitted for which the operator has not surrendered allowances, rising in later years to EUR 100 per tonne. The fine is severe and strict because the national courts are unable to alter the amount of fines after considering the specific circumstances in which the obligations are violated. The fine provided for in this Directive is applied automatically, immediately and equally to those who fail to surrender in the time allowed because they have not purchased the required amounts and to those who possessed the required allowances but for various reasons failed to transfer them to the union registry in due time.[160] Despite that fact, which runs against the position of the CJEU – the principle of proportionality requires that the individual circumstances of each particular case are taken into account when determining the penalty to be applied (if there is a choice among penalties) and when fixing the amount of the fine[161] – the fining provisions of Directive 2003/87 were not held to be disproportionate.

The above approach to the proportionality of fines regulated expressly in Union law but still imposed at the national level differs substantially from the review of proportionality of national fining legislation when an act of EU law or an international agreement binding the EU and its Member States contains a provision which explicitly demands that Member States introduce severe sanctions, including that of a strictly criminal nature, but only for specific infringements of rights and obligations regulated by that act or agreement. Consider as an example Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This provision demands that Member States provide for criminal penalties "to be applied at least in cases of wilful

157 Case C-580/14, *Bitter*, EU:C:2015:835, para. 27; Case C-203/12, *Billerud Karlsborg and Billerud Skärblacka*, para. 37.

158 Case C-580/14, *Bitter*, EU:C:2015:835, para. 28.

159 Cases C-580/14, *Bitter*, EU:C:2015:835; C-203/12, *Billerud Karlsborg and Billerud Skärblacka*, EU:C:2013:664; and C-113/19, *Luxavation SA*, EU:C:2020:228.

160 Case C-113/19, *Luxavation SA*, EU:C:2020:228, para. 42.

161 E.g. Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 67; Case C-384/17, *Link Logistik N&N*, EU:C:2018:810, para. 45.

trademark counterfeiting or copyright piracy on a commercial scale". These penalties shall include imprisonment, which can be coupled with fines or the seizure, forfeiture and destruction of the infringing goods. The Member States are also obliged to provide for criminal penalties to be applied in other cases of infringement of intellectual property rights, "in particular where they are committed wilfully and on a commercial scale". Given the wording of Article 61 of TRIPS, one should not find national implementing legislation disproportionate solely on the grounds that it allows for a cumulation of various sanctions, including fines, which increase the overall severity of the penalty imposed. However, such a cumulation will only be proportionate if it is designed in such a way as to penalise only those infringements of the IP rights that meet a threshold of a certain seriousness.[162] Hence, if EU law leaves a margin of discretion to the Member States, national sanctioning or fining provisions will undergo the proportionality test applied in a standard manner, calling for the assessment of whether a sanction provided by national implementing legislation is commensurate with the seriousness of the infringement.

Proportionality of national fines falling within the scope of internal market rules

When national fining provisions fall under internal market rules, the NAAs and national courts need to observe the following rules. First of all, fines may not be applied if national legislation imposing a specific obligation or prohibition under that penalty was found to constitute an unjustified restriction on one of the fundamental freedoms.[163] Secondly, the compatibility of that legislation with EU law must be examined in the light of both the exceptions provided for in the Court's case law and the principle of proportionality.[164] Thirdly, the compatibility with EU law of national restrictions on free movement and national fines for failing to respect them are assessed separately.[165] It follows that both the fining legislation and the legislation imposing obligations upon individuals must undergo a full-blown inquiry as to their compatibility with EU law. The NAA or national court may also be obliged to conduct the extended version of the proportionality test if national fining legislation declared to be implementing an EU directive falls outside its scope. In such a case, the national fining legislation will usually constitute an obstacle to one of the freedoms of the internal market. This calls for a test of justification, for both the obligation secured by a fine and the fine itself. This claim is supported by the judgment in *Maksimovic*. Here, the CJEU evaluated

162 Case C-655/21, *G. ST. T.*, EU:C:2023:791, paras 77 and 78.
163 Joined Cases C-338/04, C-359/04 and C-360/04, *Placanica*, EU:C:2007:133, para. 70.
164 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 89.
165 Cases C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, paras 79–80; C-418/11, *Texdata Software*, EU:C:2013:588, paras 62 and 67–69; and C-190/17, *Zheng*, EU:C:2018:357, paras 39–40.

the proportionality of sanctions provided for under Austrian law, which were intended to ensure that the competent Austrian authorities can carry out effective monitoring in order to ensure compliance with rules on the working and employment conditions applicable to posted workers. This evaluation took place in the course of assessing the compatibility of Austrian legislation with the freedom to provide services. While the sanctions under consideration were designed to enable compliance with the terms and conditions of employment established under Directive 96/71,[166] the CJEU had already held that such monitoring measures did not fall within the scope of that directive.[167] Thus, the CJEU carried out a comprehensive assessment of the national sanctions under Article 56 of the TFEU, since national law which subjects the provision of services within national territory by an undertaking established in another Member State to administrative permitting, and which provides sanctions for failing to comply with this obligation, constitutes a restriction on the freedom to provide services.[168] Another such example is provided by *ECOTEX*, where national provisions limiting the cash payment fell outside the scope of Directive 2015/849.[169] This directive is limited to the cross-border transfer of funds and does not encompass payments taking place within a single Member State.

When it comes to fines alone, national legislation that imposes penalties for non-compliance with obligations which constitute restrictions on one of the freedoms of the internal market is likely to render the exercise of that freedom less attractive.[170] Thus, such penalties constitute a restriction on the internal market. To be applicable they must pass the test of plausible justification.[171] Such fining legislation may be permitted if it (1) serves the same overriding reasons in the public interest as the legislation secured by the fine,[172] (2) is appropriate for attaining objective(s) that are plausible under EU law and (3)

166 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

167 Case C-315/13, *De Clercq and Others*, EU:C:2014:2408, para. 47.

168 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 32; Case C-18/17, *Danieli & C. Officine Meccaniche and Others*, EU:C:2018:904, para. 44.

169 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73).

170 E.g. the provision of services within a national territory by an undertaking established in another Member State which are subject to the issue of an administrative permit – Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, paras 32–33.

171 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 89.

172 It must serve the same overriding reasons in the public interest as the restrictions in question – Case C-231/20, *MT v. Landespolizeidirektion Steiermark*, EU:C:2021:845, para. 43.

does not go beyond what is necessary to attain said objective(s).[173] A national fining provision that secures the effectiveness of national provisions constituting a restriction on one of the fundamental freedoms undergoes the same justification test as the national provisions imposing that obligation. Since the CJEU adopts a two- or three-tier proportionality test regarding national interference with the internal market, one may be tempted to consider that the same extended versions of this test also apply to national sanctions and fines.

However, in reality, when assessing the compatibility of national fines with the internal market, the CJEU practically skips the appropriateness element of the test. Just as the fines provided for in national legislation implementing the EU's regulations and directives are considered to be a suitable measure for achieving the objectives intended by the European legislator, national fines in cases falling under the internal market rules are also deemed to be appropriate for ensuring compliance with obligations that restrict free movement, and hence for the purpose of achieving the objectives pursued by national legislation.[174] Therefore, if a provision of national fining legislation passes the test of having a plausible overriding requirement of the public interest, it will also pass the test of adequacy. The assessment of proportionality will thus focus on the necessity element. When it comes to the less restrictive alternative, this element of the test is usually not even mentioned in the Court's judgment when assessing the proportionality of national fining provisions or the actual fine imposed upon an individual. One of the rare exceptions to this rule is *Maksimovic*, in which the CJEU considered that a lower sanction would constitute an equally effective, yet less burdensome measure. The less restrictive alternative element may play a crucial role in the abstract assessment of national fining provisions when they are cumulated with other sanctions. In the case of sanctions more severe than fines, e.g. a custodial sentence, the threshold seems to be even higher, as the CJEU demands that such penalties must be justified on sound grounds of the public interest, as they are "particularly onerous considering the implications for the person concerned".[175]

It may also be possible that an obligation introduced by a Member State and sanctioned by a fine will not constitute an obstacle to the functioning of the internal market, yet the fine itself imposed for a breach of this obligation will do so.[176] A very good example is provided by Case C-35/20 (*A*).[177] A Finnish national made a round trip between Finland and Estonia on board a pleasure boat without carrying a Finnish passport on the trip. Upon his return, "A"

173 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 35; Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, paras 70–71.

174 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 38.

175 Joined Cases C-64/18, C-140/18, C-146/18 and C-148/18, *Maksimovic and Others*, EU:C:2019:723, para. 45; Case C-231/20, *MT v. Landespolizeidirektion Steiermark*, EU:C:2021:845, para. 51.

176 Case C-788/19, *Commission v. Kingdom of Spain*, EU:C:2022:55, para. 62.

177 Case C-35/20, *A*, EU:C:2021:813.

was unable to present his passport or any other travel document. However, his identity was established on the basis of his driving licence. According to the CJEU, the obligation to carry an identity card or passport when travelling to a Member State and the corresponding obligation to carry that document when returning to the Member State of origin cannot be regarded on its own as discouraging the exercise of the right to free movement. Thus, the obligation alone did not constitute a restriction. However, the national legislation in question provided for disproportionate sanctions for non-compliance: a fine of EUR 95,250, based on the average monthly income of the offender and corresponding to 20% of that income without any ceiling on the amount.[178] This fine failed to pass the necessity element of the proportionality test, because the CJEU declared the offence committed by "A" to be of minor importance.[179] The same would be the case for similar, even lower fines, for any breach of a purely formal requirement,[180] such as a failure to file a declaration required under national law.[181] In such instances, national fining legislation usually fails the abstract proportionality test.[182]

In the case of national fines falling within the scope of internal market rules, the proportionality test of the sanction itself also encompasses the application of the restriction sanctioned by the fines. This corresponds to "the determination of factors constituting an infringement" element of the proportionality test. Therefore, in cases such as *ECOTEX*, it was necessary to take into account that the threshold of approximately EUR 5,000, which triggered the obligation to transfer or deposit the payment into a payment account, did not appear to be excessively low. Such a threshold allowed individuals to receive payments in cash sufficient to cover their everyday purchases. In other words, the threshold that triggered the fine, constituting a restriction on the free movement of capital, was sufficiently high to cover only suspicious transactions; the scope of the fine's application was limited. Furthermore, because the obligation to make a transfer or deposit did not apply to the payment of wages, its personal scope of application was also limited.[183]

Proportionality of cumulation of fines or fines and other sanctions

The principle of proportionality also plays an important role when national legislation provides for a cumulation of fines or other sanctions. Examples include (1) the duty to pay the costs of an appeal – corresponding to a percentage of

178 Ibidem, paras 44, 74 and 79.
179 Ibidem, para. 89.
180 Ibidem, para. 88.
181 E.g. a flat-rate fine of 150% of the amount of tax, corresponding to the value of assets held abroad and undeclared, constitutes a disproportionate restriction on the free movement of capital – Case C-788/19, *Commission v. Kingdom of Spain*, EU:C:2022:55, para. 62.
182 Ibidem, para. 54.
183 Case C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, paras 81–82.

the fine (e.g. 20%) if the appeal against the fining decision is dismissed,[184] (2) various forms of limitations of personal liberty,[185] (3) the seizure of goods,[186] (4) the seizure of illegal equipment[187] or (5) the suspension of a licence to carry out a certain activity.[188]

The principle of proportionality calls for an overall assessment of all the sanctions imposed or to be imposed, since "the severity of all of the penalties imposed does not exceed the seriousness of the offence identified".[189] That was the case with *Commission v. Kingdom of Spain*, where the fine of 150% of the total amount of tax due on the sums corresponding to the value of the assets or rights held abroad was cumulated with flat rate fines of EUR 100, 1,500, 5,000 or 10,000 for each case of missing, incomplete, incorrect or false data in the tax formulaire.[190] In the same manner, in *SISTEM LUX OOD and VU*[191] the CJEU took into account that apart from the fine corresponding to 100% of the customs value of the goods, the person responsible for the infringement of the customs rules would also be additionally penalised (e.g. by seizure of the goods), with the result that the amount of combined penalties to which an infringer would be liable "may result in that person being ordered to pay three times the customs value of the goods concerned".[192]

The overall assessment of the proportionality of all sanctions involved is also conducted in an abstract[193] and concrete[194] manner, with particular emphasis given – again – to the seriousness of the infringement. Quite often, a combination of different sanctions and a fine may lead to disproportionate national legislation, as it will not correspond to the seriousness of the infringements being penalised. This is particularly the case of fines without an upper limit coupled with other sanctions. For example, in *Maksimovic and Others*, the CJEU found a significant and unlimited fine coupled with the duty to pay court costs amounting to 20% of the fine (and even a custodial sentence if the fine goes unpaid) to be disproportionate.[195] Likewise, when fines are combined with restraints of liberty, the national legislation providing for such a combination of sanctions is usually declared disproportionate, as various forms of impris-

184 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 44.
185 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 45; Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 63.
186 Joined Cases C-717/22 and C-372/23, *'SISTEM LUX' OOD and VU*, EU:C:2024:1041, para. 53; Cases C-77/20, *K.M.*, EU:C:2021:112, paras 44–46; C-655/21, *G. ST. T.*, EU:C:2023:791, para. 63; and C-501/14, *EL-EM-2001 Ltd*, EU:C:2016:777, para. 46.
187 Case C-77/20, *K.M.*, EU:C:2021:112, paras 46 and 52.
188 Ibidem, para. 51.
189 Case C-655/21, *G. ST. T.*, EU:C:2023:791, paras 66 and 73.
190 Case C-788/19, *Commission v. Kingdom of Spain*, EU:C:2022:55, paras 49 and 58.
191 Joined Cases C-717/22 and C-372/23, *'SISTEM LUX OOD and VU*, EU:C:2024:1041.
192 Ibidem, para. 53.
193 E.g. Case C-788/19, *Commission v. Kingdom of Spain*, EU:C:2022:55.
194 Case C-77/20, *K.M.*, EU:C:2021:112, para. 52.
195 Case C-64/18, *Maksimovic and Others*, EU:C:2019:723, paras 45 and 48.

onment have always been considered particularly onerous for the individuals concerned.[196] A cumulation of sanctions shall be disproportionate in all cases where – given the circumstances – there was no risk of harm to the interests protected by the supplementary sanction(s).[197]

On the other hand, if a fine is set at a low level, particularly in comparison to the benefits resulting from the infringement (both potential and actual), other sanctions supplementing the fine may be found to be proportionate, since a fine alone would not have a dissuasive effect, thus diminishing the effectiveness of EU law. That was the issue in *K.M.*, where the captain of a vessel was fined EUR 500 (with the maximum sanction ranging from EUR 10,000 to 35,000, depending on the size of the vessel) when the value of the illegal catch on board the vessel he commanded was set at EUR 344,000.[198] Given this data, the gap between the value of the catch and the fine actually imposed should favour the proportionality of combining the fine with forfeiture of the catch and seizure of illegal equipment valued at EUR 55,000. This last sanction is to be considered the most important from the point of view of the value protected by the fining legislation (this time in the form of a European regulation).[199]

Here, the other two elements of the proportionality test, usually omitted when assessing the proportionality of fines, come to the fore. First of all, sanctions other than fines may be held to be unsuitable for achieving the goals. Secondly, fines usually provide a less restrictive alternative to other types of sanctions. These other sanctions require particular justification, as exemplified in *G. ST. T*, in which Article 61 of TRIPS authorised the Member States to introduce the penalty of imprisonment together with a monetary fine "at least" in cases of wilful trademark counterfeiting on a commercial scale.[200] The sanctions also undergo a more scrutinised evaluation as demonstrated in

196 Cases C-64/18, *Maksimovic and Others*, EU:C:2019:723, para. 45; 157/79, *Pieck*, EU:C:1980:179, para. 19; C-193/94, *Skanavi and Chryssanthakopoulos*, EU:C:1996:70, para. 36; and C-195/16, *I*, EU:C:2017:815, para. 77.

197 Case C-835/18, *Terracult*, EU:C:2020:520, para. 31.

198 Case C-77/20, *K.M.*, EU:C:2021:112, paras 47–48.

199 Article 90 of Council Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No. 847/96, (EC) No. 2371/2002, (EC) No. 811/2004, (EC) No. 768/2005, (EC) No. 2115/2005, (EC) No. 2166/2005, (EC) No. 388/2006, (EC) No. 509/2007, (EC) No. 676/2007, (EC) No. 1098/2007, (EC) No. 1300/2008, (EC) No. 1342/2008 and repealing Regulations (EEC) No. 2847/93, (EC) No. 1627/94 and (EC) No. 1966/2006 (OJ 2009 L 343, p. 1); Article 45 of Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999 (OJ 2008 L 286, p. 1).

200 Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 74.

EL-EM-2001 Ltd,[201] where "the withdrawal, suspension or restriction of the driver's driving licence until the fine has been paid" was held to be less restrictive than but equally efficient to the temporary seizure of a vehicle driven in breach of the provisions on road safety in Regulation 3821/85.[202]

Consequences of non-observance

While there is no doubt that the NAAs are bound by the principle of proportionality, as discussed in Chapter 1, it is the duty of a national court to finally assess whether the relevant rules on sanctions in the national fining proceedings are proportionate.[203] It is also ultimately for the national court to assess whether the amount of the penalty goes beyond what is necessary to attain the objectives pursued by the legislation in question.[204] The requirement that a sanction, including a fine, must be commensurate with the seriousness of the offence also calls for extensive jurisdiction of national courts. They should be empowered to carry out a full-blown inquiry and be equipped with the power to amend the legal qualification of an offence fined by the NAA, if it permits the court to impose a less severe, yet adequate, penalty.[205] The court must also be entitled to vary the penalty.[206] This shows that the principle of proportionality demands that national courts be granted full jurisdiction and that – while it is generally a principle of substantive law – its effectiveness depends on equipping national courts with extensive competences when reviewing an appeal against fining decisions.

The CJEU has so far avoided declaring that either the principle of proportionality or Article 49(3) of the Charter is directly effective. When assessing the compatibility of national sanctioning provisions with the principle of proportionality, the CJEU prefers to declare that national legislation is violating the respective provisions of the EU's secondary law containing "the

201 C-501/14, *EL-EM-2001 Ltd*, EU:C:2016:777.

202 Council Regulation (EEC) No. 3821/85 of 20 December 1985 on recording equipment in road transport (OJ 1985 L 370, p. 8).

203 Case C-35/20, *A*, EU:C:2021:813, para. 85; this duty has also been already confirmed in some Member States by their highest courts, see e.g. the case of Italy: F. Borriello, Principle of Proportionality and the Principle of Reasonableness, *Review of European Administrative Law*, 2020, vol. 13, no 2, p. 162.

204 S. Armella, Customs Sanctions…, p. 6; see also cases C-487/14, *Total Waste Recycling*, EU:C:2015:780, para. 54; C-544/19, *ECOTEX BULGARIA EOOD*, EU:C:2021:803, para. 109; C-935/19, *Grupa Warzywna sp. z o.o.*, EU:C:2021:287, para. 28; and C-564/15, *Farkas*, EU:C:2017:302, para. 61.

205 Case C-655/21, *G. ST. T.*, EU:C:2023:791, para. 68; Case C-77/20, *K. M. (Sanctions imposed on the master of a vessel)*, EU:C:2021:112, para. 51.

206 Cases C-255/14, *Chmielewski*, EU:C:2015:475, para. 26, C-77/20, *K. M. (Sanctions imposed on the master of a vessel)*, EU:C:2021:112, para. 51; and C-655/21, *G. ST. T.*, EU:C:2023:791, para. 68.

proportionality of sanctions" clause rather than infringing Article 49(3) of the Charter.[207] This approach can be demonstrated by *SISTEM LUX OOD and VU*, in which the CJEU ruled that Articles 15 and 42(1) of the Union Customs Code must be interpreted as precluding "the imposition, on the person who failed to comply, of an administrative penalty which is at least equal to the customs value of the goods in respect of which he or she has failed to comply".[208]

However, in *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, the CJEU ruled that provisions of EU secondary law pursuant to which the Member States are obliged to introduce sanctions that are effective, proportionate and dissuasive are capable of producing direct effect insofar as concerns the requirement of proportionality.[209] This allows for the *Simmenthal* rule to operate. Therefore, provisions of national law which fail the proportionality test may not be applied. This covers both fining provisions and national legislation that imposes a specific obligation or prohibition under the penalty of a fine which was found to constitute an unjustified restriction on one of the fundamental freedoms.[210] Nevertheless, Article 49(3) of the Charter should also be considered as being directly effective[211].

The judgment *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld* allows for the partial inapplicability of national fining provisions that are incompatible with the principle of proportionality – it suffices to omit only that part of a national provision which results in the imposition of a disproportionate fine. Thus, if the problem with the principle of proportionality results from the minimum or strict level of a fine, the NAA or national court is empowered to omit that threshold and impose a fine lower than that envisaged in national law. If the problem of proportionality concerns sanctions other than a fine, the NAA or national court must restrain themselves from imposing those other penalties, though they may impose a fine. If national legislation was disproportionate because it did not cap a fine, then the duty of the NAA or court would be to set the final amount of the fine at a proportionate level.

Given the extensive case law on the principle of proportionality, a reopening of the fining proceedings pursuant to *Kuhne-Heitz* does not seem foreseeable.

207 Cases C-653/22, *J.P. Mali Kerékpárgyártó és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Fellebviteli Igazgatósága*, EU:C:2023:912, para. 39; C-35/20, *A*, EU:C:2021:813, para. 92; and C-205/20 *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, EU:C:2022:168; Joined Cases C-403/23 and C-404/23, *Luxone Srl and Sofein SpA*, EU:C:2024:805, para. 71.

208 Joined Cases C-717/22 and C-372/23, '*SISTEM LUX OOD and VU*, EU:C:2024:1041, para. 54.

209 Case C-205/20, *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, EU:C:2022:168, paras 17–19.

210 Joined Cases C-338/04, C-359/04 and C-360/04, *Placanica*, EU:C:2007:133, para. 70.

211 See e.g. J. Długosz, The Principle of Proportionality in European Union law as a Prerequisite for Penalization, *Przegląd Prawniczy Uniwersytetu im. Adama Mickiewicza*, 2017, vol. 7, p. 294.

However, one may not exclude a claim for damages, as it should be quite easy to demonstrate their disproportionality – at least in cases concerning fines prescribed more rigidly in national law than those representing a percentage of turnover. In the case of fines calculated in a comparable manner to those imposed for infringements of competition rules, the success of challenges to their disproportionality once a fining decision becomes final depends on the quality of the reasoning behind the fining decision or subsequent judgment.

One should remember that the burden of proof on the proportionality of national fining legislation, the decision to fine and the amount of a fine rests with the Member State and its authorities.[212] A lack of reasoning on the proportionality of a fine breaches Article 47 of the CFR and shall lead to the fining decision being revoked and the case being remanded back to the administrative authority.

Conclusions

This research confirms the key importance of the principle of proportionality in ensuring the protection of individuals in national proceedings that impose a financial penalty. This importance results from the broad scope of application of the principle in question: (1) the determination of factors constituting an infringement, (2) the determination of the rules concerning the severity (amount) of a fine, (3) the assessment of the factors which may be taken into account when setting a fine and (4) the nature of penalties other than fines and the way of ensuring compliance with its requirements in a specific case through the application of the *Simmenthal* rule. It is inadmissible to impose penalties for infringing national provisions if they prove to be contrary to the freedoms of the internal market. In addition, it is inadmissible to impose penalties that prove to be disproportionate in the factual circumstances of a given case. According to the *Simmenthal* rule, national courts deciding on appeals against criminal decisions may not only disregard the national criminal provision in its entirety, refraining from punishing the individual at all, but may also disregard that part of the provision of which the penalty regulated therein is considered disproportionate. As a result, they may impose a penalty of a lower amount or a different penalty, provided that another penalty has been established in national law for the act in question.

The analysis of the manner in which the proportionality test is applied by the CJEU also confirms that the proportionality test is applied with varying intensity, depending on whether it concerns the assessment of the proportionality of sanctions provided for directly in an act of EU law or those resulting from the obligation of the Member States to provide effective and dissuasive

212 E.g. Cases C-333/14, *Scotch Whisky Association*, EU:C:2015:845, para. 54; C-42/02, *Lindman*, EU:C:2003:613, para. 25; C-227/06, *Commision v. Belgium*, EU:C:2008:160, para. 63; and C-456/10, *ANETT*, EU:C:2012:241, para. 50.

sanctions, and on whether the sanctions serve to protect values that the EU legislator considers worthy of protecting or those that only the national legislature considers worthy of protecting. This is particularly visible in cases of financial penalties connected with the internal market freedoms.

From the point of view of applying the proportionality test of pecuniary penalties imposed in domestic proceedings, the premise of a sanction's necessity is of key importance. Two elements play a decisive role in this assessment: the gravity of the infringement of the public interest protected by the penalty and the severity of the sanction itself. The principle of proportionality allows for the imposition of severe penalties when it is justified by the gravity of the infringement, its scale and the infringer's bad faith. Penalties corresponding to the amount of benefits gained from the infringement are also permissible. On the other hand, the principle of proportionality opposes severe penalties for breaches of formal obligations. It is worth noting that the standard for assessing the proportionality of the pecuniary penalties presented in the chapter has been shaped in recent years in cases concerning pecuniary penalties, the amount of which has been precisely specified in domestic law (leaving the authority no discretion at all or only a small margin of appreciation). National courts have not referred questions for a preliminary ruling in cases concerning the proportionality of fines imposed similarly to those for infringement of competition rules (i.e. with a fine specified as a percentage of the undertaking's revenue).

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8 The principle of *ne bis in idem* – a protection against disproportionate penalty – a new version of an old principle

Kamil Kapica

Introduction

Art. 50 of the Charter of Fundamental Rights (CFR) precludes punishing the same person (*idem personae*) more than once for the same criminal act (*idem factum*)[1] for which they were previously acquitted or convicted by a final judgment or previously punished by an administrative or judicial decision which assessed the case on its merits[2] (*bis*)[3] in the European Union. The phrase "no one" used in Art. 50 of the CFR means that its personal scope encompasses self-employed people and all sorts of undertakings.[4] The material scope of the *ne bis in idem* principle covers both purely internal (national) and cross-border proceedings.[5] It is intended to ensure – as a rule – protection against the imposition of a second fine for the same act. It also protects individuals against a second prosecution alone ("being tried twice").[6] If validly triggered, Art. 50 of the CFR itself prevents national administrative authorities (NAAs) from commencing or continuing other proceedings.[7]

Contrary to other fundamental rights and general principles analysed in this monograph, the actual scope of protection of the right covered by Art. 50 of the CFR – as well as its application by both NAAs and national courts[8] – raises many significant issues which remain unresolved by the jurisprudence of the Court of Justice. First of all, the *ne bis in idem* principle only protects against a

1 Case C-857/19, *Slovak Telekom*, EU:C:2021:139, para. 42.
2 Case C-58/22, *NR*, EU:C:2024:70, paras 53 and 56.
3 Case C-596/16, *Enzo di Puma*, EU:C:2018:192, para. 39.
4 See e.g. E. Gill-Pedro, Whose Freedom Is It Anyway? The Fundamental Rights of Companies in EU Law, *European Constitutional Law Review*, 2022, vol. 18, no. 2, pp. 183–206. For the sake of simplicity, in the remainder of this chapter I will use the phrase "entity" to capture the multitude of legal forms.
5 Explanation on Article 50 of the Charter, 2007 OJ C 303/31.
6 Opinion of Advocate General A. Kokott, Case C-17/10, *Toshiba Corporation*, EU:C:2011:552, para. 131.
7 Opinion of Advocate General M. Bobek, Case C-117/20, *bpost*, EU:C:2021:680, para. 107.
8 National administrative authorities and courts may collectively be referred to as "national authorities."

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specific set of sanctions being imposed. Both sanctions must be criminal under the *Engel* criteria.[9] If one of the sanctions (imposed or not yet imposed) does not have that criminal character or does not fall within the scope of European Union law,[10] the principle under Art. 50 of the CFR will not apply. However, in such a scenario, the NAA may still be obliged to act under the *ne bis in idem* principle emerging from Art. 4 of Protocol 7 to the European Convention on Human Rights (ECHR).[11] Secondly, the most recent case law of the Court of Justice of the European Union (CJEU) suggests that Art. 50 of the CFR itself has lost most of its autonomous significance.[12] Since *Menci*, the parties to national fining proceedings benefit from *ex post* protection against the disproportionality of cumulative sanctions.[13] As a result, NAAs can limit the scope of the actual application of Art. 50 of the CFR upon fulfilment of the cumulative conditions stemming from Art. 52(1) of the CFR and CJEU jurisprudence.[14] The actual application of the *ne bis in idem* principle has consequently become a very complex matter, where even the mere assertion that the "*idem*" condition is met in proceedings in different Member States has been challenging.[15] The *idem* may now more frequently be fulfilled in cross-border proceedings, once two separate authorities have established the same set of concrete facts on the territory of the same Member State.[16] The "*idem*" requirement may also be fulfilled when the fining authority of one Member State takes into account the activities of the fined undertaking in another Member State (whose authority was the second to initiate or conclude fining proceedings) when determining

9 Three criteria are relevant in the context of that assessment. The first is the offence's legal classification under national law (practically irrelevant during assessment); the second is the intrinsic nature of the offence; and the third is the degree of severity of the penalty which the person concerned is liable to incur. See e.g. Case C-97/21, *MV – 98*, EU:C:2023:371, para. 38 and the case law cited therein.

10 Case C-617/10, *Hans Åkerberg Fransson*, EU:C:2013:105, para. 21.

11 See also G. Coffey, An Interpretative Analysis of the European ne bis in idem Principle Through the Lens of ECHR, CFR and CISA Provisions: Are Three Streams Flowing in the Same Channel?, *New Journal of European Criminal Law*, 2023, vol. 14, no. 3, pp. 345–373.

12 See also D. Sarmiento, *Ne bis in idem in the Case Law of the European Court of Justice*, in: B. van Bockel (ed.), *Ne Bis in Idem in EU Law*, Cambridge, 2016, pp. 103–130.

13 Opinion of Advocate General M. Bobek, Case C-117/20, *bpost*, EU:C:2021:680, paras 107–110.

14 See Cases C-117/20, *bpost SA*, EU:C:2022:202; C-151/20, *Nordzucker*, EU:C:2022:203; or C-524/15, *Menci*, EU:C:2018:197. See also G. Lo Schiavo, The Principle of ne bis in idem and the Application of Criminal Sanctions: Of Scope and Restrictions: CJEU 20 March 2018, Case C-524/15, Luca Menci CJEU 20 March 2018, Case C-537/16, Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob) CJEU 20 March 2018, Joined Cases C-596/16 and C-597/16, Enzo Di Puma v. Consob and Consob v. Antonio Zecca, *European Constitutional Law Review*, 2018, vol. 14, no. 3, pp. 644–663.

15 See e.g. Case C-151/20, *Nordzucker*, EU:C:2022:203, para. 23.

16 See e.g. Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 74; Case C-151/20, *Nordzucker*, EU:C:2022:203, para. 43.

the amount of the fine. The scope of protection under Art. 50 of the CFR is therefore not normatively defined and ascertainable *ex ante* in order to guarantee that no second set of proceedings will occur.[17] This calls into question the nature of the double jeopardy rule as a particular expression of the principle of legality.[18] The test of whether cumulation is admissible is based to a greater extent on an assessment of the entirety of the circumstances taking place after the imposition of both sanctions.[19]

What remains unresolved is which authority should be responsible for giving effect to Art. 50 of the CFR and when, how and under what circumstances the violation of this fundamental right is to be established, how to apply the justification reasoning under Art. 52 of the CFR, on what criteria and with what tools – such as coordination of procedures or information exchange – such examination should be based and what material or procedural consequences a national court should apply for an unjustified violation of the directly effective Art. 50 of the CFR. In consequence, the long-term application of Art. 52(1) of the CFR may contradict the uniform application of the standards of the Charter and create inconsistencies in the application of the *ne bis in idem* principle between Member States and regimes of EU law.

Legal character

In comparison to other general principles and fundamental rights analysed in this monograph, the right not to be tried or punished twice in criminal proceedings for the same criminal offence, guaranteed under Art. 50 of the CFR, offers – as a matter of principle – the same personal and material scope of protection as its "general principle" equivalent.[20] Both the general principle of prohibition of *ne bis in idem* and the fundamental right guaranteed by Art. 50 of the CFR have the same scope of application, determined by the criminal nature of the penalties imposed (including in secondary proceedings). Thus, the general principle of *ne bis in idem* does not supplement Art. 50 of the CFR – contrary to the principle of proportionality or the principle of good administration, for example.

17 Opinion of Advocate General M. Bobek, Case C-117/20, *bpost*, EU:C:2021:680, paras 107 and 119.

18 See also Case C-42/17, *M.A.S. and M.B.*, EU:C:2017:936, para. 55.

19 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 52; Case C-524/15, *Menci*, EU:C:2018:197, para. 58.

20 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others*, EU:C:2002:582, para. 59; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v. Commission*, EU:C:2004:6, para. 338; and Joined Cases C-217/15 and C-350/15, *Orsi and Baldetti*, EU:C:2017:264, para. 19.

When should Article 50 in conjunction with Article 52(1) of the CFR be considered by an NAA?

Neither Art. 50 of the CFR nor the CJEU's jurisprudence provide a clear answer to the question of at what point in national proceedings an NAA should verify whether a set of second proceedings is pending, whether the "*idem*" and "*bis*" conditions already exist or whether a sanction is criminal in nature. The same concerns the admissibility of a cumulation of proceedings or sanctions for the same individual for the same deed. Art. 52(1) of the CFR requires that (i) the possibility of cumulation is provided for by law, (ii) the cumulation respects the essence of the fundamental right, (iii) the limitation of the fundamental right resulting from the duplication of proceedings and the cumulation of sanctions serves an objective of the general interest[21] and (iv) the cumulation is strictly necessary. The requirement of strict necessity is of particular importance in that regard. Three further specific conditions relating to it must be met, namely that (i) such duplication does not represent an excessive burden for the person concerned, (ii) there are clear, precise rules making it possible to predict which acts or omissions are liable to be subject to duplication and (iii) the sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and "within a proximate timeframe".[22]

Since Art. 50 of the CFR can no longer be considered in isolation from Art. 52(1) of the CFR, the conditions under both these provisions must be applied by NAAs simultaneously and as soon as at least one of them becomes aware of the cumulation. It also seems reasonable that the criteria of Art. 52(1) of the CFR should be applied consecutively – not cumulatively – at the various stages of cumulation, not only when cumulation has become a fact in terms of the "*bis*" criterion. Art. 50 of the CFR precludes not only "being punished", but also "being tried" twice. Therefore, even the mere conduct of proceedings must be justified in terms of the limitation clause, as soon as it meets the criteria of *idem* and *bis* in terms of a criminal sanction.

Given the shifting nature of protection jointly awarded by Art. 50 of the CFR and Art. 52(1) of the CFR – from protection against double jeopardy to protection against excessive duplicatation of liability – the timing of their application is of the utmost importance. Assuming that the facts of the two sets of proceedings are identical,[23] one may be tempted to consider three configurations of cases. The first group (i) refers to cases in which a sanction of a criminal nature has already been imposed in one set of proceedings, and the decision is already final. In such cases, the second set of proceedings is initiated

21 See e.g. Case C-117/20, *bpost SA*, EU:C:2022:202, paras 44 and 49.

22 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 96; Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72, para. 99.

23 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 76.

when the *bis* condition is fulfilled. The proceedings are therefore conducted sequentially. The second group (ii) refers to cases in which the proceedings are concurrent and it cannot be determined which one will reach finality first. The third group (iii) is a particular logical sub-category of concurrent procedures, i.e. those that acquire the attribute of *bis* simultaneously (concurrently).

Considering the first set of proceedings (the *bis* condition is fulfilled before the commencement of further proceedings), all decisions on the course of the second fining procedure (e.g. continuation, discontinuance or non-imposition of a sanction) should depend on the information obtained by the national authority (NAA or court) conducting the second set of proceedings. Where a final decision exists, the principle under consideration precludes criminal proceedings regarding the same facts from being initiated or maintained.[24]

In the case of proceedings conducted in parallel (types ii and iii), even if there is a certain period between the two being initiated, it is challenging to establish either a convincing sequence of precedence or to conclusively assign the duties of the authorities concerning the coordination of proceedings or verification of the *idem* or *bis* criteria. One possibility, delineated in *VWAG*, is "first come, first served".[25] It attaches the responsibility for applying Art. 50 of the CFR to the national authority whose proceedings have not yet reached the *bis* phase. However, such a position may generate problems, mainly when the administrative procedure before that authority has already been completed and its fining decisions are now subject to judicial review. Yet, this does not necessarily apply to parallel proceedings (no *bis* yet). One may be inclined to advocate that from the point of view of Art. 50 of the CFR, even if the condition of "*idem*" is met, the principle is still not applicable because the *bis* condition has not been satisfied.[26]

Moreover, for the *bis* condition to be fulfilled, the first fining decision not only must have become final, but it must also have been based on the merits of the case.[27] It is therefore difficult to establish an "*idem*" or "*bis*" as well as a violation of Art. 50 of the CFR in any proceedings before an actual finding and final assessment of a breach of EU law. Thus, there can be no obligation to respect Art. 50 of the CFR in the case of proceedings that have not been concluded on the merits or by a final decision.

If the *bis* condition is not fulfilled in one of the two sets of proceedings, the NAAs can carry them out simultaneously without hindrance.[28] However, the effectiveness of EU law and the ultimate goal of compliance with fundamental

24 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 59.

25 Ibidem.

26 Case C-857/19, *Slovak Telekom*, EU:C:2021:139, para. 47.

27 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 39; Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 58.

28 Opinion of Advocate General M. Bobek in Case C-151/20, *Nordzucker*, EU:C:2021:68, para. 37.

rights would justify an obligation to preliminarily and preventively coordinate (e.g. exchange information about the other proceedings) or verify the *idem* factor between proceedings conducted by different NAAs under Art. 4(3) of the Treaty on European Union (TEU – principle of loyal cooperation), even before any set of parallel proceedings under consideration has become final in terms of "*bis*". Such an obligation is justified by the jurisprudence of the CJEU concerning the effects of breaches of European fundamental rights. In accordance with *Skoma-Lux* and *Grossmania*, serious violations of EU fundamental rights may render the decisions of national authorities prone to proceedings being reopened or disregarded.[29] Suppose that a breach of the *ne bis in idem* principle occurred due to a failure to prematurely coordinate fining proceedings and avoid imposing excessive cumulation of sanctions on the same individual by different authorities, from the same Member State or two different Member States and it leads to the annulment of one of the fining decisions. In that case, it is even more justifiable to prevent such breaches *ex ante* by forcing the authorities to cooperate even before all the conditions of Art. 50 of the CFR have been met. However, such an outcome would be pragmatically achievable only if the EU mechanisms for cooperation between authorities, including those enforcing different areas of EU law, have been adequately developed. Nonetheless, NAAs are obliged to coordinate, regardless of the existence of normative mechanisms to facilitate the fulfilment of this requirement.[30]

The concept of criminal sanctions under Article 50 of the CFR

The first element of the preliminary assessement under Art. 50 of the CFR is whether the proceedings and penalties at issue in the main proceedings are criminal in nature. It is apparent from the case law that three criteria are relevant in the context of that assessment: the legal classification of the offence under national law, the intrinsic nature of the offence and the severity of the penalty that the person concerned is liable to incur.[31] If one of the imposed or expected sanctions is not criminal on these grounds, the NAA may refrain from examining the other *ne bis in idem* premises.

Such a decision may not be self-evident. So far, the CJEU has not directly ruled on the criminal nature of any of the sanctions based on the *Engel* criteria, nor has it declined to do so where the national court has not expressed any

29 Case C-161/06, *Skoma-Lux*, EU:C:2007:773, para. 73; Case C-177/20, *Grossmania*, EU:C:2022:175, para. 71.

30 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 103.

31 Case C-97/21, *MV*, EU:C:2023:371, para. 38 and the case law cited therein. See also Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 45.

doubt about their criminal nature.[32] What makes it a less predictable problem is that when applying fundamental rights (e.g. *ne bis in idem* or the principle of proportionality), even sanctions with an objectively low level of liability (e.g. EUR 250)[33] might be criminal in character.

Consequently, insofar as the sanctions available to the authority fall within the scope of EU law, they are highly likely to be of a criminal nature and to activate the protection against double punishment. However, the NAA should be able to distinguish the structural elements of the sanction that allow the criminal nature of the sanction to be prejudged in light of Art. 50 of the CFR, in both its own and external proceedings. If criminal in nature, it should qualify for any financial sanctions, such as those provided by EU competition law,[34] reaching up to 10% of a company's turnover in the last financial year for which financial statements were filed.[35] There is also no doubt that tax sanctions, in the form of administrative penalty surplus (an obligation to pay outstanding VAT plus a penalty of tens of per cent), will qualify as criminal sanctions.[36]

A sufficient degree of severity (the degree of liability at risk), which is essential to establish the criminal nature of a sanction, is demonstrated first and foremost by the normative construction of the provision providing the sanction in question. Particular attention should be paid to a sanction that is calculated as (i) a percentage of the entity's turnover (e.g. sanctions under Regulation 1/2003 or Regulation 139/2004), (ii) a percentage of the value of the infringement (e.g. tax sanctions),[37] (iii) a multiplication of the value of the infringement (e.g. twice the amount of the unpaid VAT)[38] or (iv) a rigid sanction, particularly one established with a minimum threshold of liability.[39] Whenever a fine imposed by a NAA includes such a normative indicator, that

32 See e.g. Case C-570/20, *BV*, EU:C:2022:348, para. 28; Case C-55/22, *NK v. Bezirkshauptmannschaft Feldkirch*, EU:C:2023:670, para. 47.

33 Case C-97/21, *MV – 98*, EU:C:2023:371, paras 48–49.

34 Art. 23(5) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty (OJ 1, 04/01/2003, pp. 1–25) and Art. 14(5) of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 24, 29/01/2004, pp. 1–22).

35 Case C-151/20, *Nordzucker*, EU:C:2022:203; paras 32–33; Case C-117/20, *bpost SA*, EU:C:2022:202, paras 27–28. See also Opinion of Advocate General N. Wahl, Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. w Warszawie przeciwko Prezesowi Urzędu Ochrony Konkurencji i Konsumentów*, EU:C:2018:976, para. 46.

36 Opinion of Advocate General M. Bobek, Case C-117/20, *bpost*, EU:C:2021:680, paras 145–146. Examples of such may be found in Cases C-617/10, *Hans Åkerberg Fransson*, EU:C:2013:105, para. 10; C-524/15, *Menci*, EU:C:2018:197, para. 6; and C-570/20, *BV*, EU:C:2022:348, paras 6–7.

37 Ibidem.

38 Case C-820/21, *Vinal*, EU:C:2023:667, paras 17 and 56.

39 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, paras 15 and 52–54. See also Case C-97/21, *MV – 98*, EU:C:2023:371, paras 6 and 48–49.

sanction must be considered "criminal" under the *Engel* criteria. In these and other cases, the criminal character of a sanction is determined by an abstract assessment, i.e. by comparing the most minor offence that would justify the application of the sanctioning provision with the highest possible sanction to be imposed on that basis (the upper limit of the sanction). This justifies why even sanctions with an objectively low liable amount will have a penal character for the purpose of applying Art. 50 of the CFR.

Examination of *idem*

The relevant criterion to assess the existence of the same offence (the *idem* condition) is the identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which resulted in the final acquittal or conviction of the person concerned.[40] The Court has adopted a material understanding of the identity of offences,[41] irrespective of the legal classification they are given.[42] Art. 50 of the CFR does not specifically indicate the factors to be considered by NAAs in examining the *idem* condition.[43]

The starting point for assessing the notion of "the same offence" is to consider the specific unlawful course of conduct that gave rise to the proceedings of a criminal character.[44] Thus, the *ne bis in idem* principle can only be applicable where the national authority or the court dealing with the second criminal prosecution finds that the material facts in both proceedings – by being linked in time, space and subject matter – constitute an inseparable whole or a set of facts which are inextricably linked together.[45] The *ne bis in idem* principle is not intended to apply where the facts in question are not identical but merely similar.[46] Therefore, the concept of *idem* should be interpreted as referring only to the nature of the acts. However, NAAs may circumvent the *idem* condition with ease by subdividing facts by time, space and subject matter into several

40 Case C-790/19, *LG and MH (Self-laundering)*, EU:C:2021:661, para. 78.

41 G. Lo Schiavo, The Principle of ne bis in idem and the Application of Criminal Sanctions: Of Scope and Restrictions: CJEU 20 March 2018, Case C-524/15, Luca Menci CJEU 20 March 2018, Case C-537/16, Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob) CJEU 20 March 2018, Joined Cases C-596/16 and C-597/16, Enzo Di Puma v. Consob and Consob v. Antonio Zecca, *European Constitutional Law Review*, 2018, vol. 14, no. 3, p. 653.

42 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 67.

43 Case C-726/21, *GR, HS, IT*, EU:C:2023:764, para. 49.

44 Case C-58/22, *NR*, EU:C:2024:70, paras 53 and 56; Case C-537/16, *Garlsson Real Estate*, EU:C:2018:193, para. 37.

45 Case C-367/05, *Kraaijenbrink*, EU:C:2007:444, para. 28.

46 Case C-117/20, *bpost SA*, EU:C:2022:202, paras 33–36; Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 66.

violations that can be separately prosecuted and punished[47] (e.g. a single continuous infringement divided into multiple infringements[48] or assessments by authorities from different Member States of other prohibited provisions of the same contract template within the meaning of Directive 93/13).

The *ne bis in idem* principle cannot cover any offences which, although committed during the same period as those which were the subject of a final decision, concern material facts other than those which were the subject of that decision.[49] It is therefore up to the competent national courts or national authority to assess whether the degree of identity and connection between all the factual circumstances that gave rise to both criminal proceedings against the same person could allow a finding that they are "the same acts".[50] It is also for that NAA to examine the facts considered in each of those proceedings, as well as the alleged infringement period.[51]

Furthermore, particularly in cross-border violations, the national authority must assess whether the same facts were taken into account in calculating the fine or whether the NAA's decision also concerns the territory of another Member State. The mere fact that an authority of a Member State refers – in a decision finding an infringement of EU law and of the corresponding national law – to a factual element relating to another Member State is insufficient to support the inference that that factual element gave rise to the proceedings or was found by that authority to be one of the constituent elements of that infringement. It must also be ascertained whether that authority has actually ruled on that factual element comprising the infringement, established the liability for that infringement of the person against whom proceedings were brought and, as the case may be, imposed a penalty on that person, such that the infringement is to be regarded as encompassing the territory of that other Member State.[52]

To wholly proceed with the *idem* examination, the NAAs should simultaneously consider the identity of the offender, the territory of the infringement – including the markets affected by the infringement – the alleged infringement period, the specifics of the violations, the type of offence (i.e.

47 As to the matter of competition law, see R. Nazzini, Parallel Proceedings in EU Competition Law: Ne bis in idem as a Limiting Principle, in: B. van Bockel (Ed.), *Ne bis*..., p. 145. See also Art. 83 of the General Data Protection Regulation, whose application may result in absorption or accumulation of penalties by only depending on the interpretation of the term "same or linked processing operations"; see W. Kotschy, Article 83 General Conditions for Imposing Administrative Fines, in: C. Kuner et al. (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary*, Oxford Academic, 2020.

48 See also R. Nazzini, Parallel Proceedings…., p. 147.

49 Case C-726/21, *GR, HS, IT*, EU:C:2023:764, para. 82; Case C-435/22 PPU, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*, EU:C:2022:852, para. 135.

50 Case C-367/05, *Kraaijenbrink*, EU:C:2007:444, para. 32.

51 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 38; Case C-331/23, *Dranken Van Eetvelde*, EU:C:2024:1027, para. 54.

52 Case C-151/20, *Nordzucker*, EU:C:2022:203, para. 44.

single or long-term, continuous infringement) and the methodology of calculating fines in order to establish whether violations on a specific territory have been assessed on their merits and whether the turnover earned in the other Member State was included in the fine calculations.

The NAA should make a preliminary determination based on such an analysis regarding the extent to which the violations under assessment coincided with the actions of another NAA. These conclusions will pre-determine the extent to which Art. 50 of the CFR or Art. 52(1) of the CFR will or may be applicable. Following this analysis, it may be determined that either the entire proceedings should be discontinued (in instances where the actions of one authority fully overlap with those of another) or a minor, consequential action should be taken, such as calculating the penalty based on a shorter duration of the infringement (for example, where the actions of the authorities overlap by only one year of the infringement).[53]

The first element of the test concerning the identity of material facts should be whether they involve the same perpetrator[54] (identity of the offender). This criterion usually boils down to a finding that the same natural[55] or legal[56] persons are involved. According to the ECHR case law, the imposition of penalties does not constitute an infringement where the penalties concern natural or legal persons who are legally distinct.[57] The distinction of legal entities may be indirectly supported by the fact that they have been pursuing criminal activities in two different Member States.[58] In this case, the Court clearly distinguishes between the entities on whom the penalty has been imposed or against whom criminal proceedings have been brought.[59] While this premise is solid in principle, it needs to be reconsidered more thoroughly in the light of entities with a multi-level and international structure. For example, punishing both a parent company and a subsidiary for the same offence might violate the *ne bis in idem* principle under the concept of parental liability or of a single economic unit.[60] At the same time, the simultaneous sanctioning of the company and the responsible manager from said company (e.g. a board member) does not constitute a violation of this principle, as the penalties concern distinct entities. If the condition of the offender's identity is not satisfied in the context of the

53 See e.g. Case C-331/23, *Dranken Van Eetvelde*, EU:C:2024:1027, para. 54.

54 Case C-726/21, *GR, HS, IT*, EU:C:2023:764, para. 75; Case C-365/21, *Generalstaatsanwaltschaft Bamberg*, EU:C:2023:236, para. 38.

55 Case C-524/15, *Menci*, EU:C:2018:197, para. 34.

56 Case C-820/21, *Vinal*, EU:C:2023:667, para. 43; Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 65.

57 Case C-217/15, *Orsi and Baldetti*, EU:C:2017:264, para. 26; Judgment of ECtHR of 20 May 2014, *Pirttimäki v. Finland*, CE:ECHR:2014:0520JUD00353211, para. 51.

58 Case C-164/22, *Juan*, EU:C:2023:684, para. 36.

59 Cases C-217/15 and C-350/15, *Orsi and Baldetti*, EU:C:2017:264, para. 22.

60 For more on the concepts of "undertaking" and "single economic unit", see e.g. Case C-882/19, *Sumal SL*, EU:C:2021:800.

secondary proceedings, it is not necessary to examine other conditions of Art. 50 of the CFR.[61]

In further steps, mostly in cross-border cases, the territory where an offence has been committed should be examined. For example, in competition law, the identity of both territorial and product markets may be necessary for *idem* to occur.[62] An example of this may be the *Slovak Telekom* judgment, concerning two sets of proceedings dealing with substantially separate offences due to the different product markets on which the infringements occurred.[63] The Court accepted that the markets for the provision of voice telephony services; for the wholesale interconnection services on the markets for call origination and termination on public network at a fixed location and the low-speed internet access services and the relevant market for wholesale interconnection were separate product markets.[64] Therefore, if the decisions taken relate to anticompetitive practices on at least two separate product markets, the principle of *ne bis in idem* does not apply.[65]

This is a problematic approach, however. One can easily imagine a case where the decisions are inconsistent in the assessment of the same offence. The NAAs may define the relevant markets differently or may not examine an infringement from the perspective of related markets. Indeed, if consumer protection law, for example, were guided by an identical "product-market" approach, the infringements referred to in the *VWAG* judgment could not be regarded as identical. The *Slovak Telekom* case argues in favour of examining *idem* differently between fields of law. In areas where only the territorial scope of infringement as a whole (e.g. consumer protection law) is relevant for the determination of *idem*, the sole assessment of that infringement in relation to the same territory (e.g. the sale of defective cars in Italy) will satisfy the *idem* condition.

The Court, in both *Nordzucker* and *VWAG*, did not indicate the need for any basis which authorises enforcement in other Member States. This leads to a negative conclusion: if EU law does not preclude extraterritorial assessment of a violation, then such assessment is permissible. On the other hand, doubts arise as to whether even Art. 101 of the TFEU, which is essentially a substantive provision, is tantamount to an empowerment clause, conferring on any NAA the power to prosecute and punish any anticompetitive behaviour anywhere in the European Union.[66] However, in some areas of EU law, there are provisions which contain clear legal bases and limits of competences, with regard to both the application of substantive laws on the territory of Member

61 Joined Cases C-217/15 and C-350/15, *Orsi and Baldetti*, EU:C:2017:264, para. 26.

62 Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72, para. 99.

63 Case C-857/19, *Slovak Telekom*, EU:C:2021:139, paras 29–38.

64 Case C-857/19, *Slovak Telekom*, EU:C:2021:139, para. 46.

65 Case C-857/19, *Slovak Telekom*, EU:C:2021:139, para. 45.

66 Opinion of Advocate General M. Bobek in Case C-151/20, *Nordzucker*, EU:C:2021:68, para. 86.

States and their enforcement in cases of violations of a cross-border (extraterritorial) nature.[67] Examples include the General Data Protection Regulation,[68] the Digital Markets Act[69] and Regulation 2017/2394.[70] These legal acts and rules for assessing breaches are either without prejudice to the competence of national authorities or explicitly indicate derogations from the authority's power to assess a given breach on its own.[71] Although Art. 50 of the CFR does not directly address this issue, it has a significant impact on its application by NAAs. Such a jurisdictional conflict may arise where the authorities of two different Member States impose fines based on the global or even EU-wide turnover of the undertaking being fined, thus resulting in the disproportionate penalty in relation to the effects of an infringement within a single Member State. In the judgment in *Toshiba Corporation and Others*, the Court held that such a factor could be relevant to the existence of the *idem* condition.[72]

However, it is not sufficient to establish *idem* exclusively if the penalty calculation goes beyond the turnover earned in the Member State in question. It is important to ascertain whether the conduct assessed also encompasses aspects of the indertaking's conduct in another Member State and whether this circumstance impacted the calculation of the financial sanction imposed on the undertaking as a levy on the economic advantage derived from its unlawful conduct.[73] Thus, if the NAA's decision does not take into account circumstances relating to infringements committed in other Member States, but the amount of the fine indicates that it does, these factors do not con-

67 Opinion of Advocate General M. Bobek in Case C-151/20, *Nordzucker*, EU:C:2021:68, para. 77.

68 Cf. Arts. 55(1), 56 and 60 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ 119, 04 May 2016, pp. 1–88). See also Case C-645/19, *Facebook Ireland and Others*, EU:C:2021:483, para. 47 and the case law cited therein.

69 Arts. 39–41 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (OJ 265, 12 October 2022, pp. 1–66).

70 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No. 2006/2004 (OJ 2017 No. 345, p. 1 as amended; hereinafter: "Regulation 2017/2394").

71 Such solutions are adopted particularly in cases of shared competences between EU bodies (e.g. the European Commission or the European Central Bank) and national authorities. For more, see B. van Bockel, The Single Supervisory Mechanism Regulation: Questions of ne bis in idem and Implications for the Further Integration of the System of Fundamental Rights Protection in the EU, *Maastricht Journal of European and Comparative Law*, 2017, vol. 24, no. 2, pp. 194–216.

72 Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72, para. 101; Case C-151/20, *Nordzucker*, EU:C:2022:203, para. 46.

73 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 74.

stitute grounds for finding a breach of the principle of double punishment. It may, however, indicate a breach of the principle of proportionality in the imposition of fines. In order to assess *idem*, the NAA should also trace the manner in which the monetary penalty has been or may be calculated. This requires an analysis of the provision setting out how monetary penalties are calculated, as well as the reasoning of the decision in its section devoted to the penalty. Consequently, the scope and stages of this analysis partly overlap with the verification of the criminal nature of the sanction.

Yet, the rationale behind the amount of a fine may not necessarily be apparent from the legal reasoning of the decision itself. For instance, in *Toshiba Corporation and Others*, the Court examined whether the Commission had taken the territory of the Czech Republic into consideration in its decision. The Commission had not explicitly excluded the country as a non-Member State in 2003 from the scope of its decision.[74] The Court then analysed the content and wording used in the decision.[75] The basis for calculating the fine, namely the turnover earned by the members of the cartel and the financial year in question, was a significant element in the conclusion that the decision does not cover the anticompetitive effects of the cartel in Czechia.[76] The amount of the fines shows that the Commission did not intend its decision to cover the Member States which acceded on 1 May 2004. Accordingly, the prohibition against prosecution and punishment for the same course of action would be applicable in this case only if and in so far as (i) the Commission decision and (ii) the decision of the Czech competition authority related to the same territories and the same periods. Conversely, the mere fact that those decisions concerned a single international ("worldwide") cartel which was continuously active for an extended period is insufficient to support the assumption of the existence of *idem*.[77] However, the precise extent of the territory to which the Commission's decision and the fines it imposes relate must have been determined through interpretation.[78] Consequently, obligations under other general principles of EU law, such as the right to good administration and the related obligation to provide thorough justification for a decision, will

74 Case C-17/10, Toshiba Corporation, EU:C:2011:552, para. 100.

75 The consequences of the cartel at issue in the main proceedings within the European Community and the EEA expressly refer to the "Member States of the time" and the States "which were contracting parties" to the EEA Agreement. Moreover, as Advocate General A. Kokott states in the Opinion, Case C-17/10, *Toshiba* Corporation, EU:C:2011:552, para. 150, the Commission stated in recital 478 of the preamble to its decision that "the infringement covered at least the whole territory of the EEA".

76 Case C-17/10, Toshiba Corporation, EU:C:2011:552, para. 101.

77 Opinion of Advocate General A. Kokott, Case C-17/10, *Toshiba Corporation*, EU:C:2011:552, para. 134.

78 Opinion of Advocate General A. Kokott, Case C-17/10, *Toshiba Corporation*, EU:C:2011:552, para. 137.

concurrently play a key role for the purposes of the *idem* examination and respect for the *ne bis in idem* principle by NAAs.

In the *idem* examination, the NAA shall also examine the infringement period that is subject to assessment. The fact that the factual elements fall outside of the period considered for the purpose of conviction by the courts of another Member State may mean that the condition of *idem* is not satisfied.[79] For example, the first NAA assesses the merits of an infringement from 2013 to 2022. If violations continue until 2024, another authority could similarly assess violations from 2023 to 2024 without violating the *ne bis in idem* principle. Moreover, to prove that infringements were inextricably linked together, it is not enough to demonstrate only occasional overlap between acts committed in two different Member States.[80]

Bis assessment

As regards the *bis* condition, for a decision of an NAA to be regarded as a final ruling on the facts subject to a second set of proceedings, that decision must be final (i.e. there is no remedy available under national law regulations) as well as follow a determination as to the merits of the case.[81] It is clear from the ECHR case law (Art. 52(3) of the CFR) that, where a penalty has been ordered by the competent authority as a result of the behaviour attributed to the person concerned, an NAA can reasonably determine that the other competent authority had conducted a prior assessment of the circumstances of the case and whether or not said behaviour was lawful.[82]

Therefore, it is not a prerequisite for fulfilling the *bis* condition that the national court conducts any assessment at any instance, nor is it a necessary condition that such a decision is subject to judicial review.[83] Taking the *Volkswagen* proceedings as an example, it is only necessary for the public prosecutor to make a substantive finding and impose a penalty.[84] Also, by the example of competition law, setting a decision aside due to procedural defects (e.g. insufficient evidence of infringement) does not constitute conviction or acquittal;[85] not only does it give the NAA the right to re-adopt the annulled

79 Case C-435/22 PPU, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*, EU:C:2022:852, para. 134.

80 Case C-164/22, *Juan*, EU:C:2023:684, para. 36.

81 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 29; Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 58; Case C-412/21, *Dual Prod SRL*, EU:C:2023:234, para. 55.

82 Case C-412/21, *Dual Prod SRL*, EU:C:2023:234, para. 57. See also Judgment of ECtHR of 8 July 2019, *Mihalache v. Romania*, CE:ECHR:2019:0708JUD005401210, para. 98.

83 Case C-58/22, *NR*, EU:C:2024:70, para. 49.

84 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 19.

85 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV (LVM) v. Commission*, ECR

decision, but it also does not constitute grounds to apply the *ne bis in idem* principle in these circumstances.[86] Simultaneously, while it is true that the application of the *ne bis in idem* principle presupposes the existence of a prior final decision, it does not necessarily follow that the term "subsequent decisions" should encompass only those decisions adopted after the one that first became final.[87] Consequently, the temporal sequence of decisions should be deemed irrelevant to NAAs.

Where a final decision exists, the *ne bis in idem* principle itself precludes criminal proceedings regarding the same facts from being initiated or maintained,[88] irrespective of whether those proceedings actually result in the imposition of a penalty.[89] In *Nordzucker*, the CJEU established that the proceedings for the enforcement of competition law, in which only a declaration of the infringement of that law can be made, owing to the party concerned participating in the national leniency programme, are liable to be covered by the *ne bis in idem* principle.[90]

Verification of compliance with the conditions of *idem* and *bis* and grounds under Article 52(1) of the CFR

Depending on the configuration of the proceedings (sequential or parallel), one of the NAAs conducting proceedings will have to consider whether the other proceedings (finished or pending) are based on the same set of facts inextricably linked together or whether they can be deemed to regard the merits of the case. In this scenario, the justification for the admissibility of the initiation and further conduct of the proceedings will depend first on the *idem* and *bis* analyses and then on a sequential analysis of the cumulation admissibility premises under Art. 52(1) of the CFR.

In the case of parallel proceedings, it is more difficult to give a straightforward sequence of the steps for an NAA. The most pragmatic moment to undertake such a review is when the secondary proceeding becomes known and is finalised (*bis*). When the authority decides to intervene on a cross-border basis (see e.g. *VWAG*), the NAA should adopt an alternative perspective.

I-8375, paras 59–62; T-24/07, *ThyssenKrupp Stainless AG v. Commission*, ECR II-2309, para. 190. See also R. Nazzini, Parallel Proceedings…., p. 134. See also Case C-375/09, *Tele2Polska*, EU:C:2011:270, for an example of precluding a national authority from taking a certain type of decision, namely stating that there has been no abuse of a dominant position in terms of competition law. The NAA is obliged to inform that there are no grounds for action on its part.

86 R. Nazzini, Parallel Proceedings…., p. 149.

87 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 77.

88 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 59.

89 Case C-151/20, *Nordzucker*, EU:C:2022:203, para. 63.

90 Case C-151/20, *Nordzucker*, EU:C:2022:203, para. 65.

In such a case, the principle of loyal cooperation (Art. 4(3) of the TEU) and the related CJEU jurisprudence would require that the authority carrying out an extraterritorial assessment of the infringement is responsible for verifying whether its action is permissible, not least to circumvent violations of fundamental rights.

The key question remains how NAAs should primarily review whether *idem* exists between the two decisions. In my view, in addition to other publicly available sources of information, a party's formal allegation of double jeopardy, indicating the existence of another decision imposing a fine or pending proceedings, obliges the NAA or the court to act *ex officio* in accordance with the *Peterbroeck* formula.[91] The obligation to act should include requesting a reasoned decision from the other NAA and, where necessary, clarifying or supplementing the disputed decision by using mutual assistance mechanisms available under EU or national law. As the cited case law of the Court has shown, the content of the decision alone may not always be sufficient to determine whether circumstances have arisen which led to a charge under Art. 50 of the CFR. For such, it is not enough that a certain behaviour or set of facts was mentioned and reproduced somewhere in a second decision. The identical factual element must have been found to be legally relevant, with its effects having been qualified and evaluated as such.[92] The NAA should consider whether the legal assessments in cross-border violations made by the other authority on the basis of the facts established in its final decision related exclusively to the markets in one country (e.g. Germany) or to the market in the other country (e.g. Austria).

The NAA responsible for examining *idem* and *bis* should establish the actual scope of actions of national authorities from the respective Member State. This may require the use of EU or national cooperation (coordination) mechanisms, for example, to request access from a competent authority of another Member State to a decision adopted by that authority and to information concerning it.[93] Mutual trust requires that the competent authorities of the second Member State agree to take into account relevant legal information that they might receive from the first Member State.[94]

91 Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v. Belgian State*, EU:C:1995:437, para. 21.

92 Opinion of Advocate General M. Bobek in Case C-151/20, *Nordzucker*, EU:C:2021:68, para. 66.

93 Case C-151/20, *Nordzucker*, EU:C:2022:203, para. 42.

94 Case C-726/21, GR, HS, IT, EU:C:2023:764, paras 50–51 and 56. See also Case C-435/22 PPU, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*, EU:C:2022:852, para. 93 and the mechanism introduced in Art. 57 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 239, 22 September 2000 P. 0019 – 0062).

As implied from the principle of loyal cooperation, NAAs are required to first check whether the behaviour has already been the subject of adjudication by a national or other competent supervisory authority. If the suspected infringement (behaviour) is subject to parallel examination by these authorities, the authority concerned must ask whether it should withhold its own assessment until a decision has been issued. The duty to act loyally should be inferred particularly when the authority aiming to assess the violation does not have a clear competence to act in that sphere of EU law. In that case it is the other authority that should act in the first place (e.g. a data protection authority instead of a competition law protection authority).[95] Consequently, the body that has been requested to provide information or to cooperate should respond to this request within a reasonable time, provide information that will clarify the extent of the assessment it has carried out so far or the lack thereof and its intention to cooperate with other supervisory bodies. On the other hand, only a failure to respond to the request within a reasonable time or to express objections should be grounds for resuming or initiating activities, without waiting for the competent authority to issue a decision.[96] The judgment in *Meta Platforms* leads to the conclusion that the duty of loyal cooperation precludes NAAs from ignoring a prior assessment of a violation by another authority that is competent to apply a particular EU regulation in the first place, or ignoring the fact that the competent authority is conducting parallel proceedings at the same time.

Limitations to the principle and strict necessity of cumulation

It may seem that any limitations of the right enshrined in Art. 50 of the CFR undergo the same test as other rights under Art. 52(1) of the CFR. However, in practice it is the proportionality of the cumulative sanctions that has become central to the Court's consideration of the permissibility of restrictions on the *ne bis in idem* principle. This examination of proportionality is carried out under the necessity test, interchangeably referred to by the Court as an examination of the "strictly necessary"[97] or "absolutely necessary" nature of the cumulation.[98]

Although the overall analysis as to whether the duplication of proceedings can be justified under Art. 52(1) of the CFR can only be fully done *ex post*, given the nature of some of the factors to be taken into account, it does not

95 Case C-252/21, *Meta Platforms and Others*, EU:C:2023:537, para. 54.

96 Case C-252/21, *Meta Platforms and Others*, EU:C:2023:537, paras 56–59.

97 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 95.

98 Case C-524/15, *Menci*, EU:C:2018:197, para. 57.

seem reasonable to require the simultaneous consideration of the limitation criteria from Art. 52(1) of the CFR only after both sanctions are imposed or only when a subsequent sanction is imminent. Such a rigid position on checking compliance with Art. 52(1) of the CFR *ex post* is not in line with the principle of loyal cooperation, the effectiveness of EU law or the right to good administration. By verifying these premises in advance, during concurrent proceedings, the NAAs are able to take appropriate decisions, from continuing the case to closing it, or even suspending proceedings if there is no clear information leading to other resolutions. A reasoned sequence seems to be that the authority should at first ascertain whether the cumulation respects the essence of the fundamental right, then whether the two proceedings or fines are aimed at protecting different legal interests and finally whether the envisaged legal responses will complement each other. The final element of this analysis should be an examination of whether cumulation is strictly necessary.

Respecting the essence of the fundamental right

The condition of respecting the essence of the fundamental right granted under Art. 50 of the CFR was initially linked to conditions requiring the cumulation to be expressly provided for under national law.[99] In addition, the respect for the essence of the fundamental right also required compliance with the requirements arising from the principle of legality, as expressed in Art. 49(1) of the CFR.[100] The Court's attention was thus focused on a strictly normative criterion.

In the *bpost* case, the Court resigned from the enumerative requirement. The current formula assumes that the cumulation complies with the essence of Art. 50 of the CFR only if the national legislation does not allow for the same acts to be prosecuted and punished in the context of the same infringement or in pursuit of the same objective, but only provides for the possibility of cumulation based on different provisions.[101] The Court is therefore inclined to accept situations in which two sanctions or proceedings will be directed at the same aspects of the violation, provided that they do not pursue the same objective. An appropriate example would be the simultaneous violation of the rules of pharmaceutical law governing the proper distribution of medicinal products (e.g. in terms of advertising the composition or qualities of a medicinal product under Directive 2001/83/EC)[102] and the norms on protecting the

99 Case C-524/15, *Menci*, EU:C:2018:197, para. 43.

100 Case C-570/20, *BV*, EU:C:2022:348, para. 37.

101 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 43; Case C-412/21, *Dual Prod SRL*, EU:C:2023:234, para. 63; Case C-820/21, *Vinal*, EU:C:2023:667, para. 64.

102 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 311, 28 November 2001, pp. 67–128).

interests of misled consumers (under Directive 2005/29/EC).[103] In essence, this signifies that the NAAs are obligated to ascertain the provenance of the norms and objectives of EU law whose execution they are engaged in. In accordance with prevailing case law, a scenario wherein both NAAs operate in the implementation of a singular piece of secondary legislation (e.g. under Directive 2005/29/EC) will constitute a transgression of the essence of the *ne bis in idem* principle.

Applying general interest objectives and a complementary response to various aspects of unlawful behaviour

The revised concept of the essence of the right in Art. 50 of the CFR brings to the fore the need to consider whether the cumulative legal responses are aimed at ensuring the protection of different objectives of the public interest. The assessment of this criterion boils down to examining the general interest objectives pursued by the two procedures and whether the methods chosen in response to all aspects of the sanctioned infringement constitute complementary, consistent legal responses.[104]

In the light of Art. 52(1) of the CFR, the Court of Justice has recognised the following as separate general interest objectives: (i) ensuring that undertakings and their employees act in accordance with the law (corresponding to the general interest objective adopted in the case law of the CJEU) and (ii) ensuring a high level of consumer protection and contributing to the proper functioning of the internal market (transposition of Directive 2005/29);[105] (iii) liberalising the internal market and (iv) protecting free competition in postal services;[106] (v) discouraging excise tax evasion and (vi) combating serious infringements of the rules governing the tax system;[107] (vii) protecting the integrity of financial markets and (viii) public confidence in financial instruments.[108]

The Court devoted relatively little space to explaining the complementarity and consistency of cumulative legal responses. Those seem to be concerned not only with the very purpose of the sanctions in use, but also with the purpose of the regulations *sensu largo*, the effectiveness of which the sanctions are intended to ensure. The wording used by the Court refers to addressing

103 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ 149, 11 June 2005, pp. 22–39).

104 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 49.

105 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, paras 91–92; Opinion of Advocate General M.C. Sanchez-Bordona in Case C-27/22, EU:C:2023:26, para. 88.

106 Case C-117/20, *bpost SA*, EU:C:2022:202, paras 44–47.

107 Case C-820/21, *Vinal*, EU:C:2023:667, para. 68.

108 Case C-596/16, *Enzo di Puma*, EU:C:2018:192, para. 42.

different aspects of the social problem involved.[109] In this sense, complementary sanctions are those which would not constitute effective retaliation for a violation of EU law if ordered on their own. Therefore, it is necessary to consider whether sanctions of the same type (e.g. two pecuniary fines) will be complementary in a given case. When interpreting the term literally, they cannot be considered complementary, though in the Court's jurisprudence such a possibility has not been ruled out.

Assessing the strictly necessary nature of the cumulation of proceedings or sanctions

The duty to ensure that the severity of all imposed sanctions does not exceed the gravity of the violation lies with the body imposing the second or subsequent sanction.[110] The authority is therefore required to verify or guarantee that the sanction imposed in the previous proceedings has been taken into account in the imposition of the second sanction, that the burdens for the punished person resulting from such cumulation are reduced to the necessary minimum and that all sanctions correspond to the gravity of the violations committed.[111] It is important to note that, in the event of parallel proceedings, the implementation of the aforementioned requirements may only be feasible after the conclusion of both sets of proceedings or the imposition of both fines. This scenario increases the risk of subsequent cumulation being deemed inadmissible under Art. 52(1) of the CFR. To mitigate this risk, it is crucial that the authorities coordinate the proceedings effectively, taking into account the possible incompatibility of the decision with Art. 50 of the CFR and the allegations made by the penalised entity.

The predominant duty of NAAs is, after all, to prevent an excessive burden resulting from the cumulation of sanctions or proceedings. This requirement derives from Art. 52(1) of the CFR and the principle of proportionality of penalties established in Art. 49(3) of the CFR.[112] It applies without exception to all sanctions imposed cumulatively, and therefore to both the cumulation of sanctions of the same type and those of a different nature, such as fines and imprisonment.[113] However, as the CJEU jurisprudence shows, there is no uniform method of assessing the excessive burden. This results from the fact that only in a few rulings did the Court deal with the simultaneous imposition of penalties of the same type (e.g. two pecuniary fines). In most cases, cumulations involved different sanctions, including the deprivation of liberty and an

109 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 49.

110 See Case C-524/15, *Menci*, EU:C:2018:197, paras 44, 49, 53 and 55.

111 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 95.

112 Case C-524/15, *Menci*, EU:C:2018:197, para. 55.

113 Case C-570/20, *BV*, EU:C:2022:348, para. 50 and the case law cited therein.

administrative fine[114] or a fine combined with another measure, e.g. sealing the premises[115] or revoking the permit to operate a tax warehouse.[116] Thus, in addition to the property related burden, the Court also considered the duration of the measure and its impact on exercising other rights.[117] These factors will affect the outcome of the proportionality assessment, as the weight or amount of the first sanction applied may have a bearing on the proportionality of the second sanction within the meaning of Art. 52(1) of the Charter.[118] However, the fact that the penalty imposed in the second set of proceedings is more severe than that imposed by a final decision in the first does not in itself amount to disproportionality of the cumulation of proceedings and sanctions.[119]

The imposition of a EUR 5 million additional fine on Volkswagen (*VWAG*), which was already legally obliged to pay a EUR 1 billion fine[120] at the time this sanction was imposed, does not seem, in my opinion, to constitute an excessive burden. The fact that the company had accepted the amount of the first fine may be relevant.[121] Generally speaking, and subject to the findings on the nature, gravity and duration of the violations, fines equivalent to 0.5% of the company's annual turnover[122] can be considered proportionate. At the same time, a more restrictive approach may be necessary in cases in which the sanction is already final (*bis*) when the second set of proceedings begins, and on its own constitutes an effective, proportionate and deterrent response. In such a situation, it may be reasonable not to impose a second sanction.[123] This approach does not exclude the authority taking other actions as strictly necessary, such as imposing an obligation to remedy the consequences of an infringement (e.g. publishing notices on its website, granting public compensation to consumers or implementing prescribed remedies for the future).

An NAA which imposes a fine or terminates its secondary proceedings should take all the circumstances of the case into account, which also include the fact that the first penalty was imposed. Failure to do so, whether caused by the limited possibilities of the authority (e.g. national law provides for a rigid sanction) or by ignoring this requirement, will lead to the fining decision infringing Art. 50 of the CFR, or more specifically, restricting this fundamental

114 Case C-537/16, *Garlsson Real Estate*, EU:C:2018:193, para. 6.
115 Case C-97/21, *MV*, EU:C:2023:371, para. 48.
116 Case C-820/21, *Vinal*, EU:C:2023:667, para. 32.
117 Case C-412/21, *Dual Prod SRL*, EU:C:2023:234, para. 72.
118 Similar reasoning is contained in Case C-412/21, *Dual Prod SRL*, EU:C:2023:234, para. 68.
119 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 57.
120 The second fine thus amounted to 0.5% of the amount of the final fine.
121 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 96.
122 Case T-704/14, *Marine Harvest v. Commission*, EU:T:2017:753, paras 246–248.
123 Case C-537/16, *Garlsson Real Estate*, EU:C:2018:193, para. 63.

right. The excessive burden test may also face various normative obstacles, resulting from the lack of flexibility of the fining provisions. For example, it may be impossible to prevent an excessive burden when the penalty is set automatically or rigidly in the national legislation without the possibility to adjust it (e.g. twice the amount of the excise tax not charged,[124] or 20% of the amount of the VAT overcharge).[125] It will also be difficult to consider any mitigating circumstances when regulations provide for minimum or maximum penalties[126] or prevent the authority from waiving a sanction ("imposes a penalty" instead of "may impose a penalty"). Another possible obstacle may be a national law that (i) does not allow for the suspension of one set of proceedings until the other is completed, (ii) does not allow for an overall assessment of the proportionality of the cumulative sanctions,[127] (iii) does not allow the other sanction to be absorbed (i.e. by paying only the penalty of the higher amount) or its enforcement to be waived or (iv) contains exhaustive list of mitigating circumstances limited to individual cases. In the event of such obstacles, the authorities are obliged to attempt a consistent interpretation of the national regulations that would enable the proceedings to conclude in a manner consistent with Arts. 50 and 52(1) of the CFR. In the event that such an interpretation is not feasible, the authority is required to refer to the directly effective nature of Art. 50 of the CFR in order to refuse to apply the disputed provision.

Conducting proceedings in a sufficiently coordinated manner and within a proximate timeframe

In its jurisprudence to date, the Court has limited itself to an enigmatic indication that coordination is a necessary element to be considered when applying Art. 52(1) of the CFR. The CJEU uses general phrasing that the two proceedings should be conducted in a sufficiently coordinated manner and at approximately the same time.[128] It is unclear when the sufficiency or temporal correlation requirements are unmet. On the one hand, a certain margin in the period between proceedings (both administrative and judicial) will be permissible in situations involving complex evidentiary proceedings.[129] On the other hand, the greater the interval between proceedings, the more difficult it may be to justify the proportionality and complementary nature of such

124 Case C-820/21, *Vinal*, EU:C:2023:667, para. 79.

125 Case C-935/19, *Grupa Warzywna*, EU:C:2021:287, paras 32–34.

126 See e.g. case C-190/17, *Zheng*, EU:C:2018:357, paras 9 and 43–45.

127 Case C-97/21, *MV*, EU:C:2023:371, para. 59.

128 Case C-27/22, *Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft*, EU:C:2023:663, para. 95.

129 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 56. In this case, the Court found that the issuance of decisions by the two authorities 17 months apart demonstrates a sufficiently close temporal connection.

cumulation. Until recently, concurrent proceedings were required to be conducted at a short interval and not merely close in time.[130] Only in the *bpost* judgment did the Court point out the need for a "close material and temporal connection between the two proceedings at issue".[131] The abandonment of this criterion in the *VWAG* and *Vinal* cases, and the consequent acceptance of a wider temporal interval between proceedings, appears to constitute the Court's acceptance of NAAs conducting proceedings immediately following each other. Such a solution seems to correspond better with the principle of the procedural autonomy of Member States, for example in terms of the time limits within which the authorities are entitled to prosecute violations (period of claims limitations).

The Court's jurisprudence has not differentiated the required coordination pattern for concurrent and consecutive proceedings. In doing so, only vague exemplifications of this coordination have been outlined, mainly based on considerations vis-à-vis proceedings which were conducted simultaneously. Thus, among other things, it follows from the *Menci* judgment that the requirement for coordination is satisfied if the national regulation stipulates in detail in which cases it is permissible to initiate secondary proceedings and what sanction the interested party will be subject to.[132] A proper framework for ensuring coordination also means that national law at least provides for cooperation and an exchange of information between the authorities concerned, subject to verification that such coordination has in fact taken place.[133] On the other hand, the automatic nature of cumulation and the impossibility of suspending proceedings until the completion of other proceedings being conducted independently by another authority – in addition to the fact that sanctions are appealable to different courts – do not allow the effects of cumulation to be limited to what is strictly necessary.[134]

The *VWAG* judgment, which in turn relates to coordination of a cross-border nature, multiplies doubts about the desirable shape of coordination, especially when it comes to bodies with different competencies, such as the consumer protection authority and the prosecutor's office. In the *VWAG* case separate EU coordination mechanisms were provided for both types of authorities: Regulation 2017/2394[135] and the European Union Agency for Criminal Justice Cooperation (Eurojust). Therefore, there was no specific, common coordination mechanism available to national authorities operating in different executive branches. The Court's ruling does not answer three fundamental

130 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 53.

131 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 53 and the case law cited therein.

132 Case C-524/15, *Menci*, EU:C:2018:197, para. 54.

133 Case C-117/20, *bpost SA*, EU:C:2022:202, para. 55. The provision referred to by the Court merely enumerates the bodies, domestic and foreign, with which the institute mentioned therein cooperates.

134 Case C-97/21, *MV*, EU:C:2023:371, paras 55–62.

135 Regulation 2017/2394.

questions: (i) which authority should bear the burden of coordination? (ii) what should the rules of coordination be without EU-level mechanisms in this regard? (iii) on what legal basis should national authorities anchor such cooperation, particularly in cases where the authorities have heterogeneous powers and are different types of bodies? Furthermore, the judgment does not resolve the issue of the basis on which an authority is entitled to extraterritorial assessment of a violation. This prompts questions regarding the appropriate standard of conduct expected of NAAs, as well as the assertion of rights by individuals in instances of double punishment.

It is even more problematic as the case law of the CJEU unequivocally determines that the failure to coordinate affects the inadmissibility of cumulation under Art. 52(1) of the CFR. This is exactly what results from the *VWAG* case. It clearly shows that the authorities competent to assess an infringement in the territory of their Member State may face a dilemma as to how to proceed if an authority of another Member State finds an infringement in the same territory, without a clear legal basis for such action. In *VWAG* the Court ignored the fact that the consumer protection authority – which had terminated administrative proceedings as the first and only in connection with infringement in Italy's territory (as AGCM) – no longer had the opportunity to coordinate the proceedings with another authority, not to mention having no common normative mechanism to align these actions with those of the German prosecutors.

In such situations, NAAs should derive and invoke the binding standard from Art. 4(3) of the TEU, presented above in section 6. In consequence, the failure to meet the requirements of the principle of loyal cooperation would not lead to the conclusion that there has been genuine coordination of proceedings between the authorities, meaning that cumulation under Art. 52(1) of the CFR would not be deemed permissible.

It also remains unclear how to reconcile the application of the rationale of Art. 52(1) of the CFR with fulfilment of the *bis* condition in one set of proceedings – for instance, in terms of conducting proceedings in a sufficiently coordinated manner or with proportionate cumulated reactions. This will be particularly problematic where one of the imposed decisions or sanctions is already final and therefore cannot be challenged through procedural means available under national law (principle of procedural autonomy).[136] Nor should we overlook the fact that a *bis* may also occur at another stage, during the developments of another procedure (e.g. during the judicial review of the decision, as was the case with *VWAG*). The lack of correlation between *bis* effects and other grounds may suggest that the Court's jurisprudence and the requirements expressed therein are ill-suited to the reality of requiring comprehensive and complex legal responses to multi-domain violations.

136 It is entirely logical, and indeed unavoidable, that the finality of a decision is assessed under the relevant national law.

Consequences of non-observance

Art. 50 of the CFR is a directly effective provision.[137] This has implications for the duty of NAAs and national courts to ensure its effectiveness by ruling in accordance with it, particularly by using the tools available under EU law, such as consistent interpretation or the principle of primacy. An NAA's non-compliance with the prohibition against double jeopardy may result in a range of substantive and formal consequences in terms of the validity and enforceability of its decisions. Furthermore, such non-compliance may also lead to the liability of the Member State for breaches of EU law.

In the first place, national rules that are incompatible with this provision are therefore inapplicable under the *Simmenthal* rule,[138] assuming that the principle of consistent interpretation with EU law cannot lead to a result that is in line with the prohibition against double punishment.[139] However, the remedy of disapplication would only be triggered if the national provision fails the admissibility test of Art. 52(1) of the CFR. Such a necessity would arise, inter alia, with regard to provisions allowing the imposition of two sanctions to protect the same legal interest (e.g. the protection of consumer rights), preventing the required, genuine coordination between authorities or making it impossible to render the sanction proportionate (e.g. due to the rigid structure of the sanction). The duty of NAAs to disapply national provisions contrary to the *ne bis in idem* principle would produce different effects depending on the procedural stage at which this test is conducted.

Given that the possibility of invoking the protection of Art. 50 of the CFR only arises when one of the proceedings pending for the same matter acquires the attribute of finality (*bis*), an allegation of double punishment should, in principle, be made before the NAA or the court deciding on the other pending proceedings, subject to the possibility of justifying this cumulation on the basis of Art. 52 of the CFR. However, given the effectiveness of EU law and the right to an effective remedy under Art. 47 of the CFR, the right to invoke powers derived from a directly effective provision of EU law should be available before the authorities or courts conducting each of these overlapping proceedings.[140] It also seems that the order and place of raising such a plea (alleged violations) under Art. 50 of the CFR should not depend on which proceedings the *bis* condition first arose in. The effective protection of the rights of individuals and of EU law as a whole would also seem to argue in favour of controlling the conduct of the authorities even before a formal infringement of Art. 50 of the CFR has occurred, *inter alia*, on the basis of the principle of loyal cooperation expressed in Art. 4(3) of the TEU.

137 Case C-537/16, *Garlsson Real Estate*, EU:C:2018:193, paras 65–66.

138 Case C-617/10, *Hans Åkerberg Fransson*, EU:C:2013:105, para. 45.

139 Case C-177/20, *Grossmania*, EU:C:2022:175, para. 43.

140 See e.g. Cases C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paras 140 and 144–146.

However, it appears that it is not always possible or justified to raise a plea under Arts. 50 or 52(1) of the CFR at the same stage of the proceedings. If the authority is able to prove that the second set of proceedings for the same matter respects the essence of the fundamental right and aims to protect a different legal interest, and that the possible legal response to be taken may be complementary to the first sanction, then raising a plea would be justified only after a sanction of a criminal nature has been imposed. It is very likely then to be based on a breach of the requirement of strict necessity (proportionality). On the other hand, if the national authority cannot prove the above-mentioned premises, the allegation of a breach of Art. 52(1) of the CFR may be raised before the fine is imposed and should result in the discontinuance of proceedings. Depending on when the allegation is made (before or after the imposition of a sanction of a criminal nature), the formal scope of the claims raised therein shall vary – from a request to refrain from imposing a fine to a request to revoke the decision in part imposing the fine and/or stating the infringement. At the same time, it may be advisable to suspend the proceedings until the circumstances justifying their continuation or termination have been clarified.

When the incompatibility of national rules with Art. 50 of the CFR in conjunction with Art. 52(1) of the CFR is established after a national authority has imposed a fine, the court would be required to draw the consequences from this incompatibility both regarding the fining part of the decision and with regard to the part establishing such infringement. In the light of the *ne bis in idem* principle, it appears that it is also necessary to annul that part of the decision where the infringement was found. This is particularly problematic regarding the effectiveness of EU law, as the part of the decision finding an infringement may constitute a prejudgment which entitles the victims of the infringement to claim various types of compensation or remedies (e.g. in private enforcement).[141] According to the Court's jurisprudence, a measure which merely repairs the damage caused by the offence at issue is not criminal in nature, and therefore does not fall within the scope of Art. 50 of the CFR.[142]

Since there are no EU rules on how to enforce Art. 50 of the CFR in national proceedings, the consequences of a fining authority not observing this principle are covered by the principle of national procedural autonomy. It will be up to the national rules of procedure whether a fining decision should be overturned, retried or annulled.[143]

When it comes to the issue of reopening national proceedings when only the final fining decision is found to infringe Art. 50 of the CFR, it should

141 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 349, 5 December 2014, pp. 1–19).

142 Case C-97/21, *MV*, EU:C:2023:371, para. 42.

143 See Joined Cases C-392/04 and C-422/04, *i-21 Germany GmbH and Arcor AG & Co. KG*, EU:C:2006:586, para. 69; Case C-556/17, *Torubarov*, EU:C:2019:626, para. 74.

be considered under the *Kuhne-Heitz* or *I-21 Germany*[144] rules as well as the *Skoma-lux* or *Grossmania* rule,[145] given the repressive nature and sufficient severity of criminal penalties within the meaning of Art. 50 of the CFR. However, since the current jurisprudence contains several unresolved issues and ambiguities regarding the correct application of Arts. 50 and 52(1) of the CFR, the finding of a "manifest incompatibility" or even "misinterpretation of Community law" to justify reopening national fining proceedings would be a highly debatable decision.

Individuals harmed by a breach of Art. 50 of the CFR have a right to reparation under the general Francovich rule. Art. 50 of the CFR definitively confers rights on the individual (although it is no longer the right not to be tried twice, but not to be excessively punished). What remains unclear is the extent to which violations of Art. 50 of the CFR can be characterised as sufficiently serious for the purposes of such reparation. As a matter of principle, an infringement of EU law will clearly be sufficiently serious if it has persisted despite a judgment establishing the breach in question or despite a preliminary ruling or settled case law of the Court on the matter from which it is clear that the conduct in question constituted a breach.[146] What is particularly interesting in this context is that the principle of liability for damage caused to individuals by breaches of Community law attributable to a state is supposed to exert a dissuasive effect on NAAs or national courts. It seems, however, that such an effect cannot be achieved, as sufficiently serious breaches seem to be currently beyond proving.

Given the inconsistent and undefined conditions under Art. 52(1) of the CFR in terms of, for example, coordinating proceedings between the authorities of different Member States, there is a considerable doubt as to whether, *inter alia*, a lack of genuine coordination between fining authorities, in addition to the mere impossibility of justifying a restriction of Art. 50 of the CFR, would constitute (i) manifest incompatibility, (ii) a misinterpretation of community law or (iii) a sufficiently serious breach of the *ne bis in idem* principle, where the required standard of conduct of NAAs remains unspecified. A clear position is therefore unattainable regarding the impact of such a breach on the enforceability of the fine imposed or the permissibility of having the proceedings reopened.

There does not appear to be a uniform definition for such incompatibility, misinterpretation or sufficiently serious breach, as the justification for cumulating criminal penalties may prove incomparably more straightforward in a national context than a cross-border one. It seems that the much-vaunted

144 Joined Cases C-392/04 and C-422/04, *i-21 Germany GmbH and Arcor AG & Co. KG*, EU:C:2006:586, para. 69.

145 Case C-161/06, Skoma-Lux, EU:C:2007:773, para. 73.

146 Case C-177/20, *Grossmania*, EU:C:2022:175, para. 71 and Case C-45/15 P, *Safa Nicu Sepahan v. Council*, EU:C:2017:402, para. 31.

process of unification, which was supposed to be brought about above all by abandoning the condition for "identity of the legal interest protected"[147] is far from being achieved.

A separate issue is the possibility of raising a plea of infringement of Art. 50 of the CFR at the enforcement stage of the fining decision. Accepting such a plea would be tantamount to a refusal to enforce the final decision (disregarding its legal effects).[148] Such a plea could be raised, for example, when the final, chronologically second fining decision is enforced if the competent national authorities have not justified the permissibility of the derogation from the double jeopardy principle (Art. 52(1) of the CFR). The application of such a measure is most likely to occur in the case of an authority that has incorrectly applied Arts. 50 or 52(1) of the CFR or has deliberately disregarded the allegation of their violation.

However, supposing that the prerequisites of Art. 52(1) of the CFR are not fulfilled, then it remains to be seen before which national court or NAA the convicted person should directly invoke Art. 50 of the CFR and which of the penalties imposed or decisions stating an infringement in two different Member States should be annulled or whether they may have the proceedings reopened, have recourse to other exceptional forms of redress or ultimately have the pecuniary fines disregarded. The complexity of consideration shall extend to the risks of cases in which the above allegations are raised simultaneously before the authorities or courts of different Member States where proceedings falling under *idem* are or have been pending. The purpose of the protection guaranteed by Art. 50 of the CFR is not, after all, to enable the offender to avoid both fines altogether.

Conclusions

The *ne bis in idem* principle is one of the most widely and best-discussed principles of EU law.[149] It may seem that the case law of the CJEU to date has formed a consistent interpretation of the criteria derived from Art. 52(1) of the

147 See also P. Van Cleynenbreugel, BPost and Nordzucker: Searching for the Essence of ne bis in idem in European Union Law: CJEU 22 March 2022, Case C-117/20, BPost v. Autorité belge de la concurrence Case C-151/20, Bundeswettbewerbsbehörde v. Nordzucker AG e.a., *European Constitutional Law Review*, 2022; vol. 18, no. 2, pp. 357–374; A. Rosano, Ne bis Interpretatio in Idem? The Two Faces of the ne bis in idem Principle in the Case Law of the European Court of Justice, *German Law Review*, 2017, vol. 18, no. 1, pp. 39–58.

148 The utilisation of this measure does not impact the validity of the decision; it merely affects the non-enforcement of the sanctions or obligations imposed therein.

149 In addition to the above-cited publications, see also M. Luchtman, The CJEU's Recent Case Law on ne bis in idem: Implications for Law Enforcement in a Shared Legal Order, *Common Market Law Review*, 2018, no. 6, pp. 1717–1750; M. Vetzo, The Past, Present and Future of the ne bis In idem Dialogue Between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma, *Review of European Administrative Law* 2018, vol. 2, pp. 55–84; M. Szwarc, Effectiveness of EU Law

CFR to justify the limitation of the prohibition of double punishment under Art. 50 of the CFR. At the same time, this jurisprudence to a limited extent provides answers to the factual aspects of its application by NAAs and national courts. The myriads of ambiguities also call into question the way in which the fundamental principles of EU law should be applied in the context of double jeopardy and how the effectiveness of EU law – in the context of both *ne bis in idem* protection and the protection of other values and goals important for the European legislator – should be ultimately ensured (see section 9).

The test from Art. 52(1) of the CFR significantly impacts the possibility of initiating or terminating proceedings under the *ne bis in idem* principle. This approach obliges NAAs to cooperate closely, particularly in a cross-border context. The requirement that "the sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe", extensively set out in Case C-27/22, may favour areas of EU law with a higher degree of harmonisation and a longer track record of collaborative enforcement (e.g. competition law). On the other hand, the insistence on respecting the *bis* premise, once it has been satisfied, may make inter-agency coordination more complicated (or even impossible), particularly where the decision of the authority that first terminated its proceedings has become final in the second place (e.g. due to lengthy judicial proceedings). It also significantly impedes an attempt to resolve the practical dilemmas in assessing the strictly necessary nature of the cumulation of proceedings or sanctions. Once the *bis* premise has been met, the mere prejudging of which NAA is responsible for coordinating or counteracting the excessiveness of the burden resulting from cumulation may not be subject to evident criteria.

The conclusions arising from the analysis point to a number of difficulties in the application of Art. 50 of the CFR in combination with the limitation clause in Art. 52(1) of the CFR. While there are significantly fewer doubts about their application in proceedings conducted sequentially (with no temporal overlap), in the case of proceedings conducted in parallel there is no clear answer as to – as a matter of example - the desired degree of coordination between proceedings, the moment when an authority is obliged to initiate coordination or the required conduct of the authority before which the administrative proceedings have already been formally concluded (e.g. the decision is already under judicial review) or finally resolved (*bis*). The Court's firm position on the necessity of coordination that goes hand in hand with the lack of clarity on this matter is surprising. The coordination of proceedings demanded by the CJEU seems actually not to be indispensable to secure the chief function of *ne bis in idem* protection, as it now stands, to protect against the disproportionality of cumulative sanctions. To achieve such a result, national authorities may be

and Protection of Fundamental Rights – in Search of Balance in the Context of the ne bis in idem Principle, *Studia Prawnicze*, 2019, vol. 2, no. 220, pp. 37–58.

obliged to resort to solutions deriving directly from fundamental principles of EU law, including the principles of primacy, direct effect or indirect effect.

The magnitude of the uncertainties may engender a variety of effects, both on the part of the authorities and on the part of the punished individuals. The intricacy of decoding the *ne bis in idem* standard itself consequently impedes a coherent, consistent implementation of the protection against double punishment and the proportionality of cumulative sanctions, both within disparate domains of EU law and across distinct Member States. This may result in unawareness among authorities regarding existing violations of the Charter, hampers a party's ability to formulate pursuasive allegations or affect the effectiveness of claims in pursuit of violations of EU law. For instance, the prospect of holding a state liable for double punishment appears, at present, to be exceptionally challenging to substantiate and enforce.

In order to reduce the existing uncertainties, the following proposal has been put forward in this paper, starting with consecutive – not cumulative and subsequent – analysis of the criteria of Arts. 50 and 52(1) of the CFR at the various stages of cumulation. The optimal moment for conducting such an analysis should be when one of the NAAs becomes aware – irrespective of the provenance of this information – of another pending or completed set of proceedings, even before any of the parallel proceedings under consideration has become final in terms of *bis*. Regarding the effectiveness of EU law and the ultimate target of compliance with fundamental rights, the principle of loyal cooperation would justify an *ex officio* obligation to conduct preliminary and precautionary coordination between different NAAs, such as to exchange information about the other proceedings or to request a decision issued by another NAA or a verification of *idem*, the criminal character of sanctions or whether both proceedings implement EU law in terms of Art. 51(1) of the CFR. In essence, this signifies that the NAAs are obligated to ascertain the provenance of the norms and objectives of EU law in the execution of which they are engaged. Such analysis would help make a preliminary determination regarding the extent to which the violations under assessment coincide with the actions of another NAA. These conclusions will pre-determine the extent to which Art. 50 of the CFR will or may be applicable. It is only through meticulous analysis of the *ne bis in idem* grounds that an authority can ascertain whether its actions result in an accumulation of criminal proceedings and necessitate justification for their admissibility under Art. 52(1) of the CFR. Consequently, the subsequent analysis of the conditions arising from the limitation clause enables the authority to determine whether the initiation or continuation of the procedure is legitimate, as well as whether it is justified to conclude the procedure by imposing a fine.

In order to mitigate the risk of subsequent cumulation being deemed inadmissible under Art. 52(1) of the CFR, it is crucial that the authorities coordinate the proceedings effectively, taking into account the potential incompatibility of the decision with Art. 50 of the CFR and the potential allegations made by the penalised entity. Therefore, the criteria must not be applied in a limited way, such as only after both sanctions are imposed or only when a subsequent sanction is soon to be imposed. A stronger emphasis by the NAAs on the principle of loyal cooperation and the progressive (stepwise) application of the rationale of Art. 52(1) of the CFR would allow for a more balanced and predictable protection of the different legal interests in both EU primary and secondary legislation.

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9 Principle of good administration

How the general principles of EU law supplement the Charter of Fundamental Rights in national fining proceedings

Inga Kawka

Introduction

This chapter, addressing the principle of good administration, focuses on fines as a form of administrative sanction. Administrative sanctions are imposed by public administrations in EU Member States in order to deter individuals from unlawful conduct, to guarantee that their actions comply with the relevant regulatory regime and to ensure the effectiveness of public administration.[1] They are a useful tool to respond to administrative offences which, despite deserving reprehension, do not warrant a criminal sanction. No conviction is required, as sanctions arise from administrative jurisdiction and are generally subject to administrative procedural standards. The imposition of sanctions is the responsibility of public authorities with specialised knowledge, who often combine investigative, adjudicative and sanctioning roles and who have the power to act as an investigator, prosecutor and court. Indeed, administrations have adopted repressive measures without granting the addressee the procedural guarantees associated with sanctions under criminal law.[2] The procedural regulation is intended to guarantee the individual's right of defence and to give the authority effective tools to enforce the norms of substantive law.[3] The less stringent procedure arises from the fact that sanctions are usually imposed by administrative authorities in more simplified proceedings, whereas many procedural guarantees only apply at the judicial stage following an appeal against the decision of an administrative authority.[4] This means that

1 E. Żelasko-Makowska, Administrative Sanctions, *Review of Public Law*, 2017, no. 1, pp. 92–100; M. Bernatt, Administrative Sanctions: Between Efficiency and Procedural Fairness, *Review of European Administrative Law*, 2016, vol. 9, no. 1, pp. 5–32.

2 A. Weyembergh, N. Joncheray, Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to be Addressed, *New Journal of European Criminal Law*, 2016, vol. 7, no. 2, p. 191.

3 M. Wincenciak, *Sankcje w prawie administracyjnym i procedura ich wymierzania* [Sanctions in Administrative Law and the Procedure for Their Pronouncement], Warszawa 2008, pp. 169–170.

4 M. Kärner, Interplay between European Union Criminal Law and Administrative Sanctions: Constituent Elements of Transposing Punitive Administrative Sanctions into National Law, *New Journal of European Criminal Law*, 2022, vol. 13, no. 1, p. 49.

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when sanctions are imposed on individuals by national public administrations applying EU law or Europeanised national law, the right to good administration is particularly important for protecting the rights of those affected by an administrative sanction.[5] The principle of good administration thus plays a key role in filling the gap in the application of the Charter of Fundamental Rights of the European Union (CFR). Since the requirements of good administration arising from the CFR are addressed solely to the institutions and bodies of the EU, the principle of good administration, as a general principle of EU law, ensures that administrative decisions made in cases involving EU law elements must comply with the standards set out by the EU's fundamental rights framework.

In proceedings for the imposition of an administrative sanction in the form of a fine, which constitutes adverse effects for the addressee, the right to good administration primarily serves as a guarantee that safeguards the rights granted to the individual in administrative proceedings, which serve to ensure that their interests are duly protected. Indirectly, it is a premise of fair administrative procedures and a control mechanism that prevents abuse by administrative authorities seeking to act more efficiently at the expense of the subject of the sanction.

From the point of view of the individual, the principle of the right to good administration also has an informative function. It enables the individual to become acquainted with the allegations made against them, the details of the evidence concerning their case, the procedural findings of the bodies involved, the decisions taken (whether purely formal or as to the substance of the proceedings) and – importantly for specific actions – their justifications.

The principle of the right to good administration also has a sociolegal function. Respect for the fundamental rights of individuals is crucial for building public trust in public administration, strengthening the legitimacy of administrative actions and achieving public interest objectives.[6]

Legal character

The genesis for most rules of EU administrative law, including the right to good administration, is the jurisprudence of the Court of Justice of the European

5 EU law does not provide for a separate understanding of the principle of good administration or for additional procedural rights of individuals deriving from that principle in cases of administrative sanctions, including fines. In contrast, specific rules on sanctions are provided for by the Council of Europe in a soft law act, namely Recommendation No. R(91)1 of the Committee of Ministers to Member States on Administrative Sanctions, which was adopted on 13 February 1991.

6 For more on the objectives of the right to defence in criminal proceedings, see J. Matan, Zasada prawa do obrony w polskim procesie karnym oraz formy jej realizacji [The Principle of the Right to Defence in the Polish Criminal Process and the Forms of its Implementation], *Roczniki Administracji i Prawa*, 2009, vol. 9, p. 98.

Union (CJEU). In addition to functioning as a court of international or constitutional law, the CJEU also acts as an administrative court.[7] This competence arises from its ability to examine the legality of individual administrative acts issued by EU administrative bodies (primarily the Commission).[8] In the *Algera* judgment,[9] concerning the annulment of an individual administrative act, the Court stated that even in the absence of relevant Treaty provisions, it cannot refuse the right to a tribunal and is obliged to decide the case on the rules derived from the legislation, doctrine and case law of the Member States. Since then, using this method, the CJEU has recognised many general principles of administrative law within the EU legal order, including the rule of law, proportionality, legal certainty, legitimate expectations, non-discrimination and the right to be heard before a decision is taken in a case.[10] When it comes to the principle of good administration, the CJEU's jurisprudence has evolved considerably, from stating the need for "relevant procedural rules in the Alger case", through progressively recognising individual procedural rules as general principles of EU law, to recognising the principle of "good administration" as a fundamental principle of EU law as defined in Article 41 of the CFR.[11]

The right to good administration is formulated in Article 41 of the CFR. The initiative to include the right to good administration in the text of the CFR came from the European Ombudsman Jacob Söderman.[12] The right to good administration is enshrined in the CFR as a procedural principle that applies in all administrative procedures before the Union's bodies. As explained by the Convention Secretariat, the right to good administration has been influenced by its recognition in the jurisprudence of the European Court of Justice and the Court of First Instance, most notably the judgments in the cases *Nölle II*[13]

7 M. Jaskowski, Community Courts as Administrative Courts, *Public Law Quarterly*, 2001, vol. 1, p. 81 et seq.

8 A. Jackiewicz, The Right to Good Administration in the Light of the Charter of Fundamental Rights, *State and Law*, 2003, vol. 27, p. 69.

9 Joined Cases 7/56, 3/57–7/57, *Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Felicie Steichen v. General Assembly of the ECSC*, EU:C:1957:7.

10 J. Schwarze, *European Administrative Law*, London 1992, p. 6; S. Biernat, Europejskie prawo administracyjne i europeizacja krajowego prawa administracyjnego (zarys problematyki) [European Administrative Law and the Europeanisation of National Administrative Law: Outline of the Issues], in: M. Seweryński, Z. Hajna (eds.), *Studia prawno-europejskie*, vol. VI, Łódź 2002, p. 78.

11 I. Kawka, Zasada dobrej administracji w prwie wspólnotowym [The Principle of Good Administration in Community Law], in: C. Mik (ed.), *Zasady ogólne prawa wspólnotowego* [General principles of EC law], Toruń 2007.

12 K. Kańska, Towards Administrative Human Rights in the EU: Impact of the Charter of Fundamental Rights, *European Law Journal*, 2004, vol. 10, no. 3, p. 306; A. Skóra, Pojęcie i podstawowe zasady europejskiego postępowania administracyjnego [The Concept and Basic Principles of European Administrative Procedure], in: Z. Brodecki (ed.), *Regions*, Warszawa 2005, p. 336.

13 Case T-167/94 (92), *Nölle v. Council and Commission*, EU:T:1997:195.

(principle of fairness/duty of care) and *New Europe Consulting*[14] (right to be heard and principle of fairness). The first two paragraphs of Article 41 of the CFR follow from the judgments in the cases *Heylens*,[15] *Orkem*,[16] *Technische Universität München*[17] and *Lisrestal*.[18] The obligation to give reasons for decisions in Article 41(2)(c) of the CFR corresponds to the text of Articles 296 and 298 of the Treaty on the Functioning of the European Union (TFEU). As the explanatory notes to the CFR indicate, Article 41(3) of the CFR, providing for EU indemnification liability, is analogous to Article 340 of the TFEU, while Article 41(4) of the CFR corresponds to the right guaranteed under Articles 20(2)(d) and 25 of the TFEU to communicate in the official languages of the EU. The various procedural rights contained in Article 41 of the CFR thus have a basis in the case law of the CJEU and the Treaty.

Article 41 of the CFR was the first official attempt to positively define the principle of good administration[19] and to clarify which procedural rights of individuals fall within its scope. A key innovation is the explicit recognition of the principle of good administration as a set of procedural public individual rights,[20] rather than as obligations imposed on the administration, which may not always align with an individual's claim.[21] Article 41 of the CFR indicates very clearly what procedural rights EU citizens should have vis-à-vis the EU administration. In the view of the European Ombudsman, this represents "a step forward from the basic principles of citizenship introduced by the Maastricht Treaty".[22]

As is clear from the wording of Article 41 of the Charter, this provision is addressed to the institutions, bodies, offices and agencies of the Union, not to the authorities or bodies of the Member States. Therefore, an individual cannot invoke this article against national authorities. This interpretation has been confirmed by the CJEU in its case law.[23] However, when a Member

14 Case T-231/97, *New Europe Consulting and Brown v. Commission*, EU:T:1999:146.

15 Case C-222/86, *Unectef v. Heylens*, EU:C:1987:442.

16 Case, C-374/87, *Orkem v. Commission*, EU:C:1989:387.

17 Case C-269/90, *Technische Universität München*, EU:C:1991:438.

18 C-32/95 P, *Commission v. Lisrestal and Others*, EU:C:1996:402.

19 Indeed, the definition of "*maladministration*" was already included in the 1998 Annual Report of the European Ombudsman, where he stated that "*maladministration* occurs when a public administration acts contrary to the rules or principles which govern it", Annual Report of the EU Ombudsman 1997, approved by the European Parliament in Resolution No. A4-0258/98 (OJ 1998, C 292/168).

20 K. Kańska, Towards…, p. 301.

21 For more on the definition of public subjective rights, see W. Jakimowicz, *Publiczne prawa podmiotowe* [*Public Individual Rights*], Zakamycze 2002, p. 174.

22 J. Söderman, *The Struggle for Openness in the European Union*, speech from 21 March 2001, www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.ombudsman.europa.eu/export-pdf/en/309&ved=2ahUKEwj_wNvyqpWJAxXUVPEDHQtvCDIQFnoECBcQAQ&usg=AOvVaw3vC-e9hVjPog97_bRwvkQ5.

23 Joined cases C-141/12 and C-372/12, *YS and Others*, EU:C:2014:2081, para. 67; Case C-471/22, *Agentsia "Patna infrastruktura" v. Rakovoditel na Upravlyavashtia organ na*

State applies Union law, the requirements arising from the principle of good administration as a general principle of Union law – in particular, the right of every person to have their administrative matter handled impartially and within a reasonable time – apply in the context of proceedings conducted by the competent national authority.[24] Like other fundamental rights protected by the Union legal order, the principle of good administration will therefore apply as a general principle in all national cases governed by EU law.[25]

In purely national cases, not governed by Union law, the principle of good administration can only be applied where there is a reference to it in internal law. However, that reference must be genuinely intended to ensure identical treatment purely in national situations and cases governed by Union law.[26] Identical treatment is assured only if the reference to rules of Union law in national law is direct and unconditional and the provisions of national law do not allow a derogation from those rules in the sense given to them by the Court of Justice.[27] It must be clear from the national legislation that it is not the specific national rules but the rules of EU law which are to be applied in order to resolve a given question of domestic law.[28] For example, in Judgment C-313/12, the CJEU found – with regard to the obligation to state reasons – that the Italian legislation did not indicate its intention to subject internal situations to the rule in the second paragraph of Article 296 of the TFEU and Article 41(2)(c) of the CFR, instead of subjecting them to the specific provisions of Italian law concerning the obligation to state reasons and the consequences of breaching that obligation.

The principle of good administration remains consistent, whether it is addressed to EU institutions and administrations under Article 41 of the Charter or, as a general principle of law, to national administrative authorities applying EU law. In its judgment of 24 November 2020, in cases C-225/19 and C-226/19, the CJEU stated that "Article 41 of the Charter reflects a

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Operativna programa "Transport" 2007-2013 i direktor na direktsia "Koordinatsia na programi i proekti" v Ministerstvo na transporta (RUO), EU:C:2024:99, para. 41.

24 Case C-604/12, *N.*, EU:C:2014:302, paras 49–50; Case C-219/20, *Bezirkshauptmannschaft Hartberg-Furstenfeld (Limitation period)*, EU:C:2022:89, para. 37.

25 Case C-617/10, *Aklagaren v. Hans Akerberg Fransson*, EU:C:2013:105, para. 19; Case C-349/07, *Soprope - Organizaęoes de Calęado Lda v. Fazenda Publica*, EU:C:2008:746, para. 34; Case C-256/11, *Murat Dereci and others v. Bundesministerium fur Inneres*, EU:C:2011:734, para. 72; Case C-27/11, *Anton Winkow v. Naczelnik Administrativno-nakazatelna dejnost*, EU:C:2012:326, para. 58; Case C-419/14, *WebMindLicenses kft v. Nemzeti Adó- es Vamhivatal Kiemelt Adó- es Vam Foigazgatósag*, EU:C:2015:832, para. 66; Case C-206/13 *Siragusa*, EU:C:2014:126, para. 25; Case C-309/96 *Annibaldi*, paras 21–23, 79; Case C-87/12, *Ymeraga and Others*, EU:C:2013:291, para. 41.

26 Case C-313/12, *Giuseppa Romeo v. Regione Siciliana*, para. 31.

27 Case C-313/12, *Giuseppa Romeo v. Regione Siciliana*, para. 33; Case C-346/93, *Kleinwort Benson*, EU:C:1995:85, para. 16; Case C-482/10, *Teresa Cicala v. Regione Siciliana*, EU:C:2011:868, para. 33.

28 Case C-313/12, *Giuseppa Romeo v. Regione Siciliana*, para. 34.

general principle of EU law, which is applicable to Member States when they are implementing that law".[29] This is because a harmonised interpretation of the CFR and the general principles of law codified in the CFR is essential to ensure the coherent protection of fundamental rights in the EU.[30] Thus, the interpretation of the principle of good administration adopted by the CJEU in its rulings on administrative proceedings before EU institutions also applies in national proceedings involving the application of EU law.

Nevertheless, in addition to procedural guarantees for the parties in administrative proceedings, Article 41(3) of the CFR establishes the right to compensation for damages caused by EU institutions or their staff in the performance of their duties. This provision replicates an existing right contained in Article 340 of the TFEU, which allows an injured party to make a claim when a breach of law occurs. This principle is common to the constitutional traditions of the Member States and applies to national proceedings as well. However, the conditions for this liability vary among Member States and do not necessarily align with the prerequisites for EU liability for damages. Therefore, in this chapter these conditions are not considered to be applicable to national proceedings for the imposition of administrative sanctions (fines). Moreover, the right to receive a reply from the administration in one's own language (Article 41(4) of the CFR) is specific to the functioning of the EU administration and therefore does not apply to proceedings before national administrations in sanction cases.

General principle of good administration and fining proceedings

The principle of good administration, the right to an effective remedy and the presumption of innocence

The European context has undoubtedly fostered the expansion of administrative sanctions. This expansion is driven by the need to decriminalise minor offences and to reduce the associated stigmatisation of individuals. Additionally, an administrative authority that also serves as a supervisory body is often best positioned to detect and penalise infringements.[31] Greater efficiency in the administrative process is also a significant factor. This efficiency primarily arises from the reduced procedural safeguards for individuals in

29 Case C-225/19 and C-226/19, *R.N.N.S. and K.A. v. Minister van Buitenlandse Zaken*, EU:C:2020:951, para. 34; Case C-230/18, *PI v. Landespolizeidirektion Tirol*, EU:C:2019:383, para. 57; Case C-219/20, *LM v. Bezirkshauptmannschaft Hartberg-Furstenfeld*, EU:C:2022:89, para. 37.

30 D. Kornobis-Romanowska, Poszanowanie praw podstawowych w państwach członkowskich Unii Europejskiej – w stronę zapewnienia spójnego poziomu ochrony praw człowieka w Europie? [Respect for Fundamental Rights In EU Member States: Towards a Consistent Level of Human Rights Protection in Europe?], *Przegląd Prawa i Administracji. Acta Universitatis Wratislaviensis*, 2015, no. 3661, p. 453.

31 M. Kärner, Interplay..., p. 51.

administrative proceedings compared to criminal proceedings, as well as the differing consequences of breaching these safeguards in each type of proceeding. A notable example where EU secondary law mandates the imposition of administrative sanctions or non-criminal judicial measures for the sake of efficiency in the application of EU law is EU competition law. According to Article 13 of the ECN+ Directive,[32]

> Member States shall ensure that national administrative competition authorities may either impose by decision in their own enforcement proceedings, or request in non-criminal judicial proceedings, the imposition of effective, proportionate and dissuasive fines on undertakings and associations of undertakings where, intentionally or negligently, they infringe Article 101 or 102 TFEU

The effectiveness of the system of administrative sanctions must be reconciled with adequate compliance with procedural fairness and the proper rules governing administrative liability.[33] This level of protection is to be ensured precisely by the right to good administration. In the *Ziegler* judgment,[34] concerning proceedings before the Commission, the CJEU noted that, "while the Commission may not be classified as a 'tribunal' within the meaning of Article 6 of the ECHR,[35] it is nevertheless required during the administrative procedure to respect the fundamental rights of the European Union, which include the right to good administration enshrined in Article 41 of the Charter. In particular, it is that provision, not Article 47 of the Charter, which governs the administrative procedure relating to restrictive practices before the Commission".[36] Nevertheless, some administrative sanctions are qualified in the jurisprudence of the CJEU and the European Court of Human Rights (ECtHR) as administrative penalties of a criminal nature.[37] The three criteria (the *Engel* criteria) derived from ECtHR case law and confirmed by CJEU case

32 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (ECN+ Directive) (OJ 11, 14/01/2019), pp. 3–33.

33 M. Bernatt, Administrative Sanctions…, p. 6.

34 Case C-439/11 P, *Ziegler SA v. European Commission*, EU:C:2013:513, para. 154.

35 Joined Cases 209/78 to 215/78 and 218/78, *Landewyck and Others v. Commission*, EU:C:1980:248, para. 81; Joined Cases 100/80 to 103/80, *Musique Diffusion française and Others v. Commission*, EU:C:1983:158, para. 7.

36 Case C-109/10 P, *Solvay v. Commission*, EU:C:2011:686, para. 53; Case C-110/10 P, *Solvay v. Commission*, EU:C:2011:687, para. 48.

37 Case C-617/10, *Aklagaren v. Hans Akerberg Fransson*, EU:C:2013:105, para. 35; judgment of the ECtHR of 8 June 1976, *Engel and Others v. Netherlands* (CE:ECHR:1976:0608JUD000510071), paras 80–82; judgment of the ECtHR of 10 February 2009, *Zolotoukhine v. Russia*, App. No. 14939/03, paras 52–53.

law[38] are relevant when assessing whether administrative penalties are criminal in nature. 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.[39] For penalties that meet the three *Engel* criteria, the principle of effective judicial protection, along with the right of defence and presumption of innocence, will also apply to the conduct of the sanction procedure. Examples of sanctions that are formally administrative but to which a criminal standard applies are fines and periodic penalty payments imposed in the application of EU competition law, as evidenced by the character of the infringements concerned, as well as the nature and severity of the related sanctions.[40] The principle of effective judicial protection enshrined in Articles 47 and 48 of the CFR and also expressed in Article 6 of the ECHR consists of various elements, including in particular the right of defence, the right of access to a tribunal, the right to obtain advice from legal counsel, the use of defence counsel and representation and the presumption of innocence.[41] This represents a broader set of protections than those offered by the principle of good administration. While the principle of good administration provides minimum procedural guarantees in administrative proceedings, they may be extended, in the case of administrative sanctions of a penal nature, to include those derived from the principle of effective judicial protection. However, this protection is not equivalent to that in criminal cases, as it is subject to broader limitations and is generally less stringent due to the differences between pre-court and court proceedings.[42] Indeed, administrative sanctions of a criminal nature (quasi-criminal administrative sanctions) are imposed in proceedings conducted by an administrative authority (i.e. one that does not meet the independence requirements set for a court) and through administrative procedure (i.e. the sanction is imposed in

38 Case C-489/10, *Bonda*, EU:C:2012:319, para. 37.

39 C. Warin, *Op-Ed: The Right to Good Administration Remains in the Shadows (C-412/21, Dual Prod)*, www.eipa.eu/blog/op-ed-the-right-to-good-administration-remains-in-the-shadow-c-412-21-dual-prod.

40 Case C-883/19 P, *HSBC Holdings and others v. the European Commission*, EU:C:2023:11, para. 78; see also Case C-440/19 P, *Pometon v. Commission*, EU:C:2021:214, paras 59–60.

41 Case C-199/11, *Europese Gemeenschap v. Otis NV and Others*, EU:C:2012:684, paras 46–48; C. Teleki, *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights*, Leiden 2021, pp. 318–319.

42 M. Podhalicz, Prawo do obrony oraz prawo do sprawiedliwego procesu (procès équitable) w toku stosowania sankcji administracyjnych o charakterze represyjnym w prawie francuskim [The Right to Defence and the Right to a Fair Trial (*Proces Equitable*) in the Course of Application of Administrative Sanctions of a Repressive Nature in French Law], *Przegląd Prawa Publicznego*, 2022, no. 11; see also M. Bernatt, Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz. Glosa do wyroku SN z dnia 14 kwietnia 2010 r., III SK 1/10 [Procedural Guarantees in Antitrust and Regulatory Cases of a Criminal Nature in the Light of the ECHR: Notes on the Judgment of the Supreme Court of 14 April 2010, III SK 1/10], *Europejski Przegląd Sądowy*, 2011, vol. 6, pp. 40–45.

the form of an administrative decision). Differences in the standard of protection for individuals also arise from the fact that administrative penalties are frequently imposed on legal entities, such as companies, and in such cases may be subject to broader restrictions than in the case of natural persons, where the protection of fundamental rights serves to safeguard human autonomy and dignity. For example, the ECtHR recognises a broad scope for the right to silence (freedom from self-incrimination) in its case law, including the right to remain silent on purely factual matters. In the *Consob* judgment[43] the CJEU confirmed the broad application of this procedural guarantee, but only in relation to individuals. The court explained that its previous rulings on competition law could not be transposed to this case.[44] The protection of the public interest in antitrust proceedings results in a narrower interpretation of this right so as to ensure, first and foremost, the effectiveness of prosecuting infringements.[45] Therefore, the limitation on the right to silence that applies to undertakings in competition cases cannot be extended to individuals accused of an offence, who enjoy a broader scope of the right to silence.[46]

The principle of good administration thus includes the procedural guarantees for individuals in sanction proceedings before national administrations acting within the scope of EU law. These guarantees are minimal, but in the case of fines of a criminal nature they may be extended to those provided by Articles 47 and 48 of the CFR, as well as Article 6 of the ECHR.

A higher standard than that traditionally accepted in administrative law for applying administrative sanctions of a criminal nature is reflected in some Member States' legal order by the introduction of a full appeal to a general court against an administrative decision. This court's role is to assess the case on its merits, unlike an administrative court, which usually examines only the legality of the decision.[47] The right of access to a tribunal is guaranteed when

43 Case C-481/19, *DB v. Consob*, EU:C:2021:84.

44 Case C-374/87, *Orkem v. Commission*, EU:C:1989:387; Case C-301/04 P, *SGL Carbon AG*, EU:C:2006:432.

45 K. Kowalik-Bańczyk, Prawo do nieobciążania się w prawie unijnym i polskim w sprawach z zakresu ochrony konkurencji [The Right Not to Be Burdened in EU and Polish Law in Competition Cases], in: W. Jasiński (ed.), *Standardy rzetelności postępowania w sprawach z zakresu ochrony konkurencji i konsumentów*, Warszawa 2016, p. 38.

46 Case C-481/19, *Consob*, EU:C:2021:84, paras 46–48; L. Lonardo, The Veiled Irreverence of the Italian Constitutional Court and the Contours of the Right to Silence for Natural Persons in Administrative Proceedings, *EuConst*, 2021, no. 17, p. 716. For more on the apparent freedom from self-incrimination in competition protection law in Poland, see A. Stawicki, Prawa przedsiębiorców jako warunek skutecznego egzekwowania przepisów prawa konkurencji – rozważania wokół implementacji dyrektywy ECN+ [Entrepreneurs' Rights as a Condition for Effective Enforcement of Competition Law: Considerations on the Implementation of the ECN+ Directive], *online Kwartalnik Antymonopolowy i Regulacyjny*, 2021, vol. 3, no. 10, pp. 87–89.

47 M. Szpyrka, *Europejskie standardy stosowania kar pieniężnych na przykładzie polskiego prawa telekomunikacyjnego* [European Standards for the Application of Financial Penalties on the Example of Polish Telecommunications Law], Warszawa 2020, p. 65.

a court, in adjudicating a dispute concerning rights and obligations arising under Union law, has the power to review all relevant questions of law or fact.[48]

The right to have affairs handled impartially, fairly and within a reasonable time

The principle of good administration provides that "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time" (Article 41(1) of the CFR). This is a standalone provision which is not exhausted by the three sub-parts of Article 41(2).[49] It also applies to national proceedings, as an element of a general principle of EU law, when public administrations act within the scope of EU law.

Impartiality

Impartiality is closely linked to the obligation of public administration authorities and their officials to perform their duties diligently and to ultimately issue objectively justified administrative decisions.[50] This requirement is particularly crucial for decisions that adversely affect a party, such as through sanctions, including fines. In this context, a sanction is understood solely as an unfavourable situation (adverse effect) that arises for an individual due to their non-compliance with regulations (as a result of an administrative offence).

The CJEU made clear that the need for impartiality, required of institutions and bodies when carrying out their missions, is intended to guarantee equality of treatment, which is at the heart of the European Union.[51] According to the CJEU, ensuring the impartiality of the EU institutions and bodies is of fundamental importance. It is essential not only for their internal functioning, but also for their external reputation. These requirements can also be applied to national administrations operating within the scope of EU law and functioning as a European administration. The requirement of impartiality includes any circumstances that could be considered a potential source of impairment of an official's independence in a given case. The standard of impartiality has been set by the EU in, inter alia, the rulings in *HSBC Holdings*,[52] *Spain v.*

48 Case C-199/11, *Europese Gemeenschap v. Otis NV and Others*, EU:C:2012:684, paras 46–48.

49 P. Craig, Article 41, in: S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, London 2021, p. 1128.

50 A. Olszewska, Bezstronność organu administracji publicznej w świetle art. 24 § 3 kodeksu postępowania administracyjnego w odniesieniu do zasad ogólnych tego kodeksu [Impartiality of a Public Administration Body in the Light of Article 24 § 3 of the Code of Administrative Procedure in Relation to the General Principles of the Code], *Samorząd Terytorialny*, 2008, vol. 4, pp. 44–58.

51 Case C-883/19 P, *HSBC Holdings and others v. Commission*, EU:C:2023:11, para. 236.

52 *Ibidem*, para. 77.

Council[53] and *Pometon v. Commission*.[54] According to para. 77 of the *HSBC Holdings* judgment, "[t]he right to good administration, enshrined in Article 41 of the Charter provides that every person has the right, inter alia, to have his or her affairs handled impartially by the institutions of the European Union. That requirement of impartiality encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned". In addition, the CJEU has held that where several EU institutions or bodies have separate responsibilities in a procedure which may result in a decision that adversely affects a party, each of those institutions and bodies is required to comply with the requirement of objective impartiality in its actions. Consequently, even if only one of them has breached that requirement, such a breach may render unlawful a decision adopted by another at the end of the relevant procedure.[55]

Regarding objective impartiality, the CJEU provided further commentary in the context of administrative sanctions in the *Ziegler* judgment.[56] Ziegler appealed against a CJEU judgment that imposed a fine for participating in a cartel. In its appeal, the company alleged a lack of objective impartiality on the part of the Commission, which translates into a violation of the rights to a fair trial and to good administration. The company argued that the lack of impartiality stemmed from the fact that the Commission considered itself a victim of the restrictive practice in question and that Commission officials requested "cover quotes". According to the standard set by the ECtHR, victims of a violation of law cannot adjudicate in a case involving said violation.[57] The judgment stated that "the simple fact that the Commission investigates a cartel which is detrimental to the European Union's financial interests and imposes penalties on its members does not mean that the Commission lacks objective impartiality".[58]

Subjective and objective impartiality are conditions for procedural fairness and a careful examination of all the circumstances of the case. This is particularly important in sanctioning proceedings, where the public administration undertakes investigative, prosecutorial and adjudicative activities. In analysing

53 Case C-521/15, *Spain v. Council*, EU:C:2017:982, para. 91.

54 Case C-440/19 P, *Pometon v. Commission*, EU:C:2021:214, para. 58.

55 Case C 680/16 P, *Wolff and Remedia v. Commission*, EU:C:2019:257, para. 28; see also Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v. UFEX et al.*, EU:C:2008:375, para. 54; Case C-308/07 P, *Gorostiaga Atxalandabaso v. Parliament*, EU:C:2009:103, para. 46.

56 Case C-439/11 P, *Ziegler SA v. Commission*, EU:C:2013:513.

57 *Ibidem*, paras 146–156.

58 *Ibidem*, para. 157.

objective impartiality in the *Dalia* judgment,[59] the CJEU addressed the question of an investigation by OLAF and, more specifically, which actors may participate in it. Thus, the guarantee of impartiality aims to ensure that the investigation is conducted properly.

Fairness

The fairness of the proceedings is ensured through procedural guarantees. These legal constructs (mechanisms) are designed to protect individuals during the course of proceedings.[60] Procedural guarantees in the handling of administrative cases and the promotion of a universal standard of protection for the participants in the proceedings are therefore expressions of procedural justice.[61]

Among the essential elements that must be preserved in order for the proceedings to be fair, and thus to meet the requirements of a democratic state of law, include the following:[62] 1) the citizen being allowed to participate in the determination of their case, 2) the openness of the proceedings, 3) the impartiality of the determining authority, 4) the fairness of the proceedings, 5) the obligation to justify the decision, 6) the possibility to appeal against the decision and 7) judicial review of the legality of the decision. Some authors also point out that procedural justice is a set of values consisting of the opportunity to be heard, equality, an opportunity to defend oneself, confidentiality and contestability.[63] The principle of good administration is therefore an expression of the assumption that procedural justice should also be applied in non-judicial procedures, especially in repressive proceedings that may end in the imposition of sanctions on an individual.

In its case law, the CJEU emphasises one key element of a fair procedure: the right to a careful examination of all the legal and factual elements on which a decision is based (diligence of procedure).[64]

The CJEU also stated that the duty to carefully examine all the relevant circumstances of a case is an essential guarantee in administrative proceedings.

59 Case C-615/19P, *Dalli v. Commission*, EU:C:2021:133.

60 D. Strzelec, Gwarancje procesowe wynikające z zasady czynnego udziału strony w postępowaniu [Procedural Guarantees Arising from the Principle of Active Participation of a Party in Proceedings], ABC, www.prawo.pl/podatki/gwarancje-procesowe-wynikajace-z-zasady-czynnego-udzialu-strony,1201.html.

61 Z. Kmieciak, Procesowe gwarancje ochrony interesu podatnika [Procedural Guarantees of Protecting Taxpayer Interests], *Kwartalnik Prawa Podatkowego*, 2000, vol. 1, p. 17.

62 J. Łętowski, *Prawo administracyjne. Zagadnienia podstawowe* [Administrative Law: Fundamental Issues], Warszawa 1990, pp. 171–172; M. Wincenciak, Sankcje…p. 169.

63 M. Bernatt, Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji [Procedural Fairness in Proceedings before a Competition Authority], Warszawa 2011, p. 91 et seq.

64 Case T-73/95, *Oliveira v. Commission*, EU:T:1997:39; Case T-231/97, *New Europe Consulting and Brown v. Commission*, EU:T:1999:146.

This obligation was highlighted in the judgment in *Hauptzollamt München v. TU München*,[65] which concerned the validity of a Commission decision finding that an electron microscope could not be imported from Japan without payment of duty under the Common Customs Tariff because equivalent equipment was manufactured in the EC territory. Indeed, the Commission, by basing the contested decision solely on the findings of a group of unqualified experts, had not thoroughly established all the facts, which was necessary to reach a decision in the case. As a result, the CJEU annulled the contested decision. As Craig notes, "the obligation to give careful consideration to the claimant's case provides a good example of a right that could be regarded as part of the duty to act fairly within Article 41(1) of the CFR".[66]

In the judgment in *Laub*,[67] the CJEU referred to the evidentiary proceedings in a case in which sanctions were imposed: an exporter of agricultural products was prevented from benefiting from the system of export refunds. At issue was the exporter's entitlement to produce the documentation necessary to prove entitlement to refunds. According to the CJEU,

> [t]o deny exporters this opportunity would constitute an infringement of the principle of good administration, insofar as this principle precludes a public administration from penalising an economic operator acting in good faith for non-compliance with the procedural rules, when this non-compliance arises from the behaviour of the administration itself. The fact that the competent authority, on the one hand, went ahead with the payment of the export refund on the basis of incomplete evidence, and on the other hand, only initiated the recovery procedure after a certain period had passed, directly affected the opportunity for Laub to produce sufficient proof.[68]

An authority conducting proceedings must create conditions that allow the entity answering for the administrative offence to effectively and practically exercise its procedural rights. Consequently, the party to the proceedings has the right to expect the opportunity to actively participate in the authority's gathering of evidence, along with the right to pursue its own evidentiary initiatives. From the perspective of adjudicating administrative liability in the form of administrative sanctions, the formal correctness of the evidentiary actions becomes even more significant.[69]

65 Case C-269/90, *Hauptzollamt München v. TU München*, paras 25–26.
66 P. Craig, Article 41…, p. 1132.
67 Case C-428/05, *Laub*, EU:C:2007:368, para. 24.
68 *Ibidem*, para. 25.
69 R. Suwaj, *Zasady nakładania administracyjnych kar pieniężnych* [Rules for Imposing Administrative Fines], Warszawa 2021 p. 132.

Reasonable period of time

The test of a reasonable duration of administrative proceedings cannot be uniformly applied to all cases. It must be determined based on the specific circumstances of each case, including its context, the various stages of the proceedings, the conduct of the parties involved, the complexity of the case and its significance to the parties.[70] Proceedings in other related administrative cases may also be relevant for determining a reasonable time frame which can ensure that they are handled without unnecessary delays. For example, according to the CJEU judgment in *H.N. v. Minister for Justice, Equality and Law Reform and Others*,

> where a third country national submits an application for international protection […], it is for the competent authority to establish, within a reasonable time period, that the person in question does not qualify for refugee status, so that the examination of the application for subsidiary protection may be considered in good time.[71]

The right to be heard, access to case files and statement of reasons

The right to good administration includes the right to a hearing, meaning the right of every person to present their case in person before any individual measure is taken that may adversely affect their situation; the right of every person to access their case file; and the right to obtain a statement of reasons for the decision. These rights form an integral part of the broader right to defence.[72] Kowalik-Bańczyk notes that the right to defence may even be regarded as the quintessence of good administration, as highlighted by certain CJEU rulings, in particular *Vlachaki v. Commission*.[73] This judgment states that according to case law, respect for the rights of the defence in any procedure initiated against a person and likely to result in an act adversely affecting that person constitutes a fundamental principle of Community law and must be ensured even in the absence of specific regulations. That principle, which meets the requirements of good administration, requires that any person against whom a decision adversely affecting him may be taken must be given the opportunity to make known his views effectively on the evidence relied on against him as the basis for that decision.

70 See also ECtHR judgment of 25 June 2000, Case 30979/96, *Frydlender v. France*.

71 Case C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform and Others*, EU:C:2014:302 para. 47.

72 R. Zenc, Prawo do obrony we wspólnotowym prawie konkurencji [The Right to Defence in Community Competition Law], in: C. Mik, K. Gałka (eds.), *Prawa podstawowe w prawie i praktyce [Fundamental rights in law and practice]*, Toruń 2009, p. 432.

73 K. Kowalik-Bańczyk, *Prawo do obrony…*, p. 90; Case T-277/03, *Vlachaki v. Commission*, EU:T:2005:83, para. 64.

The right to be heard guarantees every person the opportunity to effectively express their opinion during administrative proceedings and before any decisions are taken which may adversely affect their interests.[74] This right must be respected not only when the proceedings may lead to the imposition of an administrative sanction (fine), but also when the investigative proceeding preceding the decision may directly and adversely affect the individual.[75]

In *Mukarubega*[76] the CJEU held that "that right also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision". The CJEU then linked the right to obtain a statement of reasons to the right of defence by indicating that "the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence"[77]. This practice is intended to allow the person concerned to defend their rights under the best possible conditions and to take a fully informed decision on bringing a case before the court, as well as to enable the court to review the lawfulness of the national decision in question in full.[78] Furthermore, the courts may not substitute for the authorities in their duty to provide the justification.[79] Also, the right of access to the file is recognised in the literature as a fundamental component of the right of defence.[80] In the judgment in *Solvay*[81] the CJEU indicated that

> [t]he right of access to the file means that the Commission must provide the undertaking concerned with the opportunity of examining all the documents in the investigation that might be relevant for its defence. Those documents comprise both inculpatory and exculpatory evidence, with the exception of business secrets of other undertakings, internal documents of the Commission and other confidential information.

74 Case C-166/13, *Mukarubega v. Prefet de police*, EU:C:2014:2336, para. 46; Case C-287/02, *Spain v. Commission*, EU:C:2005:368, para. 37.

75 Case C-49/88, *Al-Jubail Fertilizer Company v. Council*, EU:C:1991:276, para. 15.

76 Case C-166/13, *Mukarubega v. Prefet de police*, EU:C:2014:2336, para. 48.

77 Case C-230/18, *PI v. Landespolizeidirektion Tirol*, EU:C:2019:383, para. 79 ; similarly in: Case C-269/90, *Technische Universität München*, EU:C:1991:438, para. 14; Case C-349/07, *Sopropé*, EU:C:2008:746, para. 50; .

78 Case C-300/11, *ZZ*, EU:C:2013:363, para. 53; Case C-682/15, *Berlioz Investment Fund*, EU:C:2017:373, para. 84.

79 D. Dominik-Ogińska, Rzetelny proces a VAT [Due Process and VAT], *Przegląd Podatkowy*, 2020, vol. 4, pp. 9–23.

80 K. Kowalik-Bańczyk, *Prawo do obrony…*, p. 95.

81 Case C-109/10 P, *Solvay SA v. Commission*, EU:C:2011:686, paras 54–57.

The principle of good administration in fining proceedings in secondary EU law

The standards applicable to national administrations applying EU law derive not only from the general principle of EU law – the principle of good administration – but also from EU secondary law. The specific procedural regulations mainly concern areas exclusively within the Union's competence.[82] Although the EU also adopts procedural rules in the form of directives to harmonise national legislation with varying degrees of precision, in some areas EU law imposes obligations to publicise administrative decisions, provide a statement of reasons for them and conduct prior consultations with interested parties. There are often requirements to guarantee individuals the possibility to appeal against decisions of authorities applying EU law in a given area, as well as specific stipulations regarding the conduct of certain procedures, such as cooperation with the Commission, European agencies and the authorities of other Member States.[83]

Examples of the Europeanisation of standards of impartiality for the actions of national public administrations include the EU regulation of personal data protection, infrastructure sectors, competition in the internal market and the functioning of the internal market for intermediary services. In all these areas, national administrative authorities have far-reaching powers to impose administrative sanctions, including significant fines. In addition, the authority has administrative discretion in deciding whether to impose a sanction on an individual and the amount of that sanction.[84]

The General Data Protection Regulation (GDPR) gives national supervisory authorities the power in the case of certain breaches to impose administrative fines of up to EUR 20,000,000, or up to 4% of the total worldwide annual turnover of an undertaking in the previous financial year, whichever is

82 G. della Cananea, Beyond the State: The Europeanization and Globalization of Procedural Administrative Law, *European Public Law*, 2003, vol. 9, no. 4, p. 570 et seq.; Regulation (EU) no. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (Recast), (OJ EU L 269, 10 October 2013, p. 1); Council Regulation (EC) no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ EU L 1, 04/01/2003, p. 1).

83 Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20 December 2007, p. 31); Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), (OJ L 108, 24/04/2002, p. 33); Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive), (OJ L 376, 27 December 2006, p. 36).

84 K. Róziewicz-Ładoń, *Postępowanie przed Prezesem Urzędu Ochrony Konkurencji i Konsumentów w zakresie przeciwdziałania praktykom ograniczającym konkurencję* [Proceedings before the President of the Office of Competition and Consumer Protection in Counteracting Restrictive Practices], Warszawa 2011, p. 533.

higher.[85] Article 84 of the GDPR, entitled "Penalties", provides in paragraph 1 that "Member States shall lay down the rules on other penalties applicable to infringements of this Regulation [...]. Such penalties shall be effective, proportionate and dissuasive". According to Recital 148 of the GDPR *in fine*, "[t]he imposition of penalties including administrative fines should be subject to appropriate procedural safeguards in accordance with the general principles of Union law and the [CFR], including effective judicial protection and due process". One of these safeguards is the impartiality of the supervisory authority. Ensuring that public authorities are objectively impartial is supposed to follow from their independence. For example, the GDPR considers Member States' establishment of relevant supervisory authorities and the fully independent performance of their functions to be essential elements in ensuring the protection of individuals with regard to the processing of their personal data.[86] The requirement of independence was further clarified by the CJEU in its ruling in *Commission v. Germany*,[87] which stated that "in the performance of their duties, supervisory authorities should act objectively and impartially. To that end, they should remain outside any external influence, including the direct or indirect influence of the State or the Lander, and not only outside the influence of the authorities under their control". According to the Court, such independence presupposes the "absence of any instructions" for supervisory authorities in the performance of the tasks entrusted to them.[88] This ruling was reiterated by the EU legislator in Article 51(2) of the GDPR, according to which "[t]he member or members of each supervisory authority shall, in the performance of their tasks and exercise of their powers in accordance with this Regulation, remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody".

Also in sectors of the economy that depend on the existence of infrastructure networks (e.g. railways, electronic communications, postal services or energy), EU law delegates extensive powers to national administrative authorities, enabling them to impose significant administrative sanctions. The requirement of independence is a fundamental requirement set by EU law for these regulators. This independence encompasses two aspects: it can be understood as the separation of regulatory and operational activities[89] or as independence from

85 Article 83(5) GDPR.

86 Article 16 TFEU; Article 8 CFR; Recital 117 and Article 51 GDPR, previously a requirement under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995, L 281/31), Article 28(1), Recital 62.

87 Case C-518/07, *Commission v. Germany*, paras 25–28; J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona danych osobowych. Komentarz*, Warszawa 2011, p. 78.

88 C-518/07, *Commission v. Germany*, para. 28.

89 The CJEU has confirmed in its rulings that it is incompatible with EU law to cumulate regulatory and operator competences in the hands of a single body: Case C-202/88, *France v. Commission*, EU:C:1991:120, paras 51–52; Case C-18/88, *RTT v. GB-Inno-BM*, EU:C:1991:474;

day-to-day government policy.[90] Additionally, Member States are required to ensure that national regulators exercise their powers "impartially, transparently and in a timely manner" and "have adequate technical, financial and human resources to carry out the tasks assigned to them".[91] In pursuing the objective of impartiality, various sectoral directives require Member States to delegate regulatory tasks to authorities that are both legally distinct and functionally independent from infrastructure undertakings to prevent any mutual interest (particularly economic) between these authorities and the regulated undertakings. Other requirements to be met by national regulators vary depending on the area of regulation and are modified with the development and progressive liberalisation of the sectors, which is linked to successive changes in EU law. These changes are characterised by the greater powers granted to national regulators, alongside the EU legislator's growing interest in the operational and organisational rules of national regulatory administrations, particularly in guaranteeing their independence from national political influence.

The imposition of fines (or the mere threat of fines) is also an important instrument to contribute to the compliance of businesses (and their associations) with EU competition law and the rulings of antitrust authorities.[92] The requirement of impartiality of a national authority is also contained in the ECN+ Directive, which obliges Member States to ensure that national competition authorities exercise their duties and powers impartially and with a view to effective and uniform application of the rules, subject to proportionate accountability requirements and without prejudice to close cooperation between competition authorities within the European Competition Network. In order to ensure this objective impartiality, the ECN+ Directive contains standards for the independence of persons holding decision-making positions within a competition authority, as well as a requirement to ensure adequate financial, technical and organisational conditions for the enforcement of the Directive. Article 3 of the ECN+ Directive establishes that general principles of EU law and the CFR must be fully applied in both EU and national antitrust proceedings. The preamble to the Directive emphasises that these guarantees include the right to good administration and respect for the company's

ECJ ruling of 27 October 1993 in Joined Cases C-46/90 and C-93/91, *M. le Procureur du Roi v. Lagauche et autres*, EU:C:1993:852.

90 I. Kawka, *Telekomunikacyjne organy regulacyjne. Problematyka prawna* [Telecommunications Regulatory Authorities: Legal Issues], Warszawa, 2006, p. 164.

91 For example, Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17 December 2018, pp. 36–214, Article 6(2); Article 22 Postal Directive; Article 39 Gas Directive; Article 35 Energy Directive.

92 K. Kohutek, M. Sieradzka, Article 106, in: K. Kohutek, M. Sieradzka (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [*Competition and Consumer Protection Act: Commentary*], Warszawa 2014.

rights of defence, including the key element of the right to be heard. This is particularly relevant for the imposition of penalties in antitrust proceedings.[93]

The precise requirements for the operation of national supervisory authorities are specified in Article 50 of the Digital Services Act (DSA). These bodies, referred to as Digital Services Coordinators, have the authority to impose fines and periodic penalty payments or to request a judicial authority within their Member State to do so (Article 51(2)(c) and (d) DSA). Member States must ensure that their Digital Services Coordinators carry out their duties fairly, openly and promptly. To enable this, the Digital Services Coordinators must operate independently. They should not be influenced by any outside parties, either directly or indirectly, and they should not take orders from other public authorities or private entities (Article 50(1) and (2) DSA). To support this independence, Member States should provide these coordinators with the necessary support, including sufficient technical, financial and human resources, to effectively oversee all relevant intermediary service providers. Each Member State should also allow its Digital Services Coordinator to manage its budget independently, as long as it remains within the overall budget limits.

Consequences of non-observance

The general principles of EU law impose obligations that are expressed in absolute and binding terms, with the CJEU emphasising their mandatory nature.[94] This ensures judicial protection of individual rights, preventing any potential gaps.[95] Consequently, both courts and national public authorities applying EU law are obligated to give direct effect to procedural guarantees arising from the right to good administration, including every person's right to have their case heard impartially, fairly and within a reasonable time.[96] Additionally, CJEU case law establishes that individuals may directly invoke their rights of defence before national courts and administrative authorities, which includes an element of the right to good administration: the right of every person to

93 K. Kowalik-Bańczyk, Dyrektywa ECN+ – sposób na podwyższenie ochrony prawnej przedsiębiorców w postępowaniach antymonopolowych? [ECN+ Directive: A Way to Increase Legal Protection of Businesses in Antitrust Proceedings?], *Europejski Przegląd Sądowy*, 2019, vol. 10, pp. 4–10.

94 Case C-101/08, *Audiolux and Others*, EU:C:2009:626, paras 34 and 45; Case C-414/16, *Vera Egenberger v. Evangelisches Werk fur Diakonie und Entwicklung*, EU:C: 2018:257, para. 76; Joined Cases C-411/10 and C-493/10, *N.S. and Others*, EU:C:2011:865, para. 77.

95 P. J. Neuvonen, K. S. Ziegler, General Principles in the EU Legal Order: Past, Present and Future Directions, in: K. S. Ziegler, P. J. Neuvonen, V. Moreno-Lax (eds.), *Research Handbook on General Principles in EU Law: Constructing Legal Orders in Europe*, Cheltenham 2022, pp. 13–14; A. Arnull, Protecting Fundamental Rights in Europe's New Constitutional Order (Vol. 1), in: A. Arnull, T. Tridimas, P. Nebbia (eds.), *EU Law for the Twenty-First Century: Re-Thinking the New Legal Order*, Birmingham Law School, Arts and Law, 2004, pp. 95–112.

96 Case C-604/12, *H.N. v. Minister for Justice, Equality and Law Reform and Others*, EU:C:2014:302, paras 50–51.

be heard before any decision that would adversely affect their interests.[97] The duty of directly applying the general principles of EU law lies with the administrative authorities of Member States when acting within the scope of Union law, even if relevant EU provisions do not explicitly require such formalities.[98] Therefore, if the CJEU finds that a Member State's legislation violates the general principle of good administration (as in *P.I. v. Landespolizeidirektion Tirol*[99]), the State is required to amend its legislation.[100] Until such amendments are made, the principle should be directly applied by national courts and administrative authorities. However, according to the CJEU case law, this does not mean that a breach of the right to good administration makes the decision unlawful or leads to its automatic annulment. According to Clement "the approach of the CJEU is a pragmatic one: the right to good administration is a procedural right and a breach would only have an effect if it has a direct consequence on the outcome".[101] For example, a breach of the duty to deal with a case within a reasonable time does not constitute independent grounds for annulling the decision issued in the case.[102] It follows from the case law of the General Court that

> [i]nfringement of the principle that the Commission must act within a reasonable time, if established, would justify the annulment of a decision taken following administrative proceedings in competition matters only in so far as it also constituted an infringement of the rights of defence of the undertakings concerned. Where it has not been established that the undue delay has adversely affected the ability of the undertakings

97 Joined Cases C-129/13 and C-130/13, *Kamino International Logistics BV and Datema Hellmann Worldwide Logistics*, EU:C:2014:2041, paras 34–35.

98 Case C-696/22, *Cluj-Napoca*, EU:C:2024:499, para. 106; Joined Cases C-129/13 and C-130/13, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, EU:C:2014:2041, para. 31.

99 Regarding the obligation to justify decisions, the CJEU in Case C-230/18, *PI v. Landespolizeidirektion Tirol*, paras 84–85 stated that the national legislation, as it does not require that the decision ordering the closure with immediate effect of a commercial establishment such as that at issue in the main proceedings is properly reasoned, in fact and in law, in writing and communicated to its addressee, does not satisfy the requirements related to the effectiveness of the judicial review or the respect for the rights of the defence.

100 According to Article 260(1) of the TFEU, "[i]f the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court".

101 M. Clement, Breach of the Right to Good Administration: So What?, *ELTE Law Journal*, 2018, vol. 1, p. 20.

102 Thus, the CFI judgments in e.g. Joined Cases T-305–307/94, 313–316/94, 318/94, 325/94 and 328–329/94, *LVM NV and Others v. EC Commission*, EU:T:1999:80, para. 122; Case T-196/01, *Aristoteleio Panepistimio Thessalonikis v. Commission*, EU:T:2003:249, para. 233; see also K. Milecka, Zasada dobrej administracji w orzecznictwie sądów unijnych (cz. 1) [The Principle of Good Administration in the Case Law of the EU Courts (Part I)], *Europejski Przegląd Sądowy*, 2012, vol. 2, pp. 33–38.

> concerned to defend themselves effectively, failure to comply with the principle that the Commission must act within a reasonable time cannot affect the validity of the administrative procedure.[103]

Furthermore, in the *ArcelorMittal* judgment, the CJEU stated that it is for the claimant to demonstrate to the requisite legal standard that the excessive length of the administrative procedure affected the exercise of its right of defence against the Commission's claims.[104] The excessive length of the procedure is therefore not in itself grounds for annulling the decision issued in the procedure. There is no case law so far on whether exceeding a reasonable time limit could constitute grounds for liability for damages under EU law. However, the wording of Article 41 of the CFR supports this proposition.[105]

In its rulings on the right to be heard, the CJEU has gone even further, stating that establishing a breach of the right of defence is not sufficient to invalidate a decision. In the *Kamino International Logistic* ruling,[106] the CJEU indicated that "according to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in the annulment of the decision taken at the end of the administrative procedure at issue only if, had it not been for such an irregularity, the outcome of the procedure might have been different". In addition, it follows from the Court's settled case law that an *a posteriori* hearing in the context of an appeal brought against an unfavourable decision may, under certain conditions, ensure that the right to be heard is respected.[107] Therefore, a breach in one step of the administrative process does not invalidate the entire procedure if subsequent steps can make up for it. The absence of contradictory debates during the administrative phase does not impact the judicial process, as long as the judicial phase includes exchanges of positions between the parties. This distinction between administrative and judicial proceedings is likely the key argument for mitigating the effects of breaches of procedural rights during administrative procedures.[108]

103 Case T-67/01, *JCB Service v. Commission*, EU:T:2004:3, para. 40; see also Case T-81/95, *Interhotel - Sociedade International de Hoteis SARL v. Commission*, EU:T:1997:117, para. 66; K. Milecka, Zasada dobrej…, p. 36.

104 Joined Cases C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg SA v. Commission / ArcelorMittal Luxembourg and Others*, EU:C:2011:190, para. 118.

105 K. Kowalik-Bańczyk, Artykuł 41 [Article 41], in: A. Wróbel (ed.), *Karta praw podstawowych Unii Europejskiej. Komentarz* [Charter of Fundamental Rights of the European Union. Commentary], Warszawa 2020, p. 47.

106 Case C-129/13, *Kamino International Logistics BV*, EU:C:2014:2041, para. 79; see also Case C-383/13, *G. and R.*, EU:C:2013:533, para. 40.

107 Case C-696/22, *Cluj-Napoca*, EU:C:2024:499, para. 112; Case C-129/13, *Kamino International Logistics BV*, EU:C:2014:2041, para. 55.

108 M. Clement, Breach of the Right…, p. 21; C. L. Pau, Good Administration in EUCJ Jurisprudence, *"Ovidius" University Annals, Economic Sciences Series*, 2020, vol. XX, no. 2, p. 185.

In some cases the CJEU leaves the consequences of a breach of the right to good administration to the national courts, provided that the requirements of effectiveness and equivalence arising from the principle of procedural autonomy of the Member States are ensured. For example, in the judgments in *Mukarubega* and *Khaled Boudjlida v. Prefet des Pyrenees-Atlantiques*, the CJEU stated that

> where [...] neither the conditions under which observance of the rights of defence [...] is to be ensured, nor the consequences of the infringement of those rights are laid down by EU law, those conditions and consequences fall within the scope of national law, provided that the rules adopted to that effect are the same as those to which individuals in comparable situations under national law are subject (the principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by the European Union legal order (the principle of effectiveness).[109]

The CJEU therefore takes into account that administrative and judicial/administrative proceedings are conducted in accordance with national procedures and that the consequences of a breach of the principle of good administration just take into account the specific national context.[110]

In summary, it follows from the CJEU case law that a breach of the principle of good administration in proceedings before a national administrative authority applying EU law does not necessarily lead to the annulment of the decision, and that the precise effect of the procedural breach should be governed by national law.

Conclusions

The principle of good administration plays a crucial role in shaping the framework for the imposition of administrative sanctions, particularly fines, by national public administrations under EU law. This principle demands that national authorities ensure procedural fairness and impartiality, as well as implement procedural guarantees, including the right to be heard, access to case files and reasoned decisions in all sanctioning proceedings. By doing so, the national administration not only upholds the rights of individuals, but also reinforces the legitimacy of its enforcement actions.

109 Case C-166/13, *Mukarubega v. Prefet de police*, EU:C:2014:2336, para. 51; see also Case C-249/13, *Khaled Boudjlida v. Prefet des Pyrenees-Atlantiques*, EU:C:2014:2431, paras 41–42; Case C-277/11, *M. v. Minister for Justice, Equality and Law Reform and Others*, EU:C:2012:744, para. 94.

110 C. L. Pau, Good Administration..., p. 185.

Despite the principle's clear importance, breaches of procedural rights, such as delays or a lack of justification, do not automatically invalidate a decision. The CJEU has emphasised that procedural violations must have a material impact on the outcome of the procedure or on the observance of the right to defence in order to justify annulment. This nuanced approach allows national administrations to maintain the effectiveness of enforcement – for example, in sectors like competition law and data protection – while still being held accountable for respecting individual rights. The CJEU also leaves it to the courts of the Member States to determine the consequences of a breach of the principle of good administration, thereby adapting to different national procedural regulations.

In conclusion, the imposition of administrative sanctions by national authorities must strike a careful balance between efficient enforcement and the protection of procedural rights. The principle of good administration is essential in ensuring that sanctions, such as fines, are not only effective but also justly applied, fostering public trust in the administrative process.

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10 Principle of rights of defence – between procedural autonomy and effectiveness of EU fundamental rights in national fining proceedings

Krystyna Kowalik-Bańczyk

Introduction

The possible infringements of EU law are often to be sanctioned with fines. In such fining proceedings, both the national authorities and (sometimes) the European institutions, like the European Commission, would apply the same norms of substantive EU law, using however different procedural rules, different catalogues of sanctions and various standards of legal protection for individuals or entities concerned, unless there is a unification or harmonisation of the procedural rules by the EU law instruments. One major example of such a configuration comes with the application of EU competition law decentralisation, where the application of the variety of 27 (until Brexit 28) national procedures was the case. The adoption of directive 2019/1 (ECN+ directive)[1] changed it partly, introducing not only an enhanced harmonisation but also a general clause allowing for application of EU general principles also in purely internal situations.[2] Still, because the pattern of harmonisation or indeed the

1 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, pp. 3–33. A. Piszcz, C. Grynfogel, Overview of Compliance with the Requirements of Directive (EU) 2019/1 with Regard to the Independence and Resources of National Competition Authorities: The Examples of France and Poland, *International Review of Intellectual Property and Competition Law*, 2022, vol. 53, no. 7, pp. 1071–1102.

2 Cf Article 3 of the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, pp. 3–33; K. Kowalik-Bańczyk, Dyrektywa ECN+: sposób na podwyższenie ochrony prawnej przedsiębiorców w postępowaniach antymonopolowych? [ECN+ Directive - a way to increase legal protection of entrepreneurs in antitrust proceedings?], *Europejski Przegląd Sądowy,* 2019, vol. 10, no. 169, pp. 4–10; A. Piszcz, M. Knapp, Directive (EU) 2019/1 of the European Parliament and of the Council and Guarantees for the Protection of the Fundamental Rights of a Party to Anti-Monopoly Proceedings in Poland: Selected Issues, *Białostockie Studia Prawnicze,* 2023, vol. 28, no. 12, pp. 165–179; M. Rea, New Scenarios of the Right of Defence

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degree of harmonisation remains different, depending on the domain of law that we investigate, the question is if standards of legal protection of individuals or undertakings concerned differ at national and European level.

This diversity of procedural solutions is often invoked together with the principle of the so-called procedural autonomy of the EU Member States that allows Member States to apply their procedural standards as long as the EU has not pre-empted them with its regulation. This text will only focus on the standard of rights of defence in such circumstances because the more general procedural protection is already analysed in the chapters on the right to good administration (Chapter 9) and the right to effective judicial protection (Chapter 11). The other reason for not dwelling on the question of the substance of "rights of the defence" more frontally is its abundance.[3]

The rights of the defence are mainly a jurisprudential invention. Not a single reference to procedural protection was made in the founding Treaties, so the Court of Justice of the European Union (CJEU) started to use a French concept of *droits de la defense* in cases based on Article 263 Treaty on the Functioning of the European Union (TFEU – control of decisions of the European Commission)[4] or eventually also in cases based on Article 258 TFEU,[5] where a Member State was accused of infringing EU law.[6] This concept was used in situations where an undertaking or a Member State was facing an accusation for infringement of law, with a risk a being sanctioned for it, and therefore a necessity for defending oneself occurred. Thus, the EU

Following Directive 1/2019, *Yearbook of Antitrust and Regulatory Studies,* 2019, vol. 12, no. 19, pp. 111–126.

3 Cf. broadly: I. Van Bael, *Due Process in EU Competition Proceedings*, Alphen aan den Rijn 2011; A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham, Northampton 2008; M. Martyniszyn, Due Process in EU Competition Proceedings, in: D. Sokol, A.T. Guzman (eds.), *Antitrust Procedural Fairness*, Oxford 2019, pp. 48–70.

4 Joined cases 42 and 49/59 *S.N.U.P.A.T. v High Authority of the European Coal and Steel Community*, EU:C:1961:5; case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36; joined cases 100 to 103/80 *SA Musique Diffusion française and others v Commission*, EU:C:1983:158; paras 9–10; case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, para. 7.

5 Case 234/84 *Kingdom of Belgium v Commission*, EU:C:1986:302, para. 27; case 40/85, *Kingdom of Belgium v Commission*, EU:C:1986:305, paras 28, 30.

6 T. Tridimas, *The General Principles of EU Law*, Oxford 2006, pp. 370, 383. Cf also: K. Lenaerts, J. Vanhamme, Procedural Rights of Private Parties in the Community Administrative Process, *Common Market Law Review*, 1997, vol. 34, p. 531; K. Lenaerts, *Procedures and Sanctions in Economic Administrative Law, General Report, 17th FIDE Congress*, vol. III , Nomos 1996, pp. 506–577; O. Due, Le respect des droits de la défense dans le droit administratif communautaire, *Cahiers de droit européen*, 1987, p. 383; L. Goffin, La jurisprudence de la Cour de justice sur les droits de la défense, *Cahiers de droit européen,* 1980, p. 127; W. Wils, La compatibilité des procedures communautaires en matière de concurrences avec la Convention Européenne des Droits de l'Homme, *Cahiers de droit européen*, 1996, p. 1; J.-P. Tran Thiet, I. Forrester, S. Heather, Due Process in Competition Proceedings, Concurrences, 2010, vol. 3, pp. 10–22; X. Groussot, *General Principles of Community Law*, Europa Law Publishing 2006, p. 215.

rights of defence were defined in various proceedings in EU law. For instance, the pleas raising an infringement of the "rights of the defence" are one of the main points in almost every judicial proceeding before EU courts, where the European Commission's decisions in matters dealing with antitrust are questioned. The case law where various forms or elements of that notion are exposed and explained is enormous.[7] Its definition, however, remains an open one, despite the efforts of the European Union's courts to define it. Its openness stems from its character – the so-called "rights of the defence" constitute a general clause invoked to fight various forms of procedural unfairness towards a party to the proceedings, which could end with negative consequences for that party, like imposition of a fine.[8]

The question to be answered by this text is if the procedural *acquis* formulated mainly in reference to the proceedings before the European Commission should be applied as a standard in the national fining proceedings where the EU law applies. First however, the very nature of the EU rights of defence needs to be analysed.

Legal character

The rights of the defence are a procedural safeguard necessary to ensure a "fair" *trial.* Traditionally, the rights of the defence are a minimum guarantee for anyone accused in criminal proceedings and are also understood in

7 P. Oliver, T. Bombois, Competition and Fundamental Rights 2013 Survey, *Journal of European Competition Law & Practice,* 2014, W. Wils, The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in which the European Commission Acts Both as Investigator and as First-Instance Decision Maker, *World Competition*, 2014, pp. 5–25.

8 It constitutes one of the classic problems of EU Competition Law: L. Goffin, La jurisprudence…, pp. 127, 140; J. Schwarze, The administrative law of the Community and the protection of human rights, *Common Market Law Review,* 1986, vol. 23, pp. 401–417; R. Lauwaars, Rights of Defence in Competition Cases, in: D. Curtin, T. Heukels (eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers (Vol. II)*, Alphen aan den Rijn 1994, p. 497; *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence. Rights of Defence and rights of the European Commission in EC Competition Law*, Bruylant 1994; A. Pliakos, *Les droits de la défense et le droit communautaire de la concurrence*, Bruylant 1987; W. Weiß, *Die Verteidingungsrechte im EG-Kartellverfahren. Zugleich ein Beitrag zu den allgemeinen Rechtsgrundsätzen des Gemeinschaftsrechts*, Ulrich Sieber 1996; F. Montag, The Case for a Radical Reform of the Infringement Procedure under Regulation 17, *European Competition Law Review*, 1996, vol. 8, p. 428; *Un rôle pour la défense dans la procédure communautaire de concurrences. A role for the defence in community competition procedures. Die rolle der Verteidigung in europäischen Wettbewerbsverfahren*, Bruylant 1997; J. Steenbergen, Decision making in Competition Cases: The Investigator, the Prosecutor and the Judge, in: L. W. Gormley (ed.), *Current and Future perspectives on EC Competition Law: a Tribute to Professor M.R. Mok*, Alphen aan den Rijn 1997, p. 101; L. Idot, Les droits de la défense, in: F. Sudre, H. Labayle (eds.), *Réalité et perspectives du droit communautaire des droits fondamentaux*, Bruylant 2000; D. Slater, S. Thomas, D. Waelbroeck, Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?, *Global Competition Law Centre Working Paper,* 2004, vol. 4.

two ways: as a "material defence" (the accused must have the right to defend themselves in person) and a "formal defence" (the accused must have the right to defend themselves by a designated lawyer).[9] As a general rule, the rights of the defence are guaranteed by acts of national law relating to the criminal procedure itself or by acts of a constitutional nature, both in the constitutions of States and in instruments of international law which have the value of being "external constitutional acts", such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR – where that right is guaranteed by Article 6 (3), the 1966 International Covenant on Civil and Political Rights (where that right is guaranteed by Article 14) or the 1966 International Covenant (3 International Covenant on Civil and Political Rights).

In the EU the notion of rights of defence was initially a jurisprudential concept, defined mainly in the proceedings of judicial control of legality of European Commission decisions led by the CJEU under Article 263 TFEU. It was developed by the CJEU as a "general principle of law", stemming from common constitutional traditions of Member States and from the ECHR. Since the moment of entry into the Communities of the United Kingdom, the CJEU started to raise the necessity to protect rights of the defence in proceedings in front of the European Commission. They were perceived then as a set of rights attributed to a party to a proceeding, taking place in front of an administrative EU organ. Therefore, this notion was certainly different from that used in Article 6(3) ECHR, as it concerns *stricte* administrative proceedings, and not only judicial proceedings. This led to a certain "juridisation" of those proceedings[10] as it was qualified by the doctrine. The introduction of clear standards of judicial protection of undertakings in such proceedings is the only way to efficient and persuasive antitrust enforcement where those that are accused know what to expect as far as their treatment is concerned.

The CJEU was very often alone to define the ways in which the rights of defence were to be protected for participants of different, mainly antitrust proceedings,[11] creating a certain set of guarantees for procedural protection, referring initially mainly to the general principles of law.[12] In response to this case

9 P. Wiliński, *Zasada prawa do obrony w polskim procesie karnym* [The Principle of the Right to Defense in Polish Criminal Proceedings], Kraków 2006, p. 202 et seq.

10 K. Kańska, Prawo do dobrej administracji jako prawo podstawowe o randzie konstytucyjnej [The Right to Good Administration as a Fundamental Right of Constitutional Rank], in: A. Łazowski, R. Ostrihansky (eds.), *Współczesne wyzwania europejskiej przestrzeni prawnej. Księga pamiątkowa dla uczczenia 70. urodzin Profesora Eugeniusza Piontka* [Contemporary Challenges of the European Legal Space. A Commemorative Book to Celebrate the 70th Birthday of Professor Eugeniusz Piontek], Zakamycze 2005, p. 149.

11 A. Jurkowska, T. Skoczny (eds.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964–2004* [The Case Law of the Community Courts in Competition Matters in the Years 1964–2004], Warszawa 2007, p. 28.

12 T. Tridimas, *The General Principles*..., p. 373; J. Bourgeois, T. Baumé, Decentralisation of EC Competition Law Enforcement and General Principles of Community Law, in: P. Demaret,

law, some of the rights were included in the acts of secondary law.[13] In the case law of the CJEU, the rights of defence were to be protected in all proceedings in which the European Commission directs towards an individual objections that, if confirmed, might lead to negative legal consequences for this individual.[14] In a very brief overview of the rights forming the rights of defence (cf further for a broader analysis), the main elements of this notion cover: 1) right to be heard;[15] 2) right to know the charges/objections directed against an individual or undertaking from the outset of the proceedings; 3) legal professional privilege as far as communication with an "outside" lawyer is concerned;[16] 4) privilege against self-incrimination;[17] 5) right to legal aid;[18] 6) protection of confidential information;[19] 7) right to privacy; 8) access to the

I. Govaere, D. Hanf (eds.), *30 Years of European Legal Studies at the College of Europe. Liber Professorum 1973-74–2003-04*, Peter Lang 2005, pp. 397–402; W. Weiß, *Die Verteidigungsrechte…*, pp. 189–432; ECLF Working Group on Transparency and Process (R. Celli, G. Drauz, M. English, C. Jeffs, S. Kinsella, H. Melin, M.D. Powell, C. Riis-Madsen, P. Rowland, Transparency and Process: Do We Need a New Mandate for the Hearing Officer?, *European Competition Journal* 2010, no. 2, p. 476); X. Groussot, *General Principles…*, p. 220.

13 T. Tridimas calls it a "formalization" – T. Tridimas, *The General Principles…*, p. 11.

14 E. Barbier de la Serre, Procedural Justice in the European Community Case-law concerning the Rights of Defence: Essentialist and Instrumental Trends, *European Public Law* 2006, vol. 2, p. 233; K. Lenaerts, J. Vanhamme, Procedural Rights…, p. 544.

15 Case 17/74, *Transocean Marine Paint v. Commission of the European Communities*, EU:C:1974:106; case 85/76, *Hoffmann-La Roche v. Commission of the European Communities*, EU:C:1979:36; case 136/79, *National Panasonic v. Commission of the European Communities*, EU:C:1980:169, para. 21, case T-352/94, *Mooch Domsjo v. Commission*, EU:T:1998:103, paras 63, joined cases C-65/02 P and C-73/02 P, *ThyssenKrupp v. Commission of the European Communities*, EU:C:2005:454, para. 92; case C-407/04 P, *Dalmine v. Commission*, EU:C:2007:53, para. 44. Broader, treating this right as a right separate from the right of defence: M. Kolasiński, Influence of the General Principles of Community Law on Polish Antitrust Procedure, *Yearbook of Antitrust and Regulatory Studies,* 2010, vol. 3, no. 3, pp. 36–39; M. Bernatt, Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji [Procedural Fairness in Proceedings before a Competition Authority], Warszawa 2011, pp. 99–150.

16 Case 155/79, *AM* & *S Europe Limited v. Commission of the European Communities*, EU:C:1982:157, para. 27; joined cases T-125/03 and T-253/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v. Commission of the European Communities*, EU:T:2007:287.

17 Case 374/87, *Orkem v. Commission*, EU:C:1989:387, paras 28–31; case T-34/93, *Société générale v Commission*, EU:T:1995:46, paras 73–74; joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij and Others v Commission*, EU:T:1999:80, paras 445–447, 449; case C-407/04 P, *Dalmine v. Commission*, EU:C:2007:53, paras 34–35; joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P i C-219/00 P *Aalborg Portland e.a. v. Commission*, EU:C:2004:6, paras 65;, 207–208; case C-481/19, *DB*, EU:C:2021:84; case C-546/18, *FN, GM, Adler Real Estate AG, HL, Petrus Advisers LLP v Übernahmekommission*, EU:C:2021:711; cf also point 23 of the preamble to the Regulation No 1/2003.

18 Joined cases 46/87 and 227/88, *Hoechst v. Commission*, EU:C:1989:337, para. 16; case 85/87, *Dow Benelux v. Commission*, EU:C:1989:379, para. 27.

19 Case C-407/04 P, *Dalmine v. Commission*, EU:C:2007:53, paras 46–48; case C-411/04 P, *Salzgitter Mannesmann v. Commission*, EU:C:2007:54, paras 40–44; case T-474/04, *Pergan Hilfsstoffe fur industrielle Prozesse v. Commission*, EU:T:2007:306, para. 78.

file;[20] 9) right to use one's own language. This set of procedural guarantees granted initially to undertakings in the EU antitrust proceedings (mainly) is named by the EU courts as "rights of defence". Though it mainly stems from the EU courts' case law, it has also been partly codified in EU secondary law or in non-binding documents (like guidelines).

Some of those rights are important for one of the issues for which the rights of the defence are necessary – mainly, the full and active participation in the proceedings, thus creating a sword for a party to the proceedings. However, some of the other rights falling under the notion of rights of the defence might be compared to a shield, given to a party to an antitrust proceeding. Thus their function is mainly protective and not informative. In this line of division, we further briefly present those participatory and protective rights.

The central notion for assuring one's participation in a proceeding is a guarantee for this person that they will be heard.[21] Since the 1970s, the right to be heard is treated as a general principle of law in all cases where a sanction can be imposed on an undertaking,[22] particularly in the administrative (pre-judicial) phase of those proceedings.[23] This right should be guaranteed from the very first moment of the proceeding so that the "accused" might usefully present their viewpoint.[24] The party must know that the proceeding takes place[25] and further – to really exercise it – it must possess two other rights necessary to fully participate: it must be able to get to know the statements of objections and it must have access to the file.

Already in the case 48/69 *ICI* the CJEU stated that "In order to protect the rights of the defence during the course of the administrative procedure, it is sufficient that undertakings should be informed of the essential elements

20 Case C-194/99 P, *Thyssen Stahl v. Commission*, EU:C:2003:527, paras 30–31; joined cases T-25/95 and al., *Cimenteries CBR v. Commission*, EU:T:2000:77, para. 142.

21 M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym* [Fines penalties in antitrust law in the Competition and Consumer Protection Act and in European Community law], Warszawa 2001, p. 217; T. Tridimas, *The General Principles…*, p. 370; J. Bourgeois, T. Baumé, Decentralisation…, p. 397; W. Van Overbeek, The right to be heard in EC Competition Cases in: *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence. Rights of Defence and rights of the European Commission in EC Competition Law*, Bruylant 1994, p. 230; I. Van Bael, *Due Process…*, p. 103; W. Wils, The Oral Hearing in Competition Proceedings before the European Commission, *World Competition,* 2012, vol. 3, p. 35; cf also: case C-441/07 P, *Commission v Alrosa Company Ltd.* EU:C:2010:377, paras 16, 17.

22 Case 17/74, *Transocean Marine Paint Association v Commission,* EU:C:1974:106, paras 17–74. Cf J. Schwarze, *European Administrative Law*, London 2006, pp. 1192, 1230; A. Pliakos, *Les droits…*, p. 20.

23 Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para. 9.

24 Case T-334/94, *Sarrió SA v Commission,* EU:T:1998:97, paras 38–39.

25 A. Jones, B. Sufrin, *EU Competition Law. Text, Cases and Materials*, Oxford 2011, p. 1071.

of fact on which the objections are based".[26] The statement of objections should clearly indicate what behaviours of an undertaking might constitute an infringement of which an undertaking is accused.[27] But it does not have to indicate who is perceived as a leader of an accussed practise.[28] It should however inform of a will of the Commission to impose a fine.[29]

Another element of participation in the proceedings that should guarantee an effective right of defence refers to the access to the file.[30] The access to the file supplements the general right to be heard[31], and forms an element of rights of defence. The initial strategy of the European Commission was not to grant access to the whole file[32] but only to those documents that were invoked in the statement of objections.[33] The judgments in cases *Soda Ash*,[34] *Hercules*[35] and *Cimenteries*[36] have led to the codification of the right to access

26 Case 48/69, *Imperial Chemical Industries Ltd. v Commission*, EU:C:1972:70, para. 22; case 52/69 *J. R. Geigy AG v Commission*, EU:C:1972:73, paras 52–69. Cf V. Fauré, *L'apport du Tribunal de première instance des Communautés européennes au droit communautaire de la concurrence*, Dalloz 2005, p. 109.

27 Case T-352/94, *Mooch Domsjo v. Commission*, EU:T:1998:103.

28 Case C-511/06 P, *Archer Daniels Midland Co. v Commission*, EU:C:2009:433.

29 Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others v Commission*, EU:C:2005:408.

30 C case C-358/16, *UBS Europe SE*, EU:C:2018:715, where the Court of Justice confirmed that the administration is bound by the obligation to comply with EU law.

31 N. Coutrelis, V. Giacobbo, La pratique de l'accès au dossier en droit communautaire de la concurrence: Entre droits de la défense et confidentialité, Concurrences, 2006, vol. 2, p. 66; A. Mattfeld, Access to and Communication of the File in: Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence. Rights of Defence and rights of the European Commission in EC Competition Law, Bruylant 1994, p. 240; I. Van Bael, Due Process…, p. 103; Bellamy & Child, European Community Law of Competition, Oxford 2008, p. 1245. Case C-51/92 P, Hercules Chemicals NV v Commission, EU:C:1999:357, paras 75–76; case C-185/95 P, Baustahlgewebe GmbH v Commission, EU:C:1998:608, para. 89; joined cases T-10/92, T-11/92, T-12/92 and T-15/92, Cimenteries CBR and Others v Commission, EU:T:1992:123, para. 38; S. White, Rights of Defence in Administrative Investigations: Access to the File in EC Investigations, REAL, 2009, vol. 2, no. 1, p. 59; H. Schermers, D Waelbroeck, Judicial Protection in the European Union, Alphen aan den Rijn 2001, p. 57; A. Jones, B. Sufrin, EU Competition Law…, p. 1073.

32 I. Van Bael, J.-F. Bellis, *Competition Law of the European Community,* Alphen aan den Rijn 2005, p. 1078; N. Coutrelis, V. Giacobbo, La pratique…, p. 67.

33 B. Doherty, Playing Poker with the Commission: Rights of Access to the Commission's file in Competition Cases, *European Competition Law Review*, 1994, vol. 8.

34 Case T-36/91, *, ICI v Commission,* EU:T:1995:118, paras 93, 111; case T-30/91, *Solvay SA v Commission,* EU:T:1995:115, para. 83, 101. Cf L. Ortiz Blanco, K.J. Jörgens in: L. Ortiz Blanco (ed.), *EC Competition Procedure,* Oxford 2006, p. 24; K. Lenaerts, In Union we trust. Trust enhancing principles of the European Union, *Common Market Law Review*, 2004, p. 325; A. Jones, B. Sufrin, *EU Competition*…, p. 1074.

35 Case T-7/89, *SA Hercules Chemicals NV v Commission*, EU:T:1991:75, case C-51/92 P, *Hercules Chemicals NV v Commission,* EU:C:1999:357. V. Fauré, *L'apport*…, p. 124.

36 Joined cases T-25/95 and 26/95, 30–32/95, 34–39/95, 42–46/95, 48/95, 50–65/95, 68–71/95, 87–88/95, 103–104/95, *Cimenteries CBR and Others v Commission*, EU:T:2000:77.

to file by the guidelines of 1997,[37] and then those of 2005.[38] It is broadly agreed that at present the European Commission should grant access to all documents that might be of relevance and it is up to the party to decide upon it. The Commission is not allowed to select the documents.[39] Therefore the Commission is obliged to provide at least the list of documents constituting the file (*Solvay*[40] and *ICI*[41]). The party questioning the lack of access should raise not only the fact that access was denied, but also that those documents might have been important for the defence[42] – such arguments should be raised in proceedings based on Article 263 TFEU.[43] The more recent case law confirms that the right of access to the file must enable the person who is the subject of an act adversely affecting him to examine all the documents relevant to his defence. They are both inculpatory and exculpatory evidence.[44] The decision to decide which documents are relevant and which cannot belong to the authority responsible for the proceedings. However, that authority may exclude documents which are not relevant and which have not served as a factual basis for the adoption of an act adversely affecting an individual.[45] The possible conflict between the rights of the defence and secrecy is settled at the level of courts. It is for the courts to verify whether the documents covered by secrecy must be disregarded, whether the protection of secrecy should be disregarded in view of the direct link between the documents and the act adversely affecting the person concerned and the extent to which they are disclosed to the individual concerned.

An extensive case law concentrates on the other aspect of rights of the defence – the protection of the accused. Legal aid and mainly the legal professional privilege are considered by some authors as elements of the right to be heard[46] or the right of defence.[47] Using legal aid certainly belongs to the

37 [1997] OJ C23/3.

38 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] *OJ C 325/7–15.*

39 Case T-36/91, *ICI v Commission,* EU:T:1995:118, paras 81–86, 111; case T-30/91 *Solvay SA v Commission*, EU:T:1995:115, paras 91–96.

40 Case T-30/91, *Solvay SA v Commission,* EU:T:1995:115.

41 Case T-36/91 *, ICI v Commission,* EU:T:1995:118.

42 Case C-407/08 P, *Knauf Gips KG v Commission*, EU:C:2010:389, para. 24.

43 V. Fauré, *L'apport du Tribunal de première instance des Communautés européennes au droit communautaire de la concurrence*, Dalloz 2005, p. 142.

44 Case C-358/16, *UBS Europe SE*, EU:C:2018:715, para. 66.

45 Case C-358/16, *UBS Europe SE*, EU:C:2018:715, para. 67.

46 L. Ortiz Blanco, K.J. Jörgens in: L. Ortiz Blanco (ed.), *EC Competition…*, p. 23; H. Schermers, D. Waelbroeck, *Judicial Protection…*, pp. 60–61.

47 M. Król-Bogomilska, *Kary pieniężne….*, p. 218; M. Gray, M. Lester, C. Darbon, G. Facenna, C. Brown, E. Holmes, *EU Competition Law: Procedures and Remedies*, Oxford 2006, pp. 81–82.

major elements of the defence,[48] but in the (antitrust) case law of the CJEU it appeared only in two contexts. First, the CJEU analysed if the lawyers should be present during the inspections led by the European Commission. The presence of a lawyer is not a condition for the legality of this control.[49] The other aspect consists of the protection of communication with the lawyer, known as *legal professional privilege*.[50] The communication is protected if the lawyer is an independent lawyer (not an in-house lawyer).[51] In order to guarantee fair proceedings, the Commission agreed that all strictly legal papers, prepared for the purpose of legal advice, should not be copied or used by the Commission. The Commission has the sole power to assess the character and nature of documents.[52] According to the ECHR case law, in-house lawyers are also protected.[53] The privilege applies both to proceedings against an undertaking and

48 Joined cases 100 to 103/80, *SA Musique Diffusion française and others v Commission,* EU:C:1983:158, para. 8; joined cases T-213/95 and T-18/96, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission,* EU:T:1997:157, para. 56; joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij and Others v Commission*, EU:T:1999:80, para. 120; case T-228/97, *Irish Sugar plc v Commission,* EU:T:1999:246; para. 276; joined cases 46/87 and 227/88, *Hoechst v. Commission*, EU:C:1989:337, para. 16; joined cases C-76/98 P and C-77/98 P, *Ajinomoto Co., Inc. and The NutraSweet Company v Council of the European Union and Commission,* EU:C:2001:234, para. 67.

49 L. Ortiz Blanco, K.J. Jörgens in: L. Ortiz Blanco (ed.), *EC Competition…*, p. 24; M. Król-Bogomilska, *Kary pieniężne…*., p. 218; A. Jones, B. Sufrin, *EU Competition…*, p. 1056; cf case 136/79 *National Panasonic (UK) Limited v Commission,* EU:C:1980:169.

50 A. Winckler, *„Legal Privilege" et droit communautaire de la concurrence* in: *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence. Rights of Defence and rights of the European Commission in EC Competition Law*, Bruylant 1994, pp. 55–63; in the same book: Y. Brulard, P. Demolin, Legal Privilege in: *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence. Rights of Defence and rights of the European Commission in EC Competition Law*, Bruylant 1994, pp. 64–112; M. Gray, M. Lester, C. Darbon, G. Facenna, C. Brown, E. Holmes, *EU Competition…*, p. 30; Bellamy & Child, *European Community Law of Competition*, Oxford 2008, pp. 1216–1218.

51 Case 155/79, *AM & S Europe Limited v. Commission of the European Communities*, EU:C:1982:157; order in a case T-30/89, *Hilti Aktiengesellschaft v Commission,* EU:T:1990:27; joined cases T-125/03 and T-253/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v. Commission of the European Communities*, EU:T:2007:287; case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission,* EU:C:2010:512. Cf L. Pais Antunes, Just Another Brick in the Wall: Communications with In-house Lawyers Remain Unprotected by Legal Privilege at the European Union Level, *JECLP,* 2011, vol. 2, no. 1, p. 3; I. Van Bael, *Due Process…*, p. 102; B. Turno, Glosa do wyroku SPI z dnia 17 września 2007 r. T-125/03 i T-253/03 [Annotation to the judgement of CFI of September 17 2007 T-125/03 and T-253/03], *Europejski Przegląd Sądowy,* 2008, vol. 6.

52 Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission,* EU:C:2010:512.

53 *Campbell v United Kingdom* App no 13590/88 (ECHR 25 March 1992), para. 48; *Foxley v United Kingdom* App no 33274/96 (ECHR 20 June 2000), para. 43, cf: I. Van Bael, *Due Process…*, p. 154.

to the proceedings where the information is gathered[54] and covers all possible communication on the presumed infringement (not just the documents that were generated during the proceedings).[55] The protection also covers documents in which the statements of the lawyer are summarised.[56] Another protective measure is the privilege against self-incrimination,[57] recognised as an element of a fair trial in Article 6 ECHR.[58] In the antitrust procedure led before the European Commission, this organ can ask for any information (including the existing documents) at each stage of the procedure.[59] Even if an undertaking should provide this information, it does not mean an obligation to incriminate oneself.[60] When complying with a decision of the Commission, an entity cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement". It reflects the *Orkem* case,[61] where the CJEU adopted a standard of protection that was lower than the ECHR standard. The *Orkem* case clearly shows that

54 Case 155/79, *AM* & *S Europe Limited v. Commission of the European Communities*, EU:C:1982:157.

55 Case 155/79, *AM* & *S Europe Limited v. Commission of the European Communities*, EU:C:1982:157; Joined cases 46/87 and 227/88, *Hoechst v. Commission*, EU:C:1989:337, para. 16. M. Gray, M. Lester, C. Darbon, G. Facenna, C. Brown, E. Holmes, *EU Competition…*, p. 31.

56 Order in a case T-30/89, *Hilti Aktiengesellschaft v Commission*, EU:T:1990:27; cf Ivo Van Bael, Jean-François Bellis, *Competition Law…*, p. 1070.

57 T. Jestaedt, The right to remain silent in EC Competition Procedure in: *Droits de la défense et droits de la Commission dans le droit communautaire de la concurrence. Rights of Defence and rights of the European Commission in EC Competition Law*, Bruylant 1994, pp. 113–118; A. Jones, B. Sufrin, *EU Competition…*, p. 1058; Bellamy & Child, *European Community Law of Competition*, Oxford 2008, pp. 1218–1221; I. Van Bael, *Due Process…*, pp. 158–162.

58 *John Murray v United Kingdom* App no 18731/91 (ECHR 6 February 1996); L. Ortiz Blanco, K.J. Jörgens in: L. Ortiz Blanco (ed.), *EC Competition…*, p. 179; M. Król-Bogomilska, *Kary pieniężne….*, p. 221; I. Van Bael, *Due Process…*, p. 101; K. Lenaerts, Some thoughts on evidence and procedure in European Community Competition Law, *FILJ,* 2007, vol. 30, p. 1463.

59 B. Turno, Prawo odmowy przekazania informacji służącej wykryciu naruszenia reguł konkurencji w orzecznictwie Europejskiego Trybunału Sprawiedliwości [The right to refuse to provide information to detect an infringement of competition rules in the case law of the European Court of Justice], *Ruch Prawniczy, Ekonomiczny i Socjologiczny,* 2009, vol. 3, p. 32.

60 X. Groussot, *General Principles…*, pp.229; cf: case T-112/98, *Mannesmannröhren-Werke AG v Commission,* EU:T:2001:61, para. 58; joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission,* EU:T:2004:118; case C-235/92 P, *Montecatini SpA v Commission*, EU:C:1999:362.

61 Case 374/87, *Orkem v Commission,* EU:C:1989:387; case T-112/98, *Mannesmannröhren-Werke AG v Commission,* EU:T:2001:61; joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij NV (LVM) and others v Commission,* EU:C:2002:582. Cf: I. Van Bael, J.-F. Bellis, *Competition Law….*, pp. 1073–1075; T. Tridimas, *The General Principles…*, p. 374; M. Król-Bogomilska, *Kary pieniężne….*, p. 222; A. Jones, B. Sufrin, *EU Competition…*, p. 1059.

such privilege should apply also in the preparatory phase of proceedings.[62] The Commission cannot oblige an undertaking to answer questions that would confirm an infringement of law.[63] As for the rest, there is an obligation to actively cooperate with the Commission,[64] including an obligation to answer questions about facts but not implications of those facts.[65]

The last element of rights of defence that might condition the protection of the party is the accomplishment of the proceeding within a reasonable time.[66] The defence can be effective only if it happens in good time,[67] but the EU courts have enforced this guarantee only to a limited extent.[68] Only if the time limits are clearly set in the norms might the decision be invalidated.[69] In competition cases, the Commission should issue the decision within a reasonable

62 Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV (LVM) and others v Commission,* EU:C:2002:582, paras 275–285; case C-407/04 P, *Dalmine v. Commission*, EU:C:2007:53, paras 34–35; joined cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, *Erste Group Bank AG and others v Commission,* EU:C:2009:576, paras 270–273, 327.

63 Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P i C-219/00 P, *Aalborg Portland e.a. v. Commission*, EU:C:2004:6, paras 61, 65; case C-407/04 P, *Dalmine v. Commission*, EU:C:2007:53, para. 34; case T-446/05, *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v Commission,* EU:T:2010:165, para. 325.

64 „Une obligation de collaboration active" – joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P i C-219/00 P, *Aalborg Portland e.a. v. Commission*, EU:C:2004:6, paras 65, 207–208.

65 Case T-112/98, *Mannesmannröhren-Werke AG v Commission,* EU:T:2001:61; L. Ortiz Blanco, K.J. Jörgens in: L. Ortiz Blanco (ed.), *EC Competition…*, p. 181; B. Verderdorf, Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Development and Current Issues in: B. Hawk (ed.), *International Antitrust Law & Policy, Annual Proceedings of the Fordham Institute,* Juris 2004, p. 713; T. Tridimas, *The General Principles…*, p. 376; Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/6-32, para. 36.

66 CJEU refers also to the notion of "good administration" – cf case T-204/03, *Haladjian Frères SA v Commission*, EU:T:2006:273, para. 195; case T-213/00, *CGM and Others v Commission,* EU:T:2003:76, para. 317. Cf I. Van Bael, *Due Process…*, pp. 103, 214.

67 X. Groussot, *General Principles of Community Law*, Europa Law Publishing 2006, pp. 77, 223–224. case C-185/95 P, *Baustahlgewebe GmbH v Commission,* EU:C:1998:608, para. 29; cf. also *Erkner and Hofauer v Austria* App no 9616/81 (ECHR 23 April 1987); *Kemmache v France* App no 12325/86 (ECHR 2 November 1993); *Phocas v France* App no 17969/91 (ECHR 23 April 1996); *Garyfallou AEBE v Greece* App no 18996/91, (ECHR 24 September 1997), para. 39.

68 Referring to a principle of legal certainty: case 41/69, *ACF Chemiefarma NV v Commission,* EU:C:1970:71, paras 19–21; case 44/69, *Buchler & Co. v Commission,* EU:C:1970:72, para. 6; case 45/69, *Boehringer Mannheim GmbH v Commission,* EU:C:1970:73; para. 6. H. Schermers, D. Waelbroeck, *Judicial Protection…*, p. 67.

69 H. Schermers, D. Waelbroeck, *Judicial Protection…*, p. 49.

time,[70] so this obligation does not concern only judicial decisions.[71] The unnaturally long time for issuing a decision is not enough to prove an infringement of rights of the defence. What is necessary is also to prove that because of the long time of proceeding, an undertaking has encountered problems with defending itself against the objections of the European Commission.[72] An extensive time of preparatory proceedings (before the statement of objections) might also influence the possibility of defence.[73]

The elements of rights of defence consist of various procedural guarantees given to a party in proceedings leading to negative consequences for the party. All authors writing about "rights of the defence" refer to them as "rights",[74] but the content of those rights is defined in various manners. As we are talking here of a set of procedural guarantees[75] that should be at the disposal of the party to proceedings in any case, we might describe it as a set of standards of treatment for an entity concerned that guarantees a coherent and fair treatment of all entities that are subjects to proceedings.

Since 1 December 2009 the Charter of Fundamental Rights of the European Union acquired legally binding force as part of EU primary law and the right of defence is also one of the guarantees protected in it according to Article 48(2) of the Charter. This provision is very short and gives no hints as to what its actual scope would be. The "explanations to the Charter"[76] explain only that it "is the same as Article 6(2) and (3) of the ECHR". Article 6 of the ECHR covers: the right of being informed of the essence and merits of the accusation; the right to obtain time to prepare one's defence; the right to

70 Joined cases T-213/95 and T-18/96, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission* , EU:T:1997:157, paras 54–66.

71 X. Groussot, *General Principles…*, p. 260.

72 Joined cases C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg SA v Commission,* EU:C:2011:190, para. 118. Similarly: case C-113/04 P, *Technische Unie BV v Commission,* EU:C:2006:593, paras 60, 61; case C-167/04 P, *JCB Service v Commission,* EU:C:2006:594, para. 64; case T-461/07, *Visa Europe Ltd and Visa International Service v Commission,* EU:T:2011:181, para. 232; case C-385/07 P, *Der Grüne Punkt - Duales System Deutschland GmbH v Commission,* EU:C:2009:456, para. 193. A. Bailleux, Le salut dans l'adhésion? Entre Luxembourg et Strasbourg, actualité du respect des droits fondamentaux dans la mise en oeuvre du droit de la concurrence, RTDE 2010, vol. 46, no. 1, p. 46.

73 Case C-105/04 P, Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission, EU:C:2006:592, paras 49, 50–51; case T-240/07, *Heineken Nederland BV and Heineken NV v Commission,* EU:T:2011:284, paras 286, 295, 302–303.

74 T. Tridimas, *The General Principles…*, pp.373; W. Weiß, *Die Verteidingungsrechte…*, p. 189; J. Bourgeois, T. Baumé, Decentralisation…, pp. 397–402.

75 S. Summers, *Fair Trials. The European Criminal Procedural Traditions and the European Court of Human Rights*, Hart Publishing 2006, p. 178.

76 Explanations relating to the Charter of Fundamental Rights, OJ C 303 of 14.12.2007, p. 2. According to Article 6.1 TEU "The rights, freedoms and principles in the Charter shall be interpreted (…) with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

defend oneself personally or by a representative, which is connected with the right to legal aid; the right to hear the evidence of defence witnesses on the same footing as the accusation witnesses; and the use of a free translator in cases where the accused does not understand or does not speak the language of the court. Because of this formulation, Pierre Pescatore once stated that the Charter is just a plagiarism of the ECHR and some other international instruments on human rights.[77] This radical vision, as far as rights of the defence are concerned, seems not confirmed as the Charter applies to administrative proceedings regardless of whether the proceeding is qualified as a criminal, quasi-criminal or administrative proceeding. The CJEU has confirmed that Article 6 of the ECHR must be regarded as a minimum threshold of protection to be taken into account for the interpretation of Article 48 of the Charter.[78]

In the course of the work carried out in the Convention on the content of the Charter of Fundamental Rights of the European Union in 1999, the possibility of transposing the terms of Article 6(3) ECHR in full was *discussed* (which sets out the guarantees which constitute the rights of the defence in criminal matters within the meaning of Article 6 of the ECHR) in Article 48(2). However, that solution was abandoned on the ground that the laconic wording of the "rights of the defence" would give the EU greater freedom for action, while ensuring that a fundamental "minimum" for the interpretation of Article 48(2) of the Charter will be Article 6(3) ECHR.[79] Clear difference in the "saturation of content" of Article 48(2) and Article 6(3) of ECHR is therefore the deliberate result of works of the Convention establishing the Charter. The content of Article 48(2) as formulated in the Treaty establishing a Constitution for Europe and the subsequent text on the Treaty reforming the European Union has not been changed. In view of the position taken in the Convention with regard to Article 48 of the Charter, it is difficult to agree with the academic opinion that the Charter has no creative function since it merely confirms existing *rights*.[80] If that were to be the case, the drafters of the Charter would have opted for a precise repetition of the terms of the ECHR.

77 Pierre Pescatore, in an introduction to a reprinted version of his own text: 'La Cour de justice des Communautés européennes et la Convention européenne des droits de l'homme' in: *Protection des droits de l'homme: la dimension européenne. Mélanges Gérard J. Wiarda*, C. Heymanns Verlag 1988, pp. 441–455, reprinted in: F. Picod (ed.), *Études de droit communautaire européen 1962–2007*, Bruylant 2008, p. 731.

78 Case C-269/22, *IP and Others*, EU:C:2023:275, para. 38.

79 A. Eser, Commentary on Article 48(2) of the Charter of Fundamental Rights of the European Union in: J. Meyer, N. Bernsdorff (ed.), *Charta der Grundrechte der Europäischen Union: Kommentar*, Baden Baden 2006, p. 501; see Charta 4123/1/00 ERV

80 A. Wyrozumska, *Ochrona praw podstawowych w Unii Europejskiej* [Protection of fundamental rights in the European Union], in: A. Wyrozumska (ed.), *System ochrony prawnej w Unii Europejskiej* [The system of legal protection in the European Union], Warszawa 2009, p. 384; E.H. Morawska, *Konstrukcja normatywna praw podstawowych Unii Europejskiej w Karcie Praw Podstawowych Unii Europejskiej* [The normative construction of fundamental rights of the European Union in the Charter of Fundamental Rights of the European Union], in: C.

However, that does not alter the fact that Article 6(3) the ECHR remains a fundamental model for reading the wording of Article 48(2). That approach is all the more useful since it is undoubtedly possible to draw full inspiration from the case law of the European Court of Human Rights (ECtHR) on the interpretation of Article 6(3) ECHR. For the interpretation of Article 48(2) recourse must also be had to Article 52(3) of the Charter which states that

> in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The rights of the defence must therefore be interpreted on the basis of the text of the ECHR and the interpretation of the case law of the ECtHR, without excluding a broader interpretation of that concept. It should be borne in mind that the same applies to the interpretation of the Convention itself: when interpreting the substantive provisions of the Convention, it is necessary to start from the premise that they describe "only a minimum standard and may not in any event be used to limit the rights and freedoms conferred by national law".[81]

This said, the content of Article 6(3) of the ECHR is extremely developed and detailed as a "set of guarantees for a fair trial", referring to the tradition of Anglo-Saxon law, where procedural guarantees have always been highlighted. It is an open catalogue.[82] Article 6(3) of the ECHR refers only to criminal cases brought before a court or, as the case may be, before an administrative authority whose decisions are then subject to full judicial review.[83]

The line of construction putting Article 48(2) and Article 6(2) and (3) of the ECHR on equal footing would imply that it is reserved for the "judicial" proceedings and rather not covering the proceedings in front of the European Commission as a non-judicial, administrative body. The use of the notion "accused", that appears in Article 48(2), could be interpreted as limiting the

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Mik, K. Gałka (eds.), *Prawa podstawowe w prawie i praktyce Unii Europejskiej* [Fundamental rights in law and practice], Toruń 2009, p. 40.

81 P. Hofmański, *Konwencja Europejska a prawo karne*, Toruń 1995, p. 123.

82 P. Hofmański, A. Wróbel, [Commentary on Article 6], in: L. Gardocki (ed.), *Komentarz do Europejskiej Konwencji Praw Człowieka i podstawowych wolności* [Commentary on the European Convention on Human Rights and Fundamental Freedoms], Warszawa 2010, pp. 246 and 250, citing the expression. European Court of Human Rights, 13.5.1980, 6694/74, *Artico v. Italy*, § 32.

83 See the order for reference. European Court of Human Rights, 21.2.1984,*8544/79, Grüztürk v. RFN*; Lyon. European Court of Human Rights, 23.11.2006, *73053/01, Jussila v. Finland*; Lyon. ECtHR, 24.2.1994, 12547/86, *Bendenoun v. France*; Lyon. ECtHR, 23.7.2002, 34619/97, *Janosevic v. Sweden*; Lyon. ECtHR, 11.9.2011, 43509/08, *Menarini Diagnostics S.R.L. v. Italy.*

scope of application of this guarantee to the proceedings that one could qualify as "criminal". So one might wonder if it could be fully applied to proceedings that are perceived in EU law mainly as "administrative" proceedings (like antitrust proceedings). However the ECtHR in its *Menarini v. Italy* judgment[84] has qualified a national antitrust proceeding as "criminal"[85] in terms of Article 6 ECHR, even in its administrative part, taking place in front of the Italian Competition Authority. This implies that Article 48(2) of the Charter should be construed as covering the proceedings with EU element, not only in front of the European institutions but as well in front of the national authorities applying EU law or some elements of EU law. The Charter also contains a right known as the "right to good administration" (Article 41 of the Charter)[86] that corresponds partly to the CJEU's procedural *acquis* on the rights of defence, as it covers i.a. the right to be heard, the right of access to one's file and the right to obtain reasons for the decision. The right to good administration can be perceived as an equivalent of right of defence in the administrative proceedings.[87] The open scope of application of Article 48(2) and of Article 41 of the Charter causes that the existing case law on the rights of defence as a general principle of EU law retains its impact as far as the definition of individual's guarantees is concerned.

In legal literature, it is possible to take the view that Article 48(2) of the Charter refers only to criminal matters – H. Kuczyńska seems to consider that they are merely criminal proceedings, without, however, examining what it covers.[88] That interpretation is also supported by Article 52(3), which con-

84 ECtHR judgment of 11 September 2011, *Menarini Diagnostics S.R.L. v. Italy*, cf M. Bernatt, Prawo do rzetelnego procesu w sprawach ochrony konkurenci i regulacji rynku (na tle art. 6 EKPC) [The right to a fair trial in matters of competition protection and market regulation (under article 6 ECHR)], *Państwo i Prawo,* 2012, vol. 1, p. 57.

85 The discussion on the character of the antitrust proceedings and sanctions is not new, cf: M. Król-Bogomilska, *Kary pieniężne….*, pp. 188–202; cf. also M. Król-Bogomilska M., Standards of Entrepreneur Rights in Competition Proceedings – a Matter of Administrative or Criminal Law?, *Yearbook of Antitrust and Regulatory Studies* 2012, vol. 5, nr 6; A. Błachnio-Parzych, The Nature of Responsibility of an Undertaking in Antitrust Proceedings and the Concept of „Criminal Charge" in the Jurisprudence of the European Court of Human Rights, *Yearbook of* Antitrust *and Regulatory Studies,* 2012, vol. 5, no. 6.

86 K.-D. Classen, *Gute Verwaltung im Recht der Europäischen Union. Eine Untersuchung zu Herkunft, Entstehung und Bedeutung des Art. 41 Abs. 1 und 2 der Europäischen Grundrechtscharta*, Duncker&Humblot, Berlin 2008; A. Dauter-Kozłowska, Prawo do dobrej administracji w Karcie Praw Podstawowych Unii Europejskiej i w świetle Europejskiego Kodeksu Dobrej Administracji in: C. Mik, K. Gałka (eds.), *Prawa podstawowe w prawie i praktyce Unii Europejskiej*, Toruń 2009, p. 337; A.I. Jackiewicz, *Prawo do dobrej administracji jako standard europejski* [The right to good administration as a European standard], Toruń 2008.

87 AG Kokott sees in Articles 41.2 and 48.2 of the Charter two complementary parts of the right of defence in EU law, cf AG Opinion in the case C-109/10 P, *Solvay v. Commission*, EU:C:2011:256, para. 152.

88 H. Kuczyńska H., *Rzetelny proces karny w prawie UE oraz orzecznictwie ETS* [Fair criminal procedure in EU law and ECJ case law], in: P. Wiliński (ed.), *Rzetelny proces karny* [Fair criminal procedurę], Warszawa 2009, p. 161

tains the obligation to link Article 48(2) with Article 6 of the ECHR, which concerns only criminal matters. However, there is nothing to preclude an interpretation of Article 48(2) of the Charter that considers that any judicial proceedings in which an entity participating in it is accused of having infringed EU law, without classifying the case at issue as criminal, administrative, disciplinary and so forth. The rights of defence, as defined by the extensive case law of the CJEU prior to the adoption of the Charter of Fundamental Rights of the European Union, recognise that the rights of the defence must be guaranteed in all proceedings which may have negative consequences for the accused person, even in the absence of specific provisions on the matter in secondary or primary law.[89] Where the proceedings may result in a penalty being imposed on a party to the proceedings, the rights of the defence must be guaranteed in those proceedings.[90] According to the CJEU, the EU's rights of defence, so understood, should be protected not only during the procedure but also during the phase preceding the opening of the procedure.[91] However, it should be pointed out that the case law on the rights of the defence cannot, in certain cases, be applied directly to the interpretation of the paragraph of Article 48(2) of the Charter, since it concerns the assessment of an ongoing administrative procedure before the European Commission and not judicial proceedings.

Article 48 (2) of the Charter refers to the "accused" person. That seems to apply to any natural or legal person against whom a public authority or entity directs an "accusation", that is to say, he or she is accused of having committed an infringement of EU law for which sanctions may be imposed. In Article 48 (2) that accusation is not classified, as is the case in Article 6 of the ECHR, as a criminal charge. It must be held that the EU provision is broader in nature, since it is not limited solely to criminal charges. They may therefore also be infringements, administrative faults and even accusations of infringement in the context of proceedings in which anyone, for example, is accused of having engaged in unfair competition. Such a broad interpretation would be supported by a systemic argument: it would be incomprehensible to limit the application of the paragraph of Article 48(2) of the Charter in criminal proceedings, where that document is primarily intended to apply to EU

89 Case C-301/87, *France v Commission,* EU:C:1990:67, case C-48/90 and C-66/90, *Netherlands v Commission,* EU:C:1992:63, case T-122/99, *Procter the Gamble v Commission*, EU:T:2000:39.

90 Case *85/76, Hoffman-La Roche v Commission,* EU:C:1979:36; J.-F. Renucci, Commentary on Article II-108 of the draft Treaty establishing a Constitution for Europe, in: L. Burgorgue-Larsen, A. Levade, F. Picod (red.), *Traité établisant une Constitution pour l'Europe. Commentaire article par article. Partie II la Charte des droits fondamentaux de l'Union*, Brussels 2005, p. 614; R. Zenc, *Prawo do obrony we wspólnotowym prawie konkurencji* [The Right to Defence in Community Competition Law], in: C. Mik, K. Gałka (eds.), *Prawa podstawowe w prawie i praktyce Unii Europejskiej* [Fundamental rights in law and practice], Toruń 2009, p. 429.

91 Joined Cases C-46/87 and C-227/88, *Hoechst v Commission,* EU:C:1989:337.

institutions, bodies, offices and agencies, when those entities are not competent to conduct proceedings of a criminal nature. Although the interpretation of "criminal matters" adopted by the ECtHR is "functional, autonomous and broad",[92] appears to unduly restrict the interpretation of Article 48(2) of the Charter, as interpreted in the context of Article 6 of the ECHR. If that were to be the case, the drafters of the Charter would have included terms which fully correspond to those of the Convention. The wording of Article 52(3) is also an indication that an interpretation of Article 48(2) which is at least as broad as Article 6 of the ECHR is considered, but there is nothing to prevent it from being interpreted more broadly.

The entities responsible for safeguarding the rights of the defence are undoubtedly the Courts of the European Union, both in the organic sense (the Courts of the European Union listed in Article 19 TEU, namely the CJEU and the General Court) and the Courts of the European Union in the functional sense, that is to say, the courts of the Member States when they apply EU law. The question arises whether the rights of the defence must be respected by EU institutions and bodies other than judicial bodies, mainly by the European Commission and the various EU auxiliary agencies with investigative and decision-making functions, such as, for example, the European Inspection Office (OLAF). A systematic interpretation, based on the position of Article 48 of the Charter in the heading "Justice", would support the view that the rights of the defence within the meaning of Article 48(2) of the Charter should be protected only before the judicial authorities.

However, it can be argued that when EU administrations, such as the European Commission, exercise investigative and decision-making functions in which they first formulate a grievance, then decide on its fairness in the form of a decision (that is to say, in particular in the case of the application of Article 101 or 102 TFEU) and may impose financial penalties provided for in secondary EU law; it is in such circumstances that the *administrative authorities decide de facto* on liability for the acts of individuals. If their decisions are not subject to full judicial review within the meaning of the case law of the ECtHR[93] they should also guarantee the rights of defence of persons accused of having infringed the right in proceedings before them. However, it must be held that, in such cases, Article 41 of the Charter, which provides procedural guarantees for participants in administrative proceedings in the European Union, is applicable, whereas Article 48(2) of the Charter is limited to "judicial" proceedings.

It is also worth indicating that in some recent cases the CJEU used the rights of defence as a tool to exclude the procedural solutions of Member States without any reference to the procedural autonomy, because of the importance

92 P. Hofmański, A. Wróbel, *Komentarz do art. 6 EKPC…*, p. 274 et seq.
93 European Court of Human Rights of *11.9.2011, 43509/08 Menarini v. Italy.*

of safeguarding these fundamental rights. In the case C-492/22 *PPU CJ*[94] the CJEU confirmed that the rights of defence have a status of a fundamental principle that should be respected at the national level.[95] The case concerned the right to appear at the hearing and the right to have the case heard at a hearing, which could limit the possibility of a Member State addressing criminal cases without such hearings. The CJEU stated that the right of an accused person to appear in person at his trial in criminal proceedings forms an essential element of the right to a fair trial enshrined in the second and third paragraphs of Article 47 and Article 48(2) of the Charter.[96] Member State's obligation to give the accused person the opportunity to participate effectively in the proceedings concerning him was a reason to exclude the national procedure, because it would limit the effectiveness both of Articles 47 and 48(2) of the Charter. Consequently, participation in the proceedings is so important that it can block the performance of other obligations under EU law, including the execution of the European Arrest Warrant. This confirms a particular status of rights of defence as a "super principle", hierarchically higher than some other EU law provisions.

Principle of procedural autonomy

The general rule concerning the application of EU law in the EU Member States is that unless the procedural issues are directly regulated in the EU primary or secondary law, the Member States possess a so-called "procedural autonomy". The notion of procedural autonomy appeared in the doctrine of European Community law already in the 1970s,[97] even if it is rarely referred to

94 Case C-492/22, *PPU*, EU:C:2022:964.

95 The dispute concerned the question of whether the decision to postpone surrender, provided for in Article 24(1) of Framework Decision 2002/584, constitutes a decision on the execution of the European arrest warrant which must be adopted by the executing judicial authority on the basis of Article 6(2) of that framework decision.

96 Case C-420/20, *HN (Trial of an accused person removed from the territory)*, EU:C:2022:679, paras 54 to 56.

97 The first to use it was: J. Rideau, Le rôle des États membres dans l'application du droit communautaire, *Annuaire Français de Droit International* 1972, p. 884 ; as noted by: V. Couronne, L'autonomie procédurale des États Membres de l'Union européenne à l'épreuve du temps, *Cahiers de droit européen*, 2010, vol. 3–4, pp. 273, 282. The judgments always invoked to illustrate the state of autonomy are: case 33/76 *Rewe*, EU:C:1976:188, para. 5, case 45/76 *Comet*, EU:C:1976:191, para. 13. Cf broader comments on the CJEU's case law in: M. Bobek, Why There is No Principle of "Procedural Autonomy" of the Member States in: B. de Witte, H. Micklitz (eds.), *The European Court of Justice and Autonomy of the Member States*, Intersentia 2011, p. 306. There are various definitions of this principle – cf the broad presentation of different approaches: N. Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych* [Protection of rights arising from European Union law in national proceedings], Warszawa 2010, pp. 62–73; M. Domańska, Zasada autonomii proceduralnej państw członkowskich i jej ograniczenia wynikające z zasady efektywności [The principle of procedural autonomy of Member States and its limitations resulting from the

under this name. The broad application of this principle is visible in case law.[98] The principle of procedural autonomy implies that unless the procedural issues are directly regulated in the EU primary or secondary law, the Member States apply their procedural rules.[99] Thus the Member States remain competent to independently legislate on procedural issues as long as this possibility has not been used (pre-empted) by the EU.[100] It is a freedom to use Member States' own solutions in applying EU law, as long as no procedural EU rules have been adopted.[101] The procedural autonomy is also a direct consequence of the fact that the EU legal order is an incomplete legal order in that it does not contain exhaustive legislation on procedural issues. It is called a "delegated enforcement" model, because EU law is mainly enforced in the Member States in accordance with the national rules of enforcement.[102] It is thus a concept that would rather depend on the "legislative activity" of the EU, whereas the case law on procedural standards applied in proceedings with EU element should not be covered by this principle as that *acquis* stems mainly from CJEU's judgments and is only partly codified in either primary or secondary EU law.

A procedural autonomy is conditional and limited. It is conditional because it depends on the "lack of exercise of competences" by the EU.[103] One might wonder if the judicial activity (case law of CJEU) is enough for the exhaustion of this exercise. It is necessary to consider if the requirement on "EU activ-

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principle of efficiency], in: A. Wróbel, M. Szwarc-Kuczer, K. Kowalik-Bańczyk (eds.), *Stosowanie prawa Unii Europejskiej przez sądy. Tom II. Zasady-orzecznictwo-piśmiennictwo* [Application of European Union law by courts. Volume II. Principles-case law-references], Warszawa 2007, pp. 326–357.

98 The first direct invocation in the judgment was the case C-201/02, *Delena Wells*, EU:C:2004:12. The Advocates General, however, started to use it quite regularly since 1994; for an overview cf. V. Couronne, 'Autonomie procedurale…, p. 284.

99 Cf D. Miąsik, Zasada efektywności [Principle of effectiveness], in: A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy* [Application of EU Law by Courts], Warszawa 2010, p. 240.

100 In this respect there is a concept of naming this principle a „procedural competence". The notion was first used by: W. van Gerwen, Of Rights, Remedies and Procedures, *Common Market Law Review,* 2000, vol. 37, p. 501; M. Domańska, Miejsce zasady autonomii proceduralnej państw członkowskich wśród zasad ogólnych prawa wspólnotowego [The place of the principle of procedural autonomy of the Member States among the general principles of Community law], in: C. Mik (ed.), *Zasady ogólne prawa wspólnotowego* [General principles of EC law], Toruń 2007, p. 124; N. Półtorak, *Ochrona uprawnień…*, p. 73.

101 V. Couronne, L'autonomie procedurale…, p. 276.

102 N. Półtorak, *Ochrona uprawnień…*, p. 38.

103 M. Domańska, Miejsce zasady…, pp. 111, 115; A. Wróbel, Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej [Procedural autonomy of Member States. The principle of efficiency and the principle of effective judicial protection in European Union law], *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 2005, vol. 1, p. 36; M. Kaszubski, Dochodzenie roszczeń opartych na prawie wspólnotowym a autonomia proceduralna państw członkowskich – przegląd orzecznictwa [Pursuing claims based on Community law and the procedural autonomy of the Member States – a review of the case law], *Studia Prawno-Europejskie* 2004, pp. 282.

ity" is strictly limited to legislative activity. The existing jurisprudence would rather indicate that the steps to be taken by the EU are to be legislative and not only judicial.[104] This underlines the problem appearing for the national authorities – as if they follow this indication, they would "drift around" the whole judicial *acquis* on the rights of defence. For instance, using two historical examples from before the adoption of the ENC+ Directive, in the CJEU's preliminary judgment in case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA.*,[105] the Court stated that Article 5 of Regulation 1/2003 contains an exhaustive list of decisions that a national competition authority might issue in application of Article 101 or 102 TFEU and thus it precludes a possibility for the national competition authority of issuing decisions stating "non-infringement" of Article 102 TFEU. The CJEU referred to the procedural autonomy as to the concept that should be followed by the national competition authorities, unless the uniform application of Article 101 or 102 TFEU is endangered.[106] In the case C-360/09 *Pfleiderer v. Bundeskartellamt* the CJEU interpreted Articles 11 and 12 of Regulation 1/2003 in the context of national proceedings on access to the file on the imposition of a fine (including the leniency procedure documents) in order to prepare a civil action for damages in front of a German court. The CJEU stated that such access might be granted to "a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages" but on the basis of national law, with due consideration for "interests protected by European Union law".[107] This last judgment clearly allowed the EU Member States to retain their procedural provisions while applying Regulation 1/2003, even if it implied a different level of protection of undertakings concerned.

The procedural autonomy is also by definition limited, as the solutions adopted by the Member State have to align to the two principles: the national provisions cannot render the EU norms obsolete (principle of effectiveness) and they cannot place the national undertakings in a better position than the foreign ones (principle of equivalence).[108] It thus implies an obligation on the side of the Member State to undertake some legislative activity and to harmonise its national law provisions with at least those two requirements.[109] Many

104 Case 35/76, *Simmenthal*, EU:C:1976:180.

105 Case C-375/09, Tele2 Polska, EU:C:2011:270.

106 Case C-375/09, Tele2 Polska, EU:C:2011:270, paras 27–28.

107 Case C-375/09, Tele2 Polska, EU:C:2011:270, para. 32.

108 P. Oliver, Le règlement 1/2003 et les principes d'efficacité et d'équivalence, *Cahiers de droit europeén*, 2005, vol. 3–4, pp. 351–394, M. Domańska, Miejsce zasady autonomii…, p. 115. Some authors question the very reasonability of those principles as self-excluding – M. Bobek, 'Why there is no principle…, p. 305 and see under their application rather a struggle to find a balance between the legitimate interests of EU and of a Member State, p. 312.

109 Even though those principles were mainly directed towards the national courts and other national organs applying EU law. In the longer term, however, the state of breach of EU law

commentators underline that mainly the principle of effectiveness is in fact invoked in the CJEU's jurisprudence; the equivalence is much less exploited[110] The application by the CJEU of those two limiting principles for the procedural autonomy clearly indicates that the jurisprudential activity of the Court of Justice itself might introduce havoc in the (seemingly) clear-cut definition based on the lack of legislative activity on the part of the EU.

One also has to distinguish the notion of procedural autonomy and the notion of efficient pursuit of proceedings so that they bring a useful result. In case C-3/17 *Sporting Odds Limited*,[111] the Hungarian tax authorities imposed on Sporting Odds, a company incorporated under United Kingdom law, a fine for having offered online casino services in Hungary without having the licences and authorisations required by Hungarian law. The only evidence in the proceedings before the authority concerned was the findings made during the inspection of the undertaking's Hungarian website. The CJEU stated that the choice of methods for organising and controlling the operation and playing of games of chance or gambling is a matter for the national authorities in the exercise of their discretion (paragraph 21),[112] that is subject only to the proportionality assessment (paragraph 22),[113] that remains to the parties to be raised, so it is not assessed ex officio (paragraph 57).[114] However, where a restrictive system has been put in place in the field of games of chance and that system is incompatible with Article 56 TFEU, an infringement of those rules by an economic operator cannot be penalised.[115] What needs to be analysed next is the relationship of procedural autonomy with the rights of defence as they were identified in the first part of this text.

Relationship between rights of defence and procedural autonomy in fining proceedings

It seems that the principle of procedural autonomy is more and more in retreat, because Article 48(2) provides a standard of treatment that overcomes the national procedural autonomy, defining a model with which national rules must be complied with. Therefore the principle of procedural autonomy should certainly not block the application of the standard of Article 48(2) in

would have to be amended by legislative activity. The limitations of procedural autonomy can concern the proceeding of an administrative nature: case C-453/00, *Kühne&Heitz*, EU:C:2004:17; joined cases C-392/04 and C-422/04, *i-21 Germany*, EU:C:2006:586.

110 V. Couronne, L'autonomie procedurale…, p. 278.

111 Case C-3/17, *Sporting Odds Limited v Nemzeti Adó- és Vámhivatal Központi Irányítása*, EU:C:2018:130.

112 Case C-46/08, Carmen Media Group, EU:C:2010:505, para. 59; case C-49/16, Unibet International-, EU:C:2017:491, para. 41.

113 Case C-46/08, Carmen Media Group, EU:C:2010:505, para. 60

114 The fact that the court is under no obligation to act of its own motion does not infringe EU law, in particular the 47 and 48 Charter.

115 Case C-49/16, Unibet International, EU:C:2017:491, para. 50.

national proceedings where fines are imposed, if an EU element is at hand in those proceedings.

In order to illustrate this, one can look at different cases from recent years. Already in the case *Eturas*,[116] where the proceedings concerned a dispute between travel agencies and the Competition Council of the Republic of Lithuania concerning a decision by which the latter ordered those travel agencies to pay a fine for establishing and participating in competitive practices, the CJEU stated that although Article 2 of Regulation No 1/2003 expressly governs the allocation of the burden of proof, that regulation does not contain any provisions relating to specific procedural aspects, in particular, that regulation does not contain any provision in relation to the principles governing the assessment of evidence and the standard of proof in national proceedings for the application of Article 101 TFEU. That conclusion was supported by recital 5 of Regulation No 1/2003, which expressly provides that that regulation does not affect national rules on the standard of proof required. This would announce the need to have referral to the procedural autonomy principle, that in national proceedings for the application of Article 101 TFEU, the national procedure applies, since 1/2003 does not lay down procedural rules.[117] The CJEU effectively stated that according to settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish them in accordance with the principle of procedural autonomy, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).[118] Therefore the CJEU confirmed the procedural autonomy but subjected it to the obligation of equivalence and effectiveness; that is to say, if the rectification of national procedures undermines equivalence and effectiveness, the national authority must then seek to ensure an effective remedy by, for example, interpreting EU law or by refusing to apply national rules, if the national procedure is at the clash with efficiency. The principle of effectiveness requires that the rules of national law governing the assessment of evidence and the standard of proof must not be such as to render the application of the EU competition rules impossible or excessively difficult and, in particular, that they must not undermine the effective application of Articles 101 TFEU and 102 TFEU.[119] Thus, the principle of procedural autonomy cannot prevent or impede the application of 101 and 102 TFEU for reasons of efficiency. Naturally, in *Eturas* the principle

116 Case C-74/14, *'Eturas' UAB and Others v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42.

117 Case C-74/14, *'Eturas' UAB and Others v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42, paras 30–31.

118 Case C-439/08, *VEBIC*, EU:C:2010:739, para. 63; case C-310/14, *Nike European Operations Netherlands*, EU:C:2015:690, para. 28.

119 Case C-360/09, *Pfleiderer*, EU:C:2011:389, para. 24.

of procedural autonomy was not applied in the context of rights of defence but it was invoked in the context of the application of substantive EU law. Still, the principle of effectiveness was used in order to allow that the evidence of an infringement of EU competition law be adduced not only by direct evidence, but also by circumstantial evidence, provided that they are objective and consistent. Admission of indirect evidence was required even if the national law was not providing for such a possibility. Article 48 of the Charter was used in these proceedings to claim the application of the principle of the presumption of innocence (paragraph 38),[120] however with no referral to the principle of procedural autonomy at all (paragraph 45).

There are as well cases where the principle of procedural autonomy is invoked despite the harmonisation and then the test applied by the Court of Justice is to interpret the national provisions in light not only of the harmonising instruments but also Article 48 (2). For instance, in the case *TL*[121] two directives[122] and the Charter were invoked. In this case, *TL* was deprived of liberty in Portugal for failure to comply with the obligations imposed by the suspended sentence of three years' imprisonment, because he was not provided with the translation of his obligations.[123] The ancillary sanctions included a temporary ban on driving motor vehicles and a financial fine. The Court recalled the definition of procedural autonomy that, in the absence of EU rules governing the matter, the rules implementing the rights which individuals derive from EU law are a matter for the domestic legal order of the Member States, in accordance with the principle of the procedural autonomy of the Member States. However, those rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness).[124] The compatibility of

120 Presumption constitutes a general principle of EU law, now set out in Article 48 (1) of the Charter of Fundamental Rights of the European Union, cf case C-89/11, *P E.ON Energie v Commission*, EU:C:2012:738, para. 72, which the Member States are required to comply with when implementing EU competition law, cf case C-439/08, *VEBIC*, EU:C:2010:739, para. 63, case C-604/12 N, EU:C:2014:302, para. 41.

121 Case C-242/22 PPU, *TL*, EU:C:2022:611.

122 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, *OJ L 280, 26.10.2010, p. 1–7*; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ L 142, 1.6.2012, p. 1–10.*

123 TL's lawyer argued that the conviction, the order seeking clarification of the breaches of obligations concerned and the order revoking the suspension of the sentence were not translated into a language understood by T.L. (Romanian language). In view of that fact, he was not in a position to understand his obligations. T.L. was therefore unaware of the obligation to inform about the transfer of his residence and was unaware of the time limit for bringing an action for annulment of a procedural act on account of the failure to appoint an interpreter for a person who does not speak Portuguese (national law).

124 Joined cases C-776/19 to C 782/19, *BNP Paribas Personal Finance*, EU:C:2021:470, para. 27.

the national legislation was assessed in this case in accordance with the scheme characteristic of the procedural autonomy scheme. The CJEU held that directives at issue seek to establish common minimum rules for the protection of procedural safeguards and rights arising from Article 47 and Article 48 and they must be interpreted and implemented in a manner consistent with those rights and safeguards, with a view to enhancing mutual trust in the criminal justice systems of the Member States (paragraph 42). Even more importantly, the CJEU held that some provisions of the directive, read in light of Articles 47 and 48 (2) of the Charter must be interpreted as precluding national legislation under which, first, an infringement of the rights enshrined in those provisions of those directives may be validly relied on only by the holder of those rights and, second, that infringement may be relied on only within a certain limitation period (paragraph 43). The Court found that the principle of effectiveness of some of procedural rights for the accused would have been infringed if no interpretation in light of the Charter was possible (paragraph 83).[125] The essence of the procedural autonomy test in this case related to compliance with the principle of effectiveness, that is to say, whether the national provisions at issue are capable of effectively achieving the objective of the directives. However, the final assessment was left to the referring court. If an infringement of the principle of effectiveness was found, it would have to interpret the national rules beyond the EU (indirect effect) and ultimately refuse to apply them (principle of primacy).

Another scenario might imply the use of the Charter only. In the case *PI v Landespolizeidirektion Tirol*[126] that concerned the proceedings on a basis of a dispute between PI and the Landespolizeidirektion Tirol concerning the lawfulness of the closure of a commercial establishment operated by PI. The Court stated that Articles 47 and 48 of the Charter require that the person concerned must be able to ascertain the reasons upon which the decision taken in his regard by the administrative authority is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court having jurisdiction to require the competent authority to disclose them, so as to enable the person concerned to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the court having jurisdiction and enabling that court to carry out fully its review of the lawfulness of the national decision in question[127] — obligation to provide access to the reasons for the decision in order to take an informed decision with a view to a challenge and to implement the rights of

125 Case C-216/14, *Covaci*, EU:C:2015:686, paras 66 and 67.

126 Case C-230/18, *PI v Landespolizeidirektion Tirol*, EU:C:2019:383.

127 Case C-230/18, *PI v Landespolizeidirektion Tirol*, EU:C:2019:383, para. 47; case C-300/11, ZZ, EU:C:2013:363, para. 53; case C-682/15, Berlioz Investment Fund, EU:C:2017:373, para. 84.

defence. The right to be heard in all proceedings, enshrined in Articles 47 and 48 of the Charter and forming an integral part of the rights of the defence, a general principle of EU law, means that the authorities must pay due attention to the positions adopted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision; the obligation to state the reasons on which its decision is based in a sufficiently specific and concrete manner to enable the person concerned to understand the reasons for refusing his request is thus the corollary of the principle of respect for the rights of the defence.[128] Furthermore, the right to be heard in all proceedings, enshrined in Articles 47 and 48 of the Charter and forming an integral part of the rights of the defence, a general principle of EU law, means that the authorities must pay due attention to the positions adopted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision; the obligation to state the reasons on which its decision is based in a sufficiently specific and concrete manner to enable the person concerned to understand the reasons for refusing his request is thus the corollary of the principle of respect for the rights of the defence.[129] Thus, the obligation to respect the rights of defence of addressees of decisions which significantly affect their interests is, in principle, incumbent on the administrative authorities of the Member States when they take measures which come within the scope of EU law.[130] In this case, since the national legislation does not require that a decision ordering the closure with immediate effect of a retail establishment such as that at issue in the main proceedings be duly reasoned, in fact and in law, in writing and notified to its addressee, the national legislation does not satisfy the requirements laid down by the case-law. The Court did not use the procedural autonomy principle, neither how that affected the effectiveness of 47 and 48 of the Charter, but the Court itself applied those provisions of the Charter in order to assess the compliance of a national standard with the EU standard. It stated that the national legislation did not guarantee that the addressee of such decision was able to ascertain the reasons on which it was based, in order to enable him or her to defend his or her rights and to decide whether it is appropriate to bring an action before the court having jurisdiction. Accordingly, that legislation did not make it possible to ensure the effectiveness of the judicial review or the respect for the rights of the defence, guaranteed by Articles 47 and 48 of the Charter and the general principles of EU law. Therefore the lack of an adequate statement of reasons for the decision prevented the addressee from becoming acquainted with the reasons for the decision, nor did it allow for effective judicial review under Articles 47 and 48 of the Charter. The Court stated that the failure

128 Case C-166/13, *Mukarubega*, EU:C:2014:2336, paras 43, 45 and 48.
129 Case C-166/13, *Mukarubega*, EU:C:2014:2336, paras 43, 45 and 48.
130 Case C-166/13, *Mukarubega*, EU:C:2014:2336, para. 50.

to state reasons for the decision infringed both the Charter and the rights of defence and was also disproportionate to require a party to state reasons for its application for annulment of such an unjustified decision. Both the Charter and the case law on rights of defence were used here without referral to the procedural autonomy.

In the case *Adler Real Estate*[131] the final decision of the Austrian Acquisition Commission (supervisory authority) found that Adler, Petrus and GM and two other companies had infringed Directive 2004/25[132] by acting together to induce Conwert Immobilien SE to enter into a transaction. In a subsequent decision, that Commission imposed administrative pecuniary penalties on GM, HL and FN, on the basis of the factual findings of the first decision. The action against the penalty decision was brought before the Federal Administrative Court, which raised the question of whether it was permissible, under national law, to bind public administrative authorities and courts to the finding of a final decision in the first set of proceedings in the present case if the parties in two related proceedings, namely the infringement of the directive, GM, HL and FN were incomplete, in the second set of proceedings, namely the imposition of a financial penalty. In the case the CJEU made a referral to the right to remain silent (right to silence) based on Article 48 (2) of the Charter. The CJEU found that the safeguards flowing from the second paragraph of Article 48 of the Charter cover the right to silence of the natural person who is "accused". Both art 47 and 48 (2) of the Charter apply in proceedings which may lead to the imposition of administrative penal sanctions. According to the Court, three criteria are relevant to assess whether penalties are criminal in nature. The first is the legal classification of the offence under national law, the second is the intrinsic nature of the offence and the third is the degree of severity of the penalty which the person concerned is liable to incur.[133] The Court referred itself directly to Article 48 of the Charter, stating that this provision requires from Member States "to establish within reasonable limits, in view of the importance of the issue and the rights of the defence, the presumptions of fact or law existing in their criminal laws".[134] The Court stated that at first glance the sanctions at hand would appear to be criminal in nature, but it was subject to final determination, by the referring court, of whether the sanctions are in fact criminal in nature; the right to silence and the presumption of innocence, guaranteed by the second paragraph of Article 47 and Article 48 of the Charter, are thus applicable in the main proceedings.

131 Case C-546/18, *FN, GM, Adler Real Estate AG, HL, Petrus Advisers LLP v Übernahmekommission*, EU:C:2021:711.

132 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, *OJ L 142, 30.4.2004, p. 12–23.*

133 Case C-481/19, Consob, EU:C:2021:84, para. 42.

134 Case C-546/18, *FN, GM, Adler Real Estate AG, HL, Petrus Advisers LLP v Übernahmekommission*, EU:C:2021:711, para. 47; case C-45/08, *Spector Photo Group and Van Raemdonck*, EU:C:2009:806, para. 43.

If the criminal character were confirmed by the national court, it would bring about the failure to have binding effect of the decision.[135] The Court stated that in proceedings for an administrative penalty imposed on a natural person, the administration must disregard the binding effect attached to the assessment contained in the decision finding the infringement alleged against that person, which has become final, where there is no possibility for that person to challenge that assessment personally in the exercise of his own rights of defence. Further, the right to silence precludes a natural person – who may be personally liable for an offence punishable by administrative penalties of a criminal nature in subsequent proceedings for an administrative penalty – from being able to rely on that right in respect of facts which will subsequently be relied on in support of the accusation and will thus have an impact on the conviction or penalty imposed. This case illustrates that Article 48 of the Charter might have an impact on the binding force of a decision (decisions) given in other proceedings.

In the case C-646/17 *Gianluca Moro*,[136] where Article 48(2) was invoked together with guarantees stemming from secondary law, namely Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, it was clear that respect for the rights of the defence, within the meaning of that provision of the Charter, requires that, in the event of a legal reclassification of the acts to which the accusation relates, the accused person must be informed thereof at a time when he or she still has the opportunity to react effectively, that is to say, before the deliberation stage, in order to enable effective preparation of his or her defence.[137] The directive lays down minimum rules[138] and Member States may extend the rights set out in that directive in order to ensure a higher level of protection also in situations for which it does not expressly provide. The level of protection should never fall below the standards provided by the ECHR as interpreted in the case law of the ECtHR.[139]

135 Case C-546/18, *FN, GM, Adler Real Estate AG, HL, Petrus Advisers LLP v Übernahmekommission*, EU:C:2021:711, para. 60.

136 Case C-646/17 *Criminal proceedings against Gianluca Moro*, EU:C:2019:489. Gianluca Moro was charged by the Public Prosecutor's Office with having committed an offence of embezzlement consisting of obtaining from a third party gold jewellery from the Legrottaglie family and then handing it over to the Ostuni shop for profit. At the hearing, GM's admission reclassified the act of "gateway" as a "flight". On that basis, GM's lawyer submitted a request for conciliation, which was not granted due to the expiry of the time limit for submitting that request and national law precluding the admissibility of the application at issue in the event of a change in the legal classification of the facts (admissibility only where the amendment of the accusation relates to facts, which the prosecutor did not accept in the present case).

137 Case C-646/17, *Criminal proceedings against Gianluca Moro*, EU:C:2019:489, para. 70.

138 Recital 40 of Directive 2012/13.

139 The right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence (ECtHR, 25 March 1999, Pélissier and

The requirement that the accused person and his or her lawyer must be able to participate actively in the trial, in compliance with the adversarial principle and the principle of equality of arms, in order to be able effectively to make known his or her point of view, does not preclude the information relating to the accusation communicated to the defence from being subsequently amended, in particular as regards the legal classification of the acts alleged against the accused person, or the addition of new evidence to the file at the hearing. However, any such amendment and evidence must be communicated to the accused person and his or her lawyer at a time when that person and his or her lawyer still have the opportunity to react effectively, that is to say, before the deliberation stage.[140] That possibility is, moreover, provided for in Article 6(4) of that directive, according to which any change in the information provided in accordance with that article in the course of the criminal proceedings must be communicated without delay to the suspect or accused person where that is necessary to safeguard the fairness of the proceedings.[141] A legal reclassification of complaints in court proceedings is possible in relation to the decision imposing a penalty, provided that the party has had an opportunity to present its comments. However, the rights of the defence referred to in Article 48 in the context of the accused person's right to information, the Charter does not require the accused person to have the possibility of requesting, after the beginning of the hearing, the imposition of a negotiated penalty in the event of a modification of the acts on which the accusation is based or in the event of a change in the legal classification of those acts.[142] The compatibility of national law is not put in question if it aligns with the secondary EU legislation. Therefore the CJEU held that the respective article of the Directive (Article 6(1) of Directive 2012/13) and Article 48 of the Charter must be interpreted as not precluding national legislation under which the accused person may, at the hearing, submit a request for conciliation in the event of a change in the facts, but not in the event of a change in the legal classification of those facts. Precise and complete information on the charges against the defendants, and therefore the legal classification of the facts which a court may take into account, is an essential condition for safeguarding the fairness of the

Sassi v. France, CE:ECHR:1999:0325JUD002544494, § § 52 and 54). If the trial courts have the possibility, under national law, to reclassify the facts which are properly brought before them, they must ensure that the accused person has been able to exercise his or her rights of defence effectively and, therefore, has been able to acquaint themselves, in good time, with information on the cause of the accusation, namely the substantive elements which militate against him or her and on which the accusation is based, and on the legal classification of those acts, and to do so in detail (ECtHR: 11 December 2007, Drassich v. Italy, CE:ECHR:2007:1211JUD002557504, § 34; ECtHR, 22 February 2018, Drassich v. Italy, CE:ECHR:2018:0222JUD006517309, § 65).

140 Case C-646/17, *Criminal proceedings against Gianluca Moro*, EU:C:2019:489, para. 52.

141 Case C-612/15, *Kolev and Others*, EU:C:2018:392, para. 95.

142 Case C-646/17, *Criminal proceedings against Gianluca Moro*, EU:C:2019:489, para. 72.

proceedings. Thus, the standard of rights of defence, as set out in the case law of the ECtHR, is used as a model for assessing the compatibility of national law with EU law.

In order to conclude, it can be stated that the relationship between the standard stemming from Article 48(2) of the Charter and the principle of procedural autonomy develops into three possible models, which seem however to lead to the same result. First, the least frequently, in relation to national proceedings where administrative fines are imposed, Article 48(2) is applied without any procedural autonomy test. Second, more often, in proceedings where EU law is applied in order to impose fines (like EU competition law), where there is no harmonisation as far as fines are concerned, Article 48(2) serves as a model for interpretation of national rules. So analogous procedural solutions are interpreted in the same way as it is done under 48(2) in EU proceedings. There is thus no reflection on procedural autonomy, as it was clearly illustrated by the case C-74/14 *Eturas*,[143] where the Court of Justice referred to Article 48(2) with no referral to procedural autonomy. And third, which occurs in most cases, in the scope of typical criminal proceedings, where there are a number of acts of secondary legislation containing procedural solutions, the principle of procedural autonomy does not apply *ex definitione*. Nor does it have a direct impact on national criminal proceedings, since Article 48(2) of the Charter has always to be compared with the specific procedural solution of the text of secondary legislation. Whichever scenario is in place, the CJEU confirms that various components of rights of defence are binding on the national procedures for imposing penalties, regardless of the principle of national autonomy.

Consequences of non-observance

It seems rather logical that if substantial EU norms are applied, the procedural solutions applied should also be aligned to the European standards. One of the fundamental advantages of the Charter is the possibility to apply its provisions directly, instead of using the general principles of EU law, stemming from jurisprudence. This enhances the legal certainty of undertakings concerned.[144] According to some authors, the content of the Charter is not just a repetition of general principles of law or ECHR – as it is much broader than the existing ECHR *acquis* and the existing jurisprudence.[145] This naturally should lead to a possibility (or rather obligation) to apply the Charter, also in its procedural content, in national antitrust proceedings that are of administrative character.

143 Case C-74/14, *'Eturas' UAB and Others v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42.

144 X. Groussot, *General Principles…*, p. 106.

145 X. Groussot, *General Principles…*, p. 111; K. Lenaerst, E. De Smijter, A Bill of Rights for the European Union, *Common Market Law Review,* 2001, vol. 41, pp. 273, 289.

There is no Court of Justice judgment that would directly confirm the direct effect of Article 48(2). However, its application in different national cases might provide an indication that it is the case; it certainly fulfils the criteria of being directly effective. In particular, if there is a clash between the provisions of national law and the standard stemming from Article 48(2), the *Simmenthal* rule should apply and the national provisions should not be applicable/effective. However, if the rights of defence have been breached, annulment of a decision is an appropriate measure to protect that fundamental right only where the infringement of the rights of defence affects the outcome of the case.[146] That is to say, the incompatibility of the national rules/practice with the rights of defence may be of no consequence in a given case, and there is no right to reopen the proceedings either.[147] The right to compensation is possible only if it is shown that respect for the rights of the defence would lead to the imposition of a lower fine or to refrain from imposing a financial penalty in general.

Thus the EU rights of the defence, as a general principle of EU law, apply whenever the authorities are minded to adopt a measure which will adversely affect an individual. In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they adopt measures which come within the scope of EU law, even though the applicable EU legislation does not expressly provide for such a procedural requirement.[148] There is also no doubt that the EU rights of defence are to be considered in criminal matters at national level, even if the provisions of secondary law do not require it.[149]

The EU law does not necessarily regulate the procedural solutions at the national level. The Member States thus, at least nominally, still retain procedural autonomy. However, it comes with one limitation – the national procedural provisions cannot hinder effective enforcement of EU law.[150] The general principles of EU law, including the rights of the defence, are there not only as help for interpretation or as solutions for lacunas in law. They might as well constitute an independent source of law.[151] So the EU rights of the

146 Case T-235/18, *Qualcomm v Commission*, EU:T:2022:358.

147 Joined cases C-392/04 and C-422/04, *i-21 Germany*, EU:C:2006:586.

148 Case C-189/18, *Agriculture Hungary*, EU:C:2019:861, para. 39.

149 Case C-546/18, *FN, GM, Adler Real Estate AG, HL, Petrus Advisers LLP v Übernahmekommission*, EU:C:2021:711.

150 J. Bourgeois, T. Baumé, Decentralisation…, p. 388. Broader: K. Kowalik-Bańczyk, Procedural Autonomy of Member States and the EU Wils Antitrust Proceedings, *Yearbook of Antitrust and Regulatory Studies,* 2012, vol. 5, no. 6, pp. 215–234.

151 M. Jaśkowski, Miejsce podstawowych zasad ogólnych prawa wspólnotowego w hierarchii wspólnotowych źródeł prawa [The Place of the Basic General Principles of Community Law

defence might be invoked as the general principles of law. Next to this, the Charter of Fundamental Rights is binding not only for the institutions and bodies of the EU, but also for the Member States when they are implementing EU law (Article 51(1) of the Charter). Therefore in cases where the national authorities apply EU law,[152] the provisions of the Charter, including Article 48, should also be applied.[153]

Article 48 (2) of the Charter cannot be perceived as a breakthrough or radical change in comparison to usual constitutional standards of the Member States, as far as rights of defence are concerned.[154] However it might steer towards greater unification of the procedural standards.[155] This possibility (or even an obligation) to apply the Charter might bring about some unification of standards in national proceedings. The main argument for the application of procedural *acquis* on the rights of defence in national proceedings with EU elements is the coherence and transparency of procedural rules applied towards entities concerned regardless of the level (national or European) of application of EU law. Otherwise an entity concerned would enjoy a different level of protection depending on the fact which organ (European or a national) initiates the proceedings against it. The application of the jurisprudence of EU courts regarding the rights of defence might also be motivated by reference to Article 4.3 TEU – the so-called loyalty clause of Member States towards the European Union, that implies the broadest possible obligation to assure efficiency of the EU norms. The rights of defence form part of general principles of EU law that should be protected both by the EU and the Member States while they are applying EU law. Similarly, Article 51 of the Charter provides that "the provisions of this Charter are addressed (…) to the Member States only when they are implementing Union law". This seems the strongest argument for the application of CJEU's *acquis* on rights of defence in national proceedings with EU elements. The purely internal situations would be left outside of this obligation. Maciej Bernatt argues that the procedural standards developed as general principles of EU law by the European Courts should also be applied in national proceedings because they are also stemming from Article 6 ECHR.[156] It seems however that the scope of judicial *acquis* on rights

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in the Hierarchy of Community Sources of Law], in: C. Mik (ed.), *Zasady ogólne prawa wspólnotowego* [General Principles of EC Law], Toruń 2007, p. 56.

152 D. Miąsik, Sprawa wspólnotowa przed sądem krajowym [Community Case before a National Court], *Europejski Przegląd Sądowy,* 2008, no. 9; D. Miąsik, Sprawa unijna Sprawa unijna [EU case], in: Andrzej Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy* [Application of EU Law by Courts], Warszawa 2010, pp. 699–722.

153 As an example one can cite: case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland,* EU:C:2010:811.

154 I. Van Bael, *Due Process…*, p. 2.

155 Clearly visible in case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107, paras 63–64.

156 M. Bernatt, *Sprawiedliwość proceduralna…*, p. 81. Similarly: B. Turno in: A. Stawicki, E. Stawicki eds., *Komentarz do ustawy o ochronie konkurencji i konsumentów* [Commentary on the Competition and Consumer Protection Act], Warszawa 2010, p. 1064.

of defence and the Article 6 ECHR is not completely identical and analogous, as the Article 6 ECHR remains applicable to the "criminal" proceedings only, even if construed in a broad manner (like in the *Mennarini* judgment).

Such alignment would be, however, inconsistent with the principle of different treatment of entities concerned depending only on the presence or lack of the "Union" element in the proceedings – thus clashing with the principle of non-discrimination. The more controversial issue is the question of whether, in purely internal situations, such alignment should take place. As Dawid Miąsik indicates, even such purely internal situations become more and more "unionized" but in a selective manner.[157] Such an inconsistent practice of rather accidental application or disapplication of European solutions is not enhancing the legal security of individuals or undertakings. Therefore some authors, like Maciej Bernatt, are of the opinion that the similarity of the substantive EU rules should also imply an alignment of procedural standards at the European and national level.[158] If one applies the principle of procedural autonomy as it was defined above, it should be presumed that the national authorities apply their own procedural rules[159] if there is no harmonisation. However such a lack of harmonisation of procedural issues at the EU and national levels might bring two important consequences. First, it brings a risk of inconsistent application of EU substantive law provisions. Second, it causes that the protective guarantees for the entities concerned are different depending on the level of proceedings (national or European). As to this last point, this level might be either higher or lower in the national rules in comparison to the EU standard. This divergence means that the answer on the need for alignment of procedural rules is not evident.

The application of EU *acquis* on rights of defence would be particularly useful in the instances where such a solution would grant a higher level of protection that that stemming from national rules. The protection might, however, in some aspects be lower than the protection granted by national law. Then the *Melloni* scenario[160] should apply, as both the case law and the Charter

157 D. Miąsik, Solvents to the Rescue – a Historical Outline of the Impact of EU Law on the Application of Polish Competition Law by Polish Courts, *Yearbook of Antitrust and Regulatory Studies*, 2010, vol. 3, no. 3, p. 25.

158 M. Bernatt, *Sprawiedliwość proceduralna*..., p. 331; in the same way: B. Turno, in: A. Stawicki, E. Stawicki (ed)., *Komentarz*...., p. 982.

159 Case C-550/07 P, *Akzo Nobel v Commission,* EU:C:2010:512, para. 113.

160 In the case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107 a constitutional appeal before the Spanish Constitutional Tribunal, alleging infringement of the constitutional right to a fair trial, because it was impossible to challenge the conviction imposed in absentia in Italy and the fact that, on appeal, the Italian court had kept communication with the lawyers previously dismissed by SM. By its second question, the referring court essentially asked the CJEU about the compatibility of Article 4 (1) of Framework Decision 2002/584, together with the requirements flowing from the right to effective judicial protection and to a fair trial enshrined in Article 47 of the Charter and from the rights of the defence enshrined in Article 48(2) of the Charter. It should be noted that, although the

allow for the application of higher national standards. This remains the only hypothesis advocating for retaining the national procedural autonomy rather than for alignment of procedures.

Conclusions

The question of whether the procedural *standards* formulated in reference to the proceedings before the European Commission should be applied as a standard in the national proceedings where the EU law applies seems to become more and more a reality. Even if no legislative harmonisation of procedural norms with the standards set in the case law or binding norms of EU secondary or primary law occurs, the *acquis* on rights of defence can be used. Freedom of Member States is limited for various reasons. First, the EU standard should be applied if the uniform application of EU norms is endangered (*Tele 2*). The interest of the EU in the consistent and uniform application of EU law is often invoked to say that otherwise this law would have no *effet utile*. Second, the legal protection of entities concerned forces the Member States to step away from the procedural autonomy rule. The direct application of some of the provisions of the Charter of Fundamental Rights forces the Member States to readapt their procedures both to the requirements of the Charter and the ECHR. The notions used in Article 48(2) of the Charter are construed in light of the existing case law. They certainly have to follow the European standards where EU law is applied. This might bring about a growing convergence of national procedures. The EU rights of the defence could be used and protected in national proceedings, particularly those with some EU element.

The rights of defence are to be construed as a general principle of the protection against arbitrary and disproportionate intervention by the public authorities in the sphere of private activities of an entity.[161] That protection already applies at the stage of the administrative procedure, if the administrative authorities in that procedure are subject to EU law, which obviously includes rights of the defence.[162] The rights of the defence must be observed in all proceedings which are liable to culminate in a measure adversely affecting

right of the accused person to appear in person at the trial is an essential element of the right to a fair trial, that right is not absolute. The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so (para. 49). The CJEU held that Article 4a(1) Framework Decision 2002/584 does not infringe the right to effective judicial protection and to a fair trial or the rights of the defence guaranteed in Article 47 and Article 48 (2) respectively of the Charter.

161 Case C-358/16, *UBS Europe SE*, EU:C:2018:715, para. 56.

162 Case C-358/16, *UBS Europe SE*, EU:C:2018:715, para. 56, 59.

a person,[163] thus having a broader scope than Article 48 of the Charter itself. Still, the rights of the defence are not unlimited. They may for instance be subject to restrictions based on the protection of confidentiality or professional secrecy and/or on the proper functioning of the financial markets.[164]

The conclusive assumption would be that the alignment of national procedural rules, as far as rights of defence standards are concerned, should take place and is unavoidable. In the absence of such a solution both the constitutional principle of non-discrimination and the EU principle of *effectiveness* would be compromised. The European standard of rights of defence should be construed as a minimal standard allowing only for the *Melloni*[165] configuration, namely the situation where the national standard of protection can prevail uniquely when it is higher than the European one. Otherwise it seems that the procedural standards for rights of defence should be nevertheless unified, at least as long as the same provisions on the substance are applied at the national and European level.

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163 Case C-358/16, *UBS Europe SE*, EU:C:2018:715, para. 60.

164 Case C-358/16, *UBS Europe SE*, EU:C:2018:715, para. 63, 64.

165 Case C-399/11 Stefano *Melloni v* Ministerio Fiscal, EU:C:2013:107.

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11 Right to an effective remedy – a judicial right binding administrative authorities

Michalina Szpyrka

Introduction

The right to an effective remedy is an umbrella clause. It triggers the protection of other fundamental rights and general principles. It is the most important of all EU fundamental rights and general principles. This right should be respected at every stage of fining proceedings. It binds both courts and administrative authorities. Therefore, the purpose of this chapter is to analyse which elements of this right have to be respected by national administrative authorities (NAAs) and which rights the parties to fining proceedings can claim on the basis of Article 47 of the Charter of Fundamental Rights (CFR). An issue calling for a closer discussion is the different types of infringements of the right to an effective remedy, including those particular to an illiberal European democracy (e.g. a non-court hearing an appeal), and their impact on the fining decision.

Legal character

Article 47 of the Charter establishes the right to an effective remedy: a fundamental right, constituting a general principle and comprising a bundle of specific fundamental rights. It consists of the right to initiate proceedings before an independent and impartial court, previously established by law, as well as the right to a fair and public hearing within a reasonable time, the right to obtain legal advice and to benefit from the assistance of a lawyer and a representative.[1] This right is crucial to ensuring the effectiveness of other fundamental rights[2] and all subjective rights arising from EU law.[3] It is a component

1 J. Chlebny, Administrative Justice in Poland from the Perspective of Article 47 CFR, *Europejski Przegląd Sądowy,* 2022, vol. 10, p. 29.

2 Case C-231/15, *Prezes Urzędu Komunikacji Elektronicznej and Petrotel,* EU:C:2016:769.

3 K. Gutman, The Essence of Fundamental Rights, *German Law Journal*, 2019, vol. 20, p. 886; Case C-216/18 PPU, LM, EU:C:2018:586, paras 48 and 63.

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of the rule of law.[4] Therefore, a violation of the rule of law will determine a violation of Article 47 of the CFR.[5]

In the Court of Justice of the European Union (CJEU) case law, there is no uniform understanding of the term "effective remedy".[6] This term should be understood as a set of guarantees in court proceedings[7] and – of particular importance for this study – as also applicable in proceedings before NAAs.[8] On the other hand, the implementation of the right to an effective remedy under Article 47 of the CFR requires that the remedy be considered by a court with full jurisdiction. It is also inappropriate to require an individual subject to a legal measure to first violate the law or expose themselves to sanctions in order to obtain the possibility of its judicial verification.[9] However, this does not mean that every act of national law that imposes any obligations on the addressee must be subject to judicial challenge. An incidental review of such an act at the stage of administrative proceedings is permissible if it does not expose the addressee to sanctions due to a failure to comply with an obligation imposed on them whose legality is contested.[10] It is also acceptable to establish within the administrative procedure a path of appeal to authorities that are not a court within the meaning of EU law (e.g. a higher administrative authority). Before initiating the judicial procedure for verifying a dispute, it is also possible to establish the obligation to exhaust administrative or extrajudicial dispute resolution.[11] Ultimately, however, any decision of the authority that may have negative effects on the addressee must be subject to judicial review.[12]

4 L. Pech, The Rule of Law as a Constitutional Principle of European Union, *Jean Monnet Working Paper*, 2009, vol. 4, pp. 49–53; G. Marshall, The Rule of Law: Its Meaning, Scope and Problems, *Cahiers de philosophie politique et juridique*, 1993, vol. 24, p. 43.

5 Cases C-562/13, *Abdida*, EU: C:2014:2453, para. 45; C-362/14, *Schrems*, EU:C:2015:650, para. 95; C-131/15 P, *Club Hotel Loutraki and Others v. Commission*, EU:C:2016:989 para. 49.

6 D. Shipley, Due Process Rights Before EU Agencies: The Rights of Defense, *Georgia Journal of International and Comparative Law*, 2008, vol. 1, p. 5.

7 S. Prechal, The Court of Justice and Effective Judicial Protection: What Has the Charter Changed, in: C. Paulussen, T. Takács, V. Lazji, B. van Rompuy (eds.), *Fundamental Rights in International and European Law*, Springer, 2015, p. 145; Fundamental Rights Agency, Opinion: Challenges and Opportunities for the Implementation of the Charter of Fundamental Rights (30 September 2018; opinion number 4/2018), https://fra.europa.eu/en/opinion/2018/charter-training [accessed: 27 April 2024].

8 Case C-322/81, *Michelin v. Commission*, EU: C:1983:313.

9 Case C-245/19 and C-246/19, *État luxembourgeois v. B. and Others*, EU:C:2020: 795, para. 66.

10 Cases C-245/19 and C-246/19, *État luxembourgeois v. B. and Others*, EU:C:2020: 795, para. 79; C-432/05, *Unibet*, EU:C:2007:163, para. 47, 49, 53–55; C-379/18, *Deutsche Lufthansa*, EU:C:2019:1000, para. 61.

11 D. Miąsik, *Zasady i prawa podstawowe. System Prawa Unii Europejskiej* [Principles and Fundamental Rights: The European Union Legal System], Warszawa 2022, vol. 2, p. 488.

12 Cases C-924/19 PPU and C-925/19 PPU, *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, EU:C:2020:367, para. 128.

Article 47 of the CFR is an independent source of rights for individuals. It is a provision that is directly effective in both vertical[13] and horizontal relations.[14] For this study, the direct effectiveness in the vertical dimension is important, as it allows legal entities to invoke Article 47 of the CFR at the stage of fining proceedings before an administrative authority.

The right to an effective remedy interacts with national constitutional and procedural solutions. Therefore, its relations with the principle of procedural autonomy should be considered. In the case of procedural issues, Article 47 of the CFR will constitute an additional (separate) measure of the impact of national procedural regulations on the effectiveness of implementing EU law in national law. In other words, it will constitute a limitation of the principle of procedural autonomy.[15] In turn, in situations concerning systemic solutions, e.g. implementing the principle of judicial independence, the right to an effective remedy will operate independently of the principle of national procedural autonomy.[16]

The right to an effective remedy, like other fundamental rights, is not absolute and may be subject to restrictions under Article 52 of the CFR. It is inadmissible to deprive individuals of the right to judicial review of a decision that imposes a penalty.[17] However, it is permissible to limit the right to an effective remedy using various types of procedural solutions, such as deadlines,[18] the costs of proceedings[19] and the protection of life and health,[20] while maintaining the principle of proportionality of these measures. It is also permissible to introduce an evidentiary preclusion, but only if it serves to efficiently identify disputed issues and resolves them during the proceedings.[21]

13 Case C-279/09, *DEB*, EU:C:2010:811. See commentary by K. Kowalik-Bańczyk, Bezpośrednie stosowanie Karty Praw Podstawowych w postępowaniach sądów krajowych jako gwarancja skuteczności prawa UE [Direct Application of the Charter of Fundamental Rights in National Court Proceedings as a Guarantee of the Effectiveness of EU Law], *Europejski Przegląd Sądowy*, 2013, vol. 3, pp. 40–46; see also Cases C-556/17, *Torubarov*, EU:C:2019:626, para. 56; C-356/12, *Glatzel*, EU:C:2014:350, para. 43; and C-406/15, *Milkova*, EU:C:2017:198, paras 55 and 64.

14 Cases C-569/16 and C-570/16, *Bauer*, EU:C:2018:871, paras 87–90 and C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften*, EU:C:2018:874, paras 76–79.

15 Cases C-411/10 and C-493/10, *N.S. and Others*, EU:C: 2011:865, para. 77 and C-277/11, *M.*, EU:C:2012:744, para. 93.

16 Case C-508/19, *Prokurator Generalny (Chambre disciplinaire de la Cour suprême - Nominatio)*, EU:C:2022:201.

17 Case C-97/91, *Oleificio Borelli v. Commission*, EU:C:1992:491, paras 13 and 14.

18 Case C-33/76, *Rewe v. Landwirtschaftskammer für das Saarland*, EU:C:1976:188, paras 5 and 6; C-261/95, *Palmisani v. INPS*, EU:C:1997:351, para. 28; C-78/98, *Preston and Others*, EU:C:2000:247, para. 33; C-470/99, *Universale-Bau and Others*, EU:C:2002:746, para. 76.

19 Case C-279/09, *DEB*, EU:C:2010:811, paras 59–61 and C-571/16, *Kantarev*, EU:C:2018:807, para. 135.

20 E.g. the restoration of border controls during the COVID-19 pandemic.

21 D. Miąsik, *Zasady…*, p. 488.

Right to effective remedy before an NAA

Although Article 47 of the CFR expressly provides for a subjective right to initiate an appropriate procedure before an independent and impartial court, this right is also binding on public administration authorities. The most important obligations covered by Article 47 of the CFR which the NAA must fulfil include the obligation to provide reasons for a decision, the obligation to be heard in administrative proceedings (which consists of allowing access to the case file and enabling parties to the proceedings to comment on evidence and circumstances that may have negative financial consequences), resolving the case within a reasonable time and the obligation to transfer the case file to the court in the event of an appeal.

The above-mentioned obligations partially overlap with the rights resulting from other fundamental rights (Articles 41 and 48 of the CFR) and general principles. The right to an effective remedy is an umbrella clause. For a legal remedy to be effective, it is necessary to ensure certain elements, including the rights to defence, to be heard and to access the files of the administrative proceedings.[22] Only the combination of all these elements can translate into an effective legal remedy in proceedings. Therefore, when the protection of Article 47 of the CFR is triggered, other rights/general principles that are necessary for the implementation of this right and which have been expressed in the case law of the CJEU are also activated.

Obligation to be heard in administrative proceedings

Access to information on the proceedings and actions undertaken by a public administration authority is crucial for the implementation of the right to be heard by the participants in the proceedings. Public administration authorities are obliged to implement the right to be heard and the right to access case files, as they are bound by the general principle reflecting the right to good administration, expressed in Article 41 of the CFR and the general principle of

22 Cases T-101/03, *Suproco v. Commission*, EU:T :2005:336; C-225/19 and C-226/19, *Minister van Buitenlandse Zaken*, EU:C:2020:951, para. 43; C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776; C-222/86, *Unectef v. Heylens*, EU:C:1987:442, para. 15; C-46/16, *LS Customs Services*, EU:C:2017:839, para. 40; C-584/20 P and C-621/20 P, *Commission v. Landesbank Baden-Württemberg and SRB*, EU:C:2021:601, para. 103; C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, EU:C:2021:70; C-584/10 P, C-593/10 P and C-595/10 P, *Council v. Kadi*, EU:C:2013:518, para. 100; C-579/19, *The Food Standards Agency*, EU:C:2021:66, para. 89; C-7/98, *Krombach*, EU:C:2000:164; C-129/13 and C -130/13, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, paras 28–29; E. Barbier de La Serre, Procedural Justice in the European Community Case-law Concerning the Rights of the Defense: Essentialist and Instrumental Trends, *European Public Law*, 2006, vol. 12, no. 2, p. 233.

the right to defence.[23] The need to apply these principles results from the rule of law expressed in Article 2 of the Treaty on European Union (TEU), and it is additionally activated when initiating fining proceedings by the activation of protection from Article 47 of the CFR.

The essence of the right to be heard is the possibility to comment on the truth, the significance of facts and the allegations made against legal persons within specific proceedings.[24] A party to proceedings must therefore always have access to information that may incriminate them and the possibility to express their opinion on it.[25] Initially, the case law of the CJEU established that the right to be heard must be guaranteed in proceedings that may culminate in the imposition of sanctions.[26] However, with the development of case law, a broader understanding and application of this right in circumstances where a decision may cause damage to a given entity, particularly financial damages, have been adopted.[27]

The right to be heard serves a dual purpose: to establish the facts as accurately and correctly as possible through examination of the case file and to ensure effective protection for the person concerned.[28] It guarantees every person the opportunity to make known, in a useful and effective manner, their position on all the elements on which the administrative authority intends to base its decision, which may adversely affect their interests.[29] This principle also allows for the correction of errors or the inclusion of circumstances concerning their situation and supporting the adoption or non-adoption of the decision or its content.[30] This means that the parties should have access to the case file and should be informed not only of the charges being brought, but also of other actions that may be of importance to them.[31] Other entities, such as a whistleblower or even the public, should also be notified of the initiation

23 Case C-129/13 and C-130/13, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, paras 28–29.

24 Cases C-17/74, *Transocean Marine Paint Association v. Commission*, EU:C:1974:106 and C-85/76, *Hoffmann-La Roche v. Commission*, EU:C:1979:36.

25 Case C-85/76, *Hoffmann-La Roche v. Commission*, EU:C:1979:36.

26 Case C-135/92, *Fiskano v. Commission*, EU:C:1994:267.

27 Case T-260/94, *Air Inter v. Commission*, EU:T:1997:89. See also K. Lenaerts, J. Vanhamme, Procedural Rights of Private Parties in the Community Administrative Process, *Common Market Law Review*, 1997, vol. 34, p. 535.

28 Case C-187/19 P, *EEAS v. De Loecker*, EU:C:2020:444, para. 69

29 Cases C-277/11, *M.*, EU:C:2012:744, para. 84 and C-287/02, *Spain v. Commission*, para. 37.

Cases C-349/07, *Sopropé*, EU:C:2008:746, para. 37; C-141/08 P, *Foshan Shunde Yongjian Housewares & Hardware v. Council*, EU:C:2009:598, para. 83; C-27/09 P, *France v. People's Mojahedin Organization of Iran*, EU:C:2011:853, paras 64–65; C-129/13 and C-130/13, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, EU:C:2014:2041 para. 30.

30 Case C-349/07, *Sopropé*, EU: C:2008:746, para. 49.

31 M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji* [*Procedural Fairness in Proceedings before the Competition Authority*], Warszawa 2011, p. 103.

of proceedings. This will enable all interested parties to submit comments, evidence and information in the course of the proceedings, which the administrative authority should assess carefully and impartially within the context of all the circumstances of the case.[32]

The right to be heard must be exercised in each procedure, even if several procedures are linked. This means that if a Member State establishes two separate procedures, e.g. an investigation to assess whether there has been an infringement that justifies the imposition of a penalty and a separate procedure for imposing a financial penalty, then even if the actions of the same entity are analysed in both, and the latter procedure is a consequence of the former, the right to be heard must be exercised in each of those procedures.[33] The task of the authority is to conduct its investigation and to hear the entity under investigation before issuing a decision.[34] The requirement imposed on administrative authorities that the addressee of the proceedings must be able to refer to all the circumstances of the case presupposes that the addressee has, where appropriate through a legal representative, a specific opportunity to familiarise themselves with the information on which the administrative authority intends to base its decision.[35]

The right of access to the information in the case file is intended to enable the person against whom fining proceedings are brought, where appropriate through a legal representative, to present before the competent authorities their position on that information and its significance for the decision to be taken. The person concerned should have access to not only the reasons for the decision issued against them, but also to all the elements of the case file on which the administration relied, so as to respond effectively to those elements.[36] Consequently, a procedure enabling the person concerned or their legal representative to access this information while prohibiting the use of that information in the administrative procedure is not sufficient to exercise the right to defence,[37] which means that the right to an effective remedy is infringed. Respect for the right to defence does not mean that only the court has access to all the information relevant to the decision, but that the person concerned, where appropriate through a legal representative, may act in their interests by expressing their position on the circumstances.[38] Where national

32 Cases C-845/19 and C-863/19, *Okrazhna prokuratura - Varna*, EU:C:2021:86, para. 82.

33 Case C-277/11, *M.*, EU:C:2012:744, para. 91.

34 Case C-650/19, *Vialto Consulting v. Commission*, EU:C:2021:879, para. 134.

35 Case C-89/18, *Glencore Agriculture Hungary*, EU:C:2019:861, paras 51–53 and the case law cited therein.

36 Case C-300/11, *ZZ*, EU:C:2013:363, para. 53 and C-358/16, *UBS Europe and Others*, EU:C:2018:715, para. 61 and the case law cited therein.

37 Case C-159/21, *Orszagos Idegenrendeszeti Főigazgatóság and Others*, EU:C:2022:708 paras 55–56.

38 Case C-159/21, *Orszagos Idegenrendeszeti Foigazgatóság and Others*, EU:C:2022:708, para. 58.

law provides that certain decisions restricting fundamental rights or entitlements arising from provisions of secondary law are taken without prior proceedings involving the interested party and, at the same time, such cases are decided using a form or a blanket decision, it is necessary to provide the interested party with access to the administrative case file (application) based on which the blanket decision was requested.[39]

The right to be heard, like other fundamental rights, is not absolute.[40] This right may be limited by a time limit. However, this time limit should enable the effective exercise of the right to defence. The right to access the case file may be limited by interests that justify the non-disclosure of elements of the case file to that person, particularly when these interests concern national security or constitute a business secret.[41] However, this balancing cannot deprive the interested person of all effectiveness of the right to defence or the right to a remedy of its significance, in particular by failing to inform that person, or their legal representative at least, of the essential reasons constituting the basis of the decision issued against them.[42] The above-mentioned balancing may, however, lead to certain elements of the case file not being disclosed to the person concerned if the disclosure of those elements may directly and specifically threaten national security to the extent that it may endanger people's life, health or freedom or if it may disclose specific investigative methods used by national security authorities, making it difficult or even impossible for those authorities to perform their tasks in future.[43]

The duty to state reasons

A key element of the right to an effective remedy in the activities of administrative authorities is the obligation to provide reasons for a decision. The justification of an administrative decision is one of its mandatory elements. The obligation for national authorities to provide reasons for their administrative decisions which impose financial penalties originates in the general principle reflecting the right to good administration, provided for in Article 41 of the CFR.[44] It is important because it allows the party to the proceedings to make

39 Case C-349/21, *HYA and Others*, EU:C:2023:102, para. 58.

40 Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and Others*, EU:C:2010:146, para. 63; C-383/13 PPU, *G. and R.*, EU:C:2013:533, para. 33; C-418/11, *Texdata Software*, EU:C:2013:588, para. 84.

41 Case C-300/11, *ZZ*, EU:C:2013:363, paras 54, 57 and 64 and the case law cited therein.

42 Case C-300/11, *ZZ*, EU:C:2013:363, para. 65 and C-159/21, *Országos Idegenrendeszeti Foigazgatóság and Others*, EU:C:2022:708, para. 51.

43 Case C-300/11, *ZZ*, EU:C:2013:363, para. 66.

44 Cases C-225/19 and C-226/19, *Minister van Buitenlandse Zaken*, EU:C:2020:951, para. 34; C-230/18, *PI*, EU:C:2019:383, para. 57; C-377/20, *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, para. 115.

an informed decision on further action – whether to challenge or enforce the decision.

The effective implementation of the guarantees resulting from Article 47 of the CFR is subject to the condition that the addressee of a decision taken against them should be allowed to acquaint themselves with the reasons, either by reading the decision itself or by requesting those reasons, without prejudice to the right of the competent court to request the competent authority to provide those reasons, which will enable the interested party to defend their rights under the best possible conditions and to decide in a fully informed manner whether it is appropriate to bring the matter before the competent court so as to enable the court to review the legality of the decision in question.[45] The reasoning must enable the person subject to the penalty to assess whether the decision is vitiated by a defect which may allow its validity to be challenged.[46] That right also implies that the administrative authority is required to pay due attention to the objections raised by the interested party, carefully and impartially assessing all the relevant elements of the case and giving detailed reasons for the decision.[47] At the same time, the right to defence brings about the obligation to state the reasons for a decision in a sufficiently detailed and specific manner to enable a person to understand why their application was denied.[48]

The CJEU considers sufficient justification for a decision with a negative effect on the addressee to be one which is issued in circumstances known to the person concerned and which allows them to understand the content of the measure taken against them.[49] Therefore, if at least one of the reasons given in the justification is sufficiently precise and specific to constitute a sufficient basis for supporting that decision, the fact that the other reasons do not share these characteristics cannot justify the decision being invalidated.[50] Furthermore, the effectiveness of judicial review also requires that a decision which impacts a given legal person is based on a sufficiently solid factual basis. This means that the factual circumstances raised in the reasons underlying that decision must be verified, so that judicial review is not limited to an assessment

45 Cases C-225/19 and C-226/19, *Minister van Buitenlandse Zaken*, EU:C:2020:951, para. 43; C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Naft*, EU:C:2013:776; C-222/86, *Unectef v. Heylens*, EU:C:1987:442, para. 15; C-46/16, *LS Customs Services*, EU:C:2017:839, para. 40; C-584/20 P and C-621/20 P, *Commission v. Landesbank Baden-Württemberg and SRB*, EU:C:2021:601, para. 103; C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, EU:C:2021:70; C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v. Kadi*, EU:C:2013:518, para. 100; C-579/19, *Food Standards Agency*, EU:C:2021:66, para. 89.

46 Case C-682/15, *Berlioz Investment Fund*, EU: C:2017:373, para. 84.

47 Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, EU:C:1991:438, para. 14 and C-349/07, *Sopropé*, EU:C:2008:746, para. 50

48 Case C-277/11, *M.*, EU:C:2012:744, para. 88 and C-249/13, *Boudjlida*, EU:C:2014:2431, para. 38.

49 Case C-417/11 P, *Council v. Bamba*, EU:C:2012:718, para. 54.

50 Case C-584/10 P, *Commission and Others v. Kadi*, EU:C:2013:518, para. 130.

of the abstract plausibility of the reasons in question, but concerns whether those reasons are established – or at least one of them which in itself could sufficiently support the decision.[51] The justification should be adapted to the nature of the act, and it should clearly and unambiguously present the reasoning of the institution that issued the act, allowing interested parties to learn the grounds for the decision and the competent court to review it.[52] The requirement to justify should be assessed in the light of the circumstances of the given case. This means that the same justification cannot be applied in proceedings that have a different scope or application (in analogous circumstances but, for example, regarding other parties[53]). There is no requirement for justifications to specify all the relevant factual and legal circumstances, because their correctness should be assessed not only on their wording, but also on the circumstances under which they are issued and all the legal provisions regulating the given field.[54] If the decision is provided on an official form, the justification for its adoption should be included, e.g. in the "Comments" column.[55] This obligation is incumbent on the authority.[56] A justification for a judgment or an application based on which a judgment was issued that does not allow the course of the authorities' reasoning to be followed violates Article 47 of the CFR.[57]

The lack of a statement of reasons cannot be justified by an authority's obligation to respect secrecy or to protect information considered confidential.[58] In order not to breach the confidentiality of data, the institution must not only state the reasons for considering certain data confidential, but must also communicate – in a neutral form and to the extent that such communication maintains the confidential nature of certain elements of that data, in respect of which protection is justified on those grounds – the essential content of that data, particularly the content relating to the key elements of the decision.[59] The statement of reasons for a decision containing professional secrecy and confidential data must protect the sensitive information in question as well as enable the person concerned to defend their rights and to decide with full

51 Case C-584/10 P, *Commission and Others v. Kadi*, EU:C:2013:518, para. 119.

52 Case C-521/09 P, *Elf Aquitaine v. Commission*, EU:C:2011:620, para. 147 and the case law cited therein.

53 Case C-277/11, *M.*, EU:C:2012:744, para. 92.

54 Case C-521/09 P, *Elf Aquitaine v. Commission*, EU:C:2011:620, para. 147 and the case law cited therein.

55 Cases C-225/19 and C-226/19, *Minister van Buitenlandse Zaken*, EU:C:2020:951, para. 39.

56 Cases C-225/19 and C-226/19, *Minister van Buitenlandse Zaken*, EU:C:2020:951, para. 46.

57 Case C-349/21, *HYA and Others*, EU:C:2023:102, para. 61.

58 Cases C-296/82, *Netherlands and Leeuwarder Papierwarenfabriek v. Commission*, EU:C:1985:113, para. 27 and C-584/20 P and C-621/20 P, *Commission v. Landesbank Baden-Württemberg and SRB*, EU:C:2021:601, para. 120.

59 Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, EU:C:2021:70, para. 123.

knowledge of the facts whether it is appropriate to take action before a court against the decision. It is for the courts to assess whether a review of the legality of those decisions is possible.[60]

The right to appeal a decision and the self-verification procedure

The right to an effective remedy guarantees that the decision of an administrative authority – based on evidence to which both parties (the punished person and the administrative authority) had the opportunity to respond – can be reviewed. In these circumstances, the institution of self-verification of an authority, found in the legal systems of the Member States – the possibility of annulling or amending a decision as a result of an appeal filed by a party to proceedings – raises certain doubts. The institution itself does not violate the right to an effective remedy. It is important, however, that its application meets the requirements presented above, resulting from the right to an effective remedy, including the right to be heard, to access the case file and to have proper justification of the decision.

The majority of the reservations regarding protection under Article 47 of the CFR are raised by the prospect of the authority carrying out additional activities to explain the allegations raised in an appeal, particularly in circumstances where national legislation does not specify whether the results of these activities must be presented to the party to the proceedings. It seems that respecting the right to an effective remedy requires an interpretation of the above-mentioned institutions that would allow the party to the proceedings to respond to these additional activities. A different interpretation could lead to an authority using these legal instruments to correct all of the most serious errors made during the proceedings and issuing a new decision in the self-verification procedure, analogous to the previous decision but based on additional substantive evidence, which would deprive the party of the right to defend itself. It also seems inadmissible for an authority to change a decision when it is *de facto* necessary to conduct the evidentiary proceedings anew. Such circumstances require the decision to be repealed and a new decision to be issued. Similarly, a situation in which an authority changes a decision in the self-verification procedure without changing its justification is inadmissible. It is also necessary to provide for the possibility of appealing a decision issued in self-review mode to a court, within the meaning of Article 47 of the CFR.

Right to effective remedy before courts

The most important element of the right to an effective remedy in the event of a decision being issued by an NAA that has negative consequences for a party to the proceedings is its appealability. Certain requirements must be met for

60 Case C-927/19, *Klaipėdos regiono atliekų tvarkymo centras*, EU:C:2021:70, para. 135.

this right to be realised: 1) an appeal against a decision must be considered by a court; 2) the court must meet the criteria of independence and impartiality; 3) the court should not rely solely on the evidence gathered during the administrative proceedings, but is obliged to make its own factual findings; 4) the court may perform actions *ex officio*; 5) the court is obliged to exercise the right to be heard; and 6) adequate time must be provided for filing an appeal and for the case to be heard.

The requirements concerning the court itself

A court within the meaning of Article 47(2) of the CFR is an authority established by law. This concept is understood analogously to the case law of the European Court of Human Rights and in practice applies not only to the establishment of the court in accordance with the law, but also to the guarantee of the constitutional and organisational foundations of its operation, in order to ensure its independence from the executive power.[61] In the CJEU jurisprudence, independence, which is guaranteed by the right to an effective remedy, has two aspects: internal and external. The external aspect comes down to the lack of external pressure and interference that could threaten the independence of the decision. On the other hand, the internal aspect concerns the requirement of impartiality, which is understood as taking the same attitude towards all parties to the proceedings and their interests.[62] The guarantees of independence also extend to those elements of the proceedings that are independent of the substantive examination of the case within the framework of specific proceedings. This means that they should also be applied to administrative actions undertaken within the framework of court management (e.g. when complementing adjudicating panels), which should not raise any doubts about the independence of the court as a judicial authority or the neutrality of a given judge concerning the interests of the parties to the proceedings.[63] This requirement is of particular importance in proceedings for appeals against a decision of an administrative authority, because one of the parties to the adversarial proceedings is the administrative authority, which emanates from the Member State. There can therefore be no doubts as to the impartiality of the judge examining such a case, because this would destroy the right to an effective remedy.

Reserving jurisdiction to hear an EU case for a public authority that does not meet the requirements of Article 47 of the CFR would effectively deprive

61 M. Szpyrka, *Europejskie…*, p. 286.

62 Cases C-506/04, *Wilson*, EU:C:2006:587, paras 51–52 and C-517/09, *RTL Belgium*, EU:C:2010:821, para. 39.

63 Cases C-216/18 PPU, *Minister for Justice and Equality*, EU:C:2018:583, para. 66 and C-619/18, *Commission v. Poland*, EU:C:2019:531, para. 74.

the interested party of legal protection guaranteed by EU law.[64] Therefore, if national law provides that an authority which is not a court within the meaning of Article 47 of the CFR is competent to hear an appeal against a decision of an administrative authority (and does not meet the criteria of independence and impartiality), then another authority of the Member State to which an appeal against a decision to impose a penalty would be filed, and which would be a court within the meaning of EU law (one that would be competent to hear the case under an earlier act consistent with EU law, e.g. another chamber of the Supreme Court) should refrain from applying the provision of national law granting jurisdiction in the case to an authority which is not a court.[65] This does not apply to situations where national law provides for administrative appeal proceedings to a higher-level authority before referring the case to a court.

Scope of review

Courts, when ruling on appeals to decisions of administrative authorities, are obliged to conduct a full review of decisions to impose penalties. The scope of this review includes not only the proceedings before the administrative authority itself, but also two aspects of the correctness of the decision: its legality and its substantive correctness.[66]

Within the framework of full control, courts are entitled to make their factual findings and legal assessments, even if they differ from the findings or interpretation of the law adopted by the authority. The courts' review largely concerns compliance with the procedural rules in administrative proceedings, including the right to be heard and the right to defence.[67] The courts are also obliged to analyse the factual basis of a decision, because its absence could lead to the substance of the case not being recognised or an incorrect decision being issued (one that is inconsistent with the factual state).[68] Courts are also entitled to assess economic issues that are within the scope of the authority's discretion. The courts' powers in this respect include analysing the evidence

64 Cases C-414/16, *Egenberger*, EU:C:2018:257, para. 72 and C-585/18, *AK*, EU:C:2019:982, para. 165.

65 Cases C-462/99, *Connect Austria*, EU:C:2003:297, para. 42 and C-15/04, *Koppensteiner*, EU:C:2005:345, para. 32.

66 L. Drabek, A Fair Hearing Before EC Institutions, *European Review of Private Law*, 2001, vol. 4, p. 561; K. Lenaerts, J. Vanhamme, Procedural Rights…, pp. 561–562; S. Lavrijssen, M. de Visser, Independent Administrative Authorities and the Standard of Judicial Review, *Utrecht Law Review*, 2006, vol. 1, pp. 111–135; Case T-156/94, *Aristrain v. Commission*, EU:T:1999:53, para. 115; Judgments of the European Court of Human Rights: *Bendenoun v. France*, no. 284, para. 46; *Umlauft v. Austria*, no. 328-B, para. 37–39; *Schmautzer v. Austria*, no. 15523/89, para. 34; *Janosevic v. Sweden*; Reports of judgments and decisions 2002-VII, para. 81.

67 Case T-44/90, *La Cinq v. Commission*, EU:T:1992:5, para. 86.

68 Case T-41/96, *Bayer v. Commission*, EU:T:2000:242, para. 174.

in terms of its consistency, completeness and whether it is a sufficient basis for the authority's assessment.[69]

Using evidence collected in administrative proceedings

An important issue related to the scope of control exercised by courts in cases of appeal against an administrative decision imposing a financial penalty is that of using evidence gathered in administrative proceedings within the framework of court proceedings. In principle, this is a problem covered by the principle of procedural autonomy.

However, it seems justified to claim that in the case of a full model of review, the court should repeat the evidentiary proceedings, or at least supplement them to the extent it considers necessary, and should base its findings on all the evidence. It seems inappropriate for a court to rely solely on the evidence collected during administrative proceedings. This thesis is supported by the CJEU case law, which states that the task of an authority conducting the proceedings at each stage (both the administrative and appeal stages) is to conduct its proceedings and draw its conclusions.[70] However, this does not mean that it should be inadmissible to use files from administrative proceedings in court proceedings. On the contrary, the court should take into account all the evidence collected in the case – both the material collected in the administrative proceedings and its findings – and should issue a ruling based on such findings.

This raises the question of a court disregarding evidence that an authority collected in violation of the law – especially when it is impossible to prove the commission of an act punishable by a fine. It seems that the court should correct the authority's violations only to a limited extent, in situations where it is possible, e.g. by re-examining witnesses. In other cases, e.g. when the authority has conducted a disproportionate search or one that violated the right to privacy, the court should examine the case in the light of the procedural defect, and should not correct it even if this makes it impossible to impose a fine for this reason.[71]

Right to be heard

At the stage of court proceedings, all guarantees arising from the right to an effective remedy apply. The most important here are the right to be heard and the right to access case files.

69 Cases C-12/03, *Commission v. Tetra Laval*, EU:C:2005:87, para. 39 and T-342/99, *Airtours v. Commission*, EU:T:2002:146, paras 63–64.

70 Case C-650/19, *Vialto Consulting v. Commission*, EU:C:2021:879, para. 134.

71 M. Bernatt, *Sprawiedliwość proceduralna*…, p. 302.

In court proceedings, the parties should have the right to present all circumstances that may affect their legal situation, including the right to effectively respond to all evidence and circumstances established in the case.[72] This means that in proceedings in which courts examine appeals against decisions imposing financial penalties, the institution of evidentiary preclusion should not be applied, as it could constitute an unjustified restriction of the right to be heard. Regardless of how the appeal procedure and the jurisdiction of the court (administrative courts, criminal courts and civil courts) are structured in the Member States, if a decision to impose a penalty was issued by an administrative authority,[73] the Peterbroeck formula[74] – and not the van Schijdel[75] formula – applies to evidentiary preclusion and the application of law *ex officio*.

The right to be heard is connected with the right to access the case file. A party to the proceedings can only have an effective opportunity to refer to the evidence gathered in the case if they have access to it.[76] By the standard developed in the CJEU case law that a party should be able to access information that constitutes the basis for a specific decision about them,[77] it seems justified to claim that within the framework of court proceedings, a party should have access to the files of both the administrative proceedings and the court proceedings. For the right to an effective remedy to be exercised, it is not sufficient for the court alone to have access to the information necessary to decide the case.[78]

Court proceedings

In the context of implementing the right to an effective remedy in court proceedings initiated by an appeal against a decision imposing a financial penalty, it also seems important to consider what actions the court may take. Of course, this depends on the procedure adopted in a given Member State, following the principle of procedural autonomy. The tools that the court should have at its disposal to fully implement the guarantees arising from Article 47 of the CFR are presented below.

It is worth noting here that 47 of the CFR does not state whether courts should consider the case in the court of first instance when considering appeals against decisions of administrative authorities, thereby ensuring the right to

72 Case C-187/19 P, *EEAS v. De Loecker*, EU:C:2020:444, para. 69.

73 M. Bernatt, *Sprawiedliwość proceduralna*…, p. 313.

74 Case C-312/93, *Peterbroeck*, EU:C:1995:437.

75 Cases C-430/93 and C-431/93, *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten*, EU:C:1995:441.

76 Cases C-300/11, *ZZ*, EU:C:2013:363, para. 53 and C-358/16, *UBS Europe and Others*, EU:C:2018:715, para. 61 and the case law cited therein.

77 Cases C-300/11, *ZZ*, EU:C:2013:363, para. 65 and C-159/21, *Országos Idegenrendeszeti Főigazgatóság and Others*, EU:C:2022:708, para. 51.

78 Case C-159/21, *Országos Idegenrendeszeti Főigazgatóság and Others*, EU:C:2022:708, para. 58.

two-instance court proceedings.[79] It does seem, however, that especially in appeals against decisions imposing a financial penalty, such a solution would be optimal and would fully implement the right to an effective remedy. Two-instance proceedings, moreover, are widely used in EU Member States.[80]

Acting ex officio

The court's *ex officio* action may *prima facie* seem to be contrary to the principle of equality of arms, but it is significant when verifying the complainant's claims regarding procedural irregularities in the evidentiary proceedings. The application of this institution may also be justified in situations where no findings have been made in the administrative proceedings as to a premise whose existence implies an assessment of whether the application of a given provision of substantive law was justified.[81]

Forms of court decisions

Another instrument that the court should have in the framework of reviewing fining decisions is the possibility of issuing both a formal ruling (rejection of an appeal if it is inadmissible for specific reasons) and a substantive ruling (dismissal when there are no grounds for taking it into account, annulment of the decision when rehabilitation in court proceedings is impossible or change of the decision and a ruling on the merits of the case). This range of available decisions in court proceedings seems to be justified by the obligation to conduct a full judicial review of an administrative ruling. The question also arises whether the court should have the competence to declare a decision of an authority invalid. This seems appropriate, with the reservation that it should be permissible if such a right is not granted to the party under another effective legal remedy. Therefore, if national law establishes a procedure for invalidating the decision of an authority, and provides that such invalidation is to be carried out by an authority that does not meet the requirements resulting from Article 47 of the CFR, the court should refrain from applying said provision and should ensure that the case is examined in accordance with EU law (e.g. in proceedings before a court that meets the requirements of independence and impartiality).[82]

79 Cases C-181/16, *Gnandi*, EU:C:2018:465, para. 57; C-180/17, *Staatssecretaris van Veiligheid en Justitie*, EU:C:2018:775, para. 30; C-175/17, *Belastingdienst v. Toeslagen*, EU:C:2018:776, paras 34–35.

80 See more about two-instance proceedings in EU Member States – Supreme Administrative Courts' Jurisprudence in Europe, ed. *Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union*, Warszawa 2021, pp. 11–13.

81 M. Bernatt, *Sprawiedliwość proceduralna*…, p. 314.

82 Cases C-462/99, *Connect Austria*, EU:C:2003:297, para. 42 and C-15/04, *Koppensteiner*, EU:C:2005:345, para. 32.

Time limits

There are three aspects of procedural deadlines: 1) the time for filing an appeal; 2) the time for the authority to deliver the files to the court in the event of an appeal; and 3) consideration of the case within a reasonable time.

Time to file an appeal

To properly exercise the right to an effective remedy, it should be possible to appeal the decision of an authority within a time limit that allows a full and comprehensive appeal to be prepared. When determining the time limit, all circumstances of the case should be taken into account, including the possibility for the appellant to familiarise themselves with the reasons underlying the proceedings against them and all evidence, also obtained under e.g. in a leniency programme.[83] Another important aspect that should be taken into account when determining the time limit for filing an appeal against a decision is the fact that the appellant must prove the fault in the factual findings, the contested decision, its scope of complexity and the subject of the case. This is of particular importance in situations where exceeding the time limit for filing an appeal would close the court route. When determining the time limit for filing an appeal, two values should therefore be balanced: the efficiency of conducting the proceedings and the full realisation of the right to an effective remedy. No uniform position has been developed in the doctrine and case law on an appropriate time limit for filing an appeal against a decision imposing a financial penalty. A certain point of reference here may be the period (two months) provided for in Article 263 of the Treaty on the Functioning of the European Union. The CJEU has not ruled unequivocally on what an appropriate period is, leaving it to the national courts to decide, while maintaining the principle of proportionality.[84] Nevertheless, in some cases, it has ruled that the period for filing an appeal was sufficient.[85]

Time for an NAA to submit files to the court

No uniform position has been developed in either the CJEU case law or the doctrine regarding an appropriate time for an NAA to transfer the files to the relevant court. It is also worth noting here that the deadline for filing an appeal should be proportionate to the deadline for the administrative authority to transfer the files of the contested administrative proceedings to the court. It would be unjustified for a complainant to be given a deadline to prepare an appeal if the authority is not bound by any deadline for transferring the files

83 M. Bernatt, *Sprawiedliwość proceduralna*…, p. 308.

84 Case C-135/08, *Rottman*, EU:C:2010:104.

85 Cases C-671/18, *Centraal Justitieel Incassobureau*, EU:C:2019:1054 (6 weeks); and C-58/23, *Abboudnam*, EU:C:2023:748 (3 days).

to the court. Such a state of affairs would undermine the right to an effective remedy and place the appellant in a worse situation.[86]

Adjudicating the case within a reasonable time

Another aspect related to the duration of the proceedings is the requirement, which results directly from the wording of Article 47 of the CFR, to examine cases within a reasonable time. There is no uniform position in the doctrine and case law determining a reasonable time for all proceedings. This is due to a pragmatic approach which assumes that the circumstances of each case, its complexity and the actions taken by the court during it should be taken into account. However, there is agreement in the case law on the obligation to establish an appropriate legal remedy to correct the irregularity of excessively long proceedings.[87] In such a case, a claim for compensation resulting from excessively long proceedings is considered a remedy that guarantees effective judicial protection.[88]

Consequences of non-observance

The right to an effective remedy also requires consideration of the legal consequences resulting from the failure to realise it, which will depend on the nature of the violation and the stage of the proceedings at which it occurred.

A case heard by a non-court

Firstly considered should be a situation in which an appeal against a decision of an administrative authority is decided by an authority that is not a court.[89] The position taken by the CJEU in case C-462/99 suggests that if national law provides that an authority that is not a court within the meaning of Article 47 of the CFR would be competent to hear an appeal against a decision of an administrative authority, then another authority of that country that is a court and "normally" hears cases of this type should consider itself competent to hear it.[90] However, this solution has certain drawbacks: the party must bring a specific legal remedy before a court that is not competent within the meaning of national law, and the remedy must effectively reach that authority. This may

86 M. Szpyrka, *Europejskie…*, p. 286.

87 Case C-58/12 P, *Groupe Gascogne v. Commission*, EU:C:2013:770, para. 80; Judgment of the European Court of Human Rights 30210/96, Kudla v. Poland, paras 156 and 157.

88 Cases C-58/12 P, *Groupe Gascogne v. Commission*, EU:C:2013:770, para. 89 and T-135/09, *Nexans France and Nexans v. Commission*, EU:T:2012:596, para. 133.

89 Case C-718/21, *Krajowa Rada Sądownictwa*, EU:C:2023:1015 and the case law cited therein.

90 Cases C-462/99, *Connect*, EU:C:2003:297, para. 42 and C-15/04, *Koppensteiner*, EU:C:2005:345, para. 32.

prove impossible when the appeal must be brought through the authority that issued the contested fining decision, and that authority – against the will of the other party – does not refer the appeal to a court within the meaning of Article 47 of the CFR, but to the authority designated in national law as competent to hear the appeal, even though this authority is not a court within the meaning of EU law. If such a solution were impossible or ineffective to apply, it would be necessary to consider another measure provided for in national law, e.g. demanding the exclusion of a judge (or all judges) of an authority that is not a court, which would require the case to be heard by another court (authority) that is a court within the meaning of Article 47 of the CFR.

Ineffectiveness of a fining decision following a judgment by a non-court

Another effect of violating the right to a court under Article 47 of the CFR of the European Union that should be considered in this context is the ineffectiveness of a decision imposing a financial penalty when an appeal against the decision has been heard by a non-court. Such cases have occurred in the case law of the CJEU and were already discussed in Chapter 3's section on "Non-execution of fines".[91] Sticking to issues relevant for this chapter, both *Donnellan* and *DP* involved a cross-border element. Apart from that the enforcement of fining decisions issued in one Member State by the authorities of another Member State was regulated in secondary law. The question therefore arises whether the scope of protection granted in these two cases can be applied in situations in which there is no cross-border element, but the CFR applies? And if so, can these judgments be applied to all guarantees that constitute the rights to an effective remedy? It seems justified to answer affirmatively. Regardless of whether we are dealing with an EU case with a cross-border element or not, there is the same violation of Article 47 of the CFR. The cases based on which this standard was derived are the first of this type. As a result, differentiating the standard based on the presence (or absence) of a cross-border element would constitute unjustified discrimination based on the nature of the case, within the meaning of Article 21 of the CFR. As a result, this would mean that a breach of any of the guarantees constituting the right to an effective remedy may activate the possibility to apply a remedy of refusing to enforce the judgment.

In the circumstances analysed in this section – the examination of a case by a non-court – in practice this means that a fining decision cannot be enforced if, at any stage before the final judgment is issued, an authority that is not a court within the meaning of EU law has ruled on the case. It should be noted here that this measure – refusing to apply a decision – is independent of the content of the judgment within it, meaning that even a decision which is correct from a substantive legal point of view cannot be enforced if an authority

91 Cases C-34/17, *Donnellan*, EU:C:2018:282 and C-338/20, *DP*, EU:C:2021:805.

that does not meet the criteria of a court under EU law has ruled on the proceedings. The refusal to enforce a decision applies to every judgment issued in a given Member State within the appeal procedure prior to the final judgment, regardless of the number of instances provided for in national law. This thesis is not undermined by the obligation to ensure that an appeal is examined in a single instance, as provided for in the CJEU case law.[92] This is the minimum standard that must be ensured within the national procedure. If, however, a Member State – using the principle of procedural autonomy – decides to establish an appeal procedure that provides for more than one instance or the possibility to file extraordinary remedies, it is obliged to ensure the requirements resulting from Article 19(1) of the TEU at every stage of the proceedings. Therefore, failure to ensure the guarantee of independence and impartiality makes it possible to refuse to execute judgments of non-courts, because the systemic guarantees established in EU law operate independently of the principle of procedural autonomy.

The non-court test also extends to the application of extraordinary remedies – available under national law from a final judgment. If the resolution of this extraordinary remedy does not interfere with the court's judgment[93] (meeting the criteria of Article 47 of the CFR), then it is necessary to seek a path for realising the right to an effective remedy other than refusing to apply the decision. In these circumstances, one may consider the institution of omitting (recognising as non-existent) judgments issued by an authority that is not a court.[94] The CJEU allows for such a possibility – subject to several requirements – if the circumstances of the case reveal that the process and conditions under which the judge issuing the judgment was appointed do not allow the court on whose behalf the judge is adjudicating to be recognised as an independent and impartial authority established by law.[95]

However, this raises further doubts, not only as to legal certainty but also the situation of the punished party. Omitting a non-court ruling would validate an earlier ruling (either an administrative decision of the authority or a judgment of a lower court). Therefore, the party would have to execute the binding legal decision or appeal it once again, exposing themselves not only to further proceedings and costs, but also to the possibility that the case will be re-examined by a non-court. In these circumstances, it seems more rational to use the measures provided for in national law to ensure the proper

92 Cases C-181/16, *Gnandi*, EU:C:2018:465, para. 57; C-180/17, *Staatssecretaris van Veiligheid en Justitie*, EU:C:2018:775, para. 30; C-175/17, *Belastingdienst v. Toeslagen*, EU:C:2018:776, paras 34–35.

93 This refers to situations in which, due to the resolution of the extraordinary appeal, there is no change in the decision of a properly staffed court or the revocation of the decision of a properly staffed court, as a result of which the court will retry the case.

94 Cases C-187/19, *EEAS v. De Loecke*, EU:C:2020:444 and C-487/19, *W.Ż.*, EU:C:2021:798.

95 Case C-487/19, *W.Ż.*, EU:C:2021:798.

composition of the court (by excluding judges) or to refer the case to an inappropriate authority under national law which is a court.

Annulment decisions from legal transactions

Another possible consequence of violating the right to an effective remedy is eliminating a decision from legal transactions. This can take different forms, ranging from declaring a decision invalid, through repealing it to changing the decision, depending on the procedural rules in force in the Member State. These measures should be applied in the event of a breach of Article 47 of the Charter during proceedings before an administrative authority, particularly a breach of the rights to be heard and to access the case files. Such a breach cannot be corrected in court proceedings. The party should have the opportunity to comment on all the evidence before a decision is issued. It should be emphasised that a decision should only be eliminated from legal transactions – in the event of a breach of the right to defence – if the proceedings could have led to a different decision in the absence of the breach.[96] However, in the event that a breach consisted of failing to provide access to case files, the penalised party does not have to demonstrate that the case would have ended differently if they had had access to the full documentation during the administrative proceedings. It is only obliged, following the Solvay doctrine,[97] to demonstrate that it could have better prepared its defence. This standard specified under EU law is reflected in the breach of the right to defence in national proceedings.[98] However, this is not a rigid standard, but a minimum level of protection that Member States must provide to parties in domestic proceedings.

In the CJEU case law, there is no clear ruling on the consequences of violating the rights to be heard and to access case files within an appellate review of a judgment issued by a national court as a result of an appeal against a fining decision. This is likely conditioned by the adoption of a minimum standard of a single-instance procedure. However, the Member States are not strictly limited by this requirement and, by the principle of procedural autonomy, may provide for multi-instance proceedings and extraordinary remedies, while being obliged to ensure the effectiveness of EU law. This means that at each stage of the national procedure, they are obliged to ensure at least a minimum

96 Cases C-301/87, *French v. Commission*, EU:C:1990:67, para. 31; C-288/96, *Germany v. Commission*, para. 101; C-141/08 P, *Foshan Shunde Yongjian Housewares & Hardware v. Council*, EU:C:2009:598, para. 94; C-96/11 P, *Storck v. OHIM*, EU:C:2012:537, para. 80.

97 Cases C-109/10 P, *Solvay v. Commission*, EU:C:2011:686, para. 57; C-199/99 P, *Corus UK v. Commission*, EU:C:2003:531, para. 128; C-238/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission*, EU:C:2002:582, para. 318; C-204/00 P, *Aalborg Portland and Others v. Commission*, EU:C:2004:6, para. 131; T-194/13, *United Parcel Service v. Commission*, EU:T:2017:144.

98 Case C-383/13 PPU, *G. and R.*, EU:C:2013:533, paras 41–42.

standard for exercising the right to defence and the consequences of violating this guarantee. Consequently, at each stage of the national procedure, the Member States are obliged to provide means for challenging a judgment issued in circumstances in which the party was deprived of the opportunity to defend its rights.

A fining decision may also be eliminated from legal transactions in the event of a breach of the obligation to justify the decision. The lack of a justification for an authority's decision or an incorrect justification (which does not express the motives that the authority was guided by when issuing the decision) cannot be remedied during court proceedings. In such circumstances, the court should annul the decision and refer the case to the authority for reconsideration/justification.

In turn, a lack of justification of a judgment or erroneous justification is analogous to a violation of the right to defence. The minimum standard is a single-instance procedure. However, if a Member State decides to construct an appeal procedure covering more than one instance or extraordinary remedies, then by the principle of effectiveness of EU law it is obliged to ensure at each stage of the proceedings an analogous – meeting at least the minimum specified under EU law – scope of protection of guarantees against encroaching on the right to an effective remedy. Consequently, this means that a lack of justification or its erroneous development should constitute grounds for appealing such a judgment if the court decision does not comply with the law. This principle should also be applied to other procedural irregularities in court proceedings, meaning that they should only constitute grounds for eliminating the judgment from legal circulation if they affected the outcome of the case.

Damages

The final solution, in the event that claims arising from a breach of the right to an effective remedy cannot be pursued, is to claim for damages for breaches of EU law. The use of this legal remedy, however, would mean the need for a flexible application of the criteria set out in the *Francovich* case. While the basic premise for exercising this claim, a breach of EU law, is met, the other two premises – damage and a causal link – remain problematic.

If it proves impossible to obtain a court ruling within the meaning of EU law in proceedings concerning the imposition of a financial penalty, the party being penalised will suffer damages in the form of the obligation to pay the penalty; however, it is difficult in these circumstances to demonstrate a direct link between the breach of Article 47 of the CFR and the obligation to pay the penalty.[99] The only point of reference for applying this remedy is therefore the

99 Case C-46/93, *Brasserie du pêcheur v. Bundesrepublik Deutschland and The Queen*, EU:C:1996:79.

obligation resulting from the CJEU case law to examine the causal link in a specific case, because the norm that was violated may entitle the party to compensation as a result of other, additional facts within a given case.[100] Of course, this is not the optimal form for ensuring the right to an effective legal remedy. However, if it is possible to apply in a given case, it may mitigate the negative effects of a violation of the party's rights.

Conclusions

In the context of administrative proceedings, the authorities should respect the right to be heard and the right to access the case file, and they should duly justify their decisions. An important element of the right to an effective remedy is ensuring the possibility of appealing an administrative decision to an authority that is a court within the meaning of Article 47 of the CFR. The court must meet the requirements of independence and impartiality under Article 47 of the CFR and Article 19(1) of the TEU. The court is obliged to verify decisions issued by an administrative authority in terms of the correctness of the proceedings, the decisions' compliance with substantive law and the amount of the sanction. Such a model of full control excludes the possibility of the court relying solely on the evidence collected during the administrative proceedings and precludes new evidence. The court is obliged to conduct its proceedings, guaranteeing the parties the exercise of their right to defence.

From the point of view of the essence of Article 47 of the CFR, it is inadmissible to subject cases of appeals against fining decisions to an authority that is not a court within the meaning of Article 47 of the CFR and Article 19(1) of the TEU. It is also not permissible to prevent interested parties from accessing the evidence that constitutes the basis for a decision that concerns them. The authority also cannot waive the justification of a decision, as this would deprive the interested party of the possibility of making an informed decision regarding their appeal. Within the framework of court proceedings, it is permissible to limit the right to appeal against a fining decision with a deadline, but one which must enable the preparation of a comprehensive appeal and be proportionate to the authority's deadline for submitting the files to the court.

In the event of a breach of the right under Article 47 of the Charter, the CJEU case law indicates that the possibility of eliminating an administrative judgment from legal transactions is considered an exceptional solution and may be applied only when a different decision would have been issued in the absence of the breach. An interesting, although legally questionable means of protecting the right under Article 47 of the Charter is the unenforceability of judgments issued in breach of Article 47 of the CFR, when issued by authorities that are not courts within the meaning of EU law.

100 Case C-420/11, *Leth*, EU:C:2013:166, para. 46.

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Part 3

Enforcement of EU law at the national level by fines

Specific problems and case studies

12 Principle of legal certainty in addressing novel anticompetitive abuses of a dominant position in the digital economy

What should the role of antitrust authorities be in imposing fines?

Artur Szmigielski

Introduction

This chapter discusses the principle of legal certainty in the context of novel anticompetitive practices in the digital economy (i.e. new forms of abuse of dominance), particularly regarding so-called leveraging practices. It explores how the evolving nature of digital markets creates new forms of behaviour that may not be directly covered by current interpretations of competition law, raising significant questions about how to interpret and apply legal principles to these emerging practices. In the rapidly evolving digital economy, competition law faces unprecedented challenges as new anticompetitive behaviours emerge, often beyond the scope of traditional legal frameworks. The core issue revolves around how antitrust authorities, such as national competition authorities (NCAs) and the European Commission (EC), should approach these new, often undefined forms of anticompetitive behaviour while maintaining the principle of legal certainty. Legal certainty, a fundamental general principle of EU law, demands that laws be clear and predictable so that businesses can understand the legal consequences of their actions. However, the open-textured nature of Article 102 of the Treaty on the Functioning of the European Union (TFEU) allows for flexibility, enabling authorities to adapt to changing market realities, which can introduce uncertainty, particularly for new and innovative business models.

The chapter raises important questions about the role of antitrust authorities in imposing fines for these novel practices, paying particular attention to the need to respect legal certainty. Should fines be imposed on businesses for behaviours that are not clearly illegal when they occur? How should authorities balance the need to deter anticompetitive practices with the potential chilling effect on innovation caused by legal uncertainty? The chapter examines these dilemmas, focusing on whether fines should be used cautiously, particularly when there are no clear legal precedents, and what approaches

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competition authorities should take to ensure both fairness and effectiveness in their enforcement of competition law in digital markets.

Open nature of Article 102 TFEU

Antitrust law is open to non-legal (economic) criteria and aims to protect the competitive process to maximise consumer welfare. In other words, competition law governs a vast, complex set of business practices, which have extremely diverse effects on welfare. Due to its nature, it cannot have a fully codified form – unlike, for example, civil law, which precisely defines a tenant's rights and obligations. To analyse competition problems we must use economic concepts that serve the market economy.[1]

Under EU competition law, conduct is deemed lawful or unlawful depending on whether it restricts competition. Article 102 TFEU prohibits "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it" and provides a non-exhaustive list of *prima facie* abusive conduct. This provision refers to several general and undetermined concepts such as "undertaking", "dominant position" or "abuse", which are left to the case law to specify. Similarly, because a restriction of competition is an open-textured concept that is not defined in the Treaties or secondary legislation, the question of what amounts to a restriction needs to be inferred from the application of the law to concrete scenarios. It does not help that there is no such thing as a generally accepted definition of a restriction of competition, since scholars have presented a number of different positions.[2]

The open, vague terms of these provisions allow for previously unknown anticompetitive practices to be "uncovered" in order to counteract the increasingly sophisticated strategies adopted by undertakings to violate competition law.[3] Therefore, the concept of novel forms of anticompetitive practices (abuses) can be defined as business behaviours which are not specified in legislation or case law and which may prove incompatible with the system of undistorted competition and may constitute a violation of antimonopoly law.[4] In other words, they are forms of market behaviour that are not covered

1 R. Whish, *Competition Law*, Oxford 2009, pp. 1–2.

2 D. Bailey, Restrictions of Competition by Object under Article 101 TFEU*, Common Market Law Review,* 2012, vol. 49, no. 2, pp. 559–599; P. I. Colomo, A. Lamadrid, On the Notion of Restriction of Competition: What We Know and What We Don't Know We Know, in: D. Gerard, M. Merola, B. Meyring (eds.), *The Notion of Restriction of Competition: Revisiting the Foundations of Antitrust Enforcement in Europe*, Bruylant 2017, pp. 333–373.

3 See Case AT.39985, *Motorola*; Case AT.39226, *Lundbeck*.

4 Sometimes conduct could be "novel", but constitute a "clear" violation of law, in the case of a simple (straightforward) theory of harm, e.g. foreclosure of rivals in an anticompetitive way without any economic justification. Take, for example, *Baltic rail* (Case AT.39813), where the incumbent railway operator in Lithuania dismantled 19 km of track after it learnt that a rival could be using it to serve one of its customers. In terms of novelty, the case did not feature a well-known "refusal to deal" practice (capable of having ambivalent effects on competition),

by any established category of anticompetitive practices.[5] The legal basis for novel infringements is the open-textured wording of Article 102 TFEU. Given that the list of potential infringements is open-ended, there is clearly an issue of uncertainty for practices that have not yet been sanctioned by antitrust authorities.[6] Therefore, while Article 102 TFEU does not establish an exhaustive list of abusive conduct, any new infringement must be consistent with the legal framework of EU competition law. Vesterdorf summarised the provision's uncertain nature: "The least that can be said is that Article 102 does not create a situation of great legal certainty. Quite the opposite in fact. Even a careful and law-abiding undertaking may easily find itself in a situation in which it is not (at all) clear whether it is dominant and whether its conduct might be deemed to be abusive".[7] This quotation particularly fits cases where a given behaviour has not yet been the subject of a decision or judicial practice, and the criteria for distinguishing a prohibited practice from a permitted form of competition are not obvious.

The open-textured language of competition law is intentional, resulting from the need to make its application more flexible. As a result, competition and market authorities should be given discretionary power. In a rapidly changing environment driven by technological developments, it is essential to have sufficient tools and competencies to keep up with these changes. Depending on the features of the relevant industry and market, intervention may take one form or another. As Advocate General Kokott remarked, no-one could ignore the fact that "individual sectors of the economy and markets can differ significantly from one another and that, moreover, economic circumstances are subject to constant change, which, not least, can also entail new business practices".[8] Competition law, intended to be applied across the board and not in a particular sector, must be flexible and adaptable. An open texture makes it possible to refine intervention in an incremental manner so as to capture theoretical and empirical advances in the field.[9] Therefore, competition law is a constantly evolving area of law, which corresponds to political and economic thinking.

Under competition law, it is often difficult to classify individual behaviour as being explicitly allowed or prohibited. For this reason, the act of predicting

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but was a previously unknown practice: "sacrificing" one's own infrastructure to eliminate competition. Therefore, some novel conduct can violate the antitrust laws and can be even more egregious than "clear" violations.

5 E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings Under EU: The Spectrum of Tests*, Alphen aan den Rijn 2010, p. 316.

6 P. Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches*, Oxford – Portland 2012, p. 286.

7 B. Vesterdorf, Article 102 TFEU and Sanctions: Appropriate When?, *European Competition Law Review*, 2011, no. 32, p. 575.

8 Case C-95/04 P, *British Airways*, para. 40.

9 P. I. Colomo, *The Shaping of EU Competition Law*, Cambridge 2018, p. 24.

the legality of any particular practice in the light of the considerable degree of discretion granted to the antitrust authority, resulting from the process of determining the actual meaning of the open-textured provisions of competition law, should be considered in terms of probability, not legal certainty.[10] This statement particularly pertains to "grey areas" of EU competition law, where no clear line can be drawn between permitted competition and harmful and prohibited practice.

Application of the principle of legal certainty in enforcing competition law

Legal certainty is a general principle of EU law which requires that legal subjects know which conduct is lawful and which behaviour is prohibited.[11] As an element of the rule of law, this is a basic guarantee for undertakings operating within a given market, protecting them against unpredictable actions of regulators.[12] Predictability is the main virtue of the rule of law which allows undertakings to work around imperfect rules as necessary while enabling economic processes to proceed.[13] Legal certainty (predictability) in the enforcement of competition law refers to how likely businesses' predictions concerning the assessment of the lawfulness of their conduct will turn out to be correct.[14] Legal certainty for undertakings operating under EU competition rules also promotes innovation and investment.[15] Unclear rules may cause a business to not engage in conduct that may actually be legitimate and procompetitive.[16]

Infringement of competition rules is associated with the possibility of imposing severe financial penalties on the addressees of prohibitions stipulated in Articles 101 and 102 of the TFEU, which requires compliance with the principle *nullum crimen sine lege*, enshrined in Article 49 of the CFR and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, these provisions must be interpreted in a way which allows undertakings contemplating a business practice to assess – in

10 B. E. Hawk, N. Denaeijer, The Development of Articles 81 and 82 EC Treaty: Legal Certainty, in: C. D. Ehlermann, I Atanasiu (eds.), *European Competition Law Annual 2000: The Modernization of EC Antitrust Policy*, Oxford –-Portland 2001, p. 136.

11 See Case C-81/10, *France Télécom*, EU:C:2011:811, para. 100; Case C-158/07, *Förster*, EU:C:2008:630, para. 67.

12 See H. C. H. Hoffmann, General Principles of EU Law and EU Administrative Law, in: C. Barnard, S. Peers (eds.), *European Union Law*, Oxford 2017, p. 208; N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford 2005, p. 16.

13 F. A. Hayek, *The Road to Serfdom*, London 2001, pp. 80–92.

14 J. Broulík, Predictability: A Mistreated Virtue of Competition Law, *Journal of Antitrust Enforcement*, 2023, vol. 12, no. 3, p. 3.

15 Recital 38 of Regulation 1/2003.

16 A lack of certainty may cause businesses to refrain from carrying out certain investments, or engaging in other conduct or transactions that are beneficial for the economy and society as a whole.

advance, at reasonable cost and with reasonable certainty – whether or not the envisaged practice violates EU competition law. Individuals should be able to know from the law which acts and omissions will make them liable, and which penalties they could incur.[17]

A theory of harm must therefore be based on objective criteria that can be applied generally to all companies and can distinguish clearly between competition on the merits and abusive behaviour. In the same vein, the principle that Article 102 of the TFEU also creates direct rights that victims can invoke before the national courts implies that this provision must not be interpreted in ways that make it unnecessarily difficult for customers, competitors or other market participants to assert their rights under Article 102 of the TFEU when confronted with a practice implemented or announced by a dominant undertaking.[18]

However, a concept of "law" does not refer to statutory provisions alone, but also includes decisional practice and case law. Therefore, open-ended provisions, like Article 102 of the TFEU, are not in themselves problematic, whether or not previous case law or decisional practice has provided clear guidance on their meaning and scope.[19] Therefore, the general clause on abuse of dominance, as expressed in Article 102 TFEU, does not violate the requirement for legal certainty or the clarity of prohibited acts, provided that existing case law and decision-making practices offer sufficient guidance on its interpretation. An analysis of specific practices of abuse of dominance and their categories, as identified in the decision-making practices of competition authorities, has indicated that they are sufficiently clear and broad to also encompass the examined scenarios of anticompetitive unilateral practices. At the same time, the protection of legal certainty does not preclude antitrust authorities from identifying and "discovering" new forms of abuse that were not previously explicitly defined, or from "reinterpreting" established criteria for specific forms of abuse to account for the new context of digital markets.

Antimonopoly authorities have to reach decisions that will be ultimately upheld by judiciaries in order to secure an effective and predictable competition regime. Competition authorities and courts are also responsible for specifying broad and open-ended provisions adapted by the legislature. Enhancing the principle of legal certainty requires clarity and consistency of antitrust authorities' decisions and courts' rulings to ensure predictability, an effective system under EU competition law and a legitimate system vis-à-vis market

17 Case C-501/11 P, *Schindler*, C:2013:522, para. 57.

18 W. P. J. Wils, The Judgment of the EU General Court in Intel and the So-Called More Economic Approach to Abuse of Dominance, *World Competition*, 2014, vol. 37, no. 4, pp. 419–420.

19 M. Eben, Fining Google: A Missed Opportunity for Legal Certainty?, *European Competition Journal*, 2018, vol. 14, no. 1, p. 131.

participants.[20] A lack of uniform enforcement can lead to legal uncertainty and inequality. A lack of clarity also has serious adverse implications, including high costs for compliance, enforcement and litigation, as well as unfairness, reduced access to justice and businesses being deterred from engaging in conduct that might benefit the economy and consumers.[21] A predictable framework is critical for the indirect mechanism of deterrence to function effectively, as it relies on businesses being able to foresee legal judgments on their actions. However, as noted by competition law scholars, when enforcement predictability is downplayed, competition law fails to achieve its deterrent goals, leading to both over- and under-deterrence.[22]

Uncertainty regarding the application of Article 102 TFEU to the digital economy

Digital markets can be understood as industries where undertakings supply digital goods or digital services to their customers or where goods or services are supplied through digital platforms. In this sense, digital markets include e.g. markets for operating systems, applications, social networks, search engines, e-commerce platform services, etc.[23] One of the defining features of digital markets is the presence of online platform operators, which often serve as intermediaries connecting different user groups, such as consumers and businesses. When these platform operators gain significant market power, they frequently leverage this power into adjacent or neighbouring markets.[24] The evolving economic landscape in digital markets brings with it an inevitable uncertainty, particularly regarding the nature of competitive pressure, the ability of markets to self-correct, the potential theories of harm that may arise in digital markets.

Despite the current preference for a more economic approach in competition law, categorising specific market behaviours and applying targeted legal tests remain essential in providing predictability and clarity, particularly when enforcing the prohibition on abuse of dominance in Article 102 TFEU. This is especially pertinent in assessing the legality of unilateral practices by online platform operators, whose leveraging behaviours cover a wide range of actions

20 OECD, *Enhancing Legal Certainty in the Relationship Between Competition Authorities and Judiciaries*, OECD Publishing, 2016, p. 2.

21 W. Brown, *Legal Certainty and Competition Law: Can They Be Reconciled?*, Dissertation presented for the degree of Legum Doctor (LLD), Faculty of Law, Stellenbosch University, December 2018, p. 6.

22 J. Broulík, Predictability…, p. 3.
Recital 38 of Regulation 1/2003.

23 M. Kadar, European Union Competition Law in the Digital Era, *Zeitschrift für Wettbewerbsrecht*, 2015, vol. 13, no. 4, p. 342.

24 J. Crémer, Y.-A. de Montjoye, H. Schweitzer, *Competition Policy for the Digital Era*, Brussel 2019, p. 7.

and require differentiated analysis. The diversity and complexity of business models in digital markets make it difficult to apply a single legal test across all cases of market power leveraging. For each individual type of anticompetitive practice, including leveraging practices, the case law identifies specific criteria that distinguish the conduct from competition on merits and cause it to be abusive. In the case of certain behaviours, particularly those related to refusal to deal, the antitrust authority must meet the stringent and challenging criterion of the "indispensability" of the resource in question, in line with the essential facilities doctrine.[25] In the digital environment, care must be taken not to equate "popularity" with "indispensability". Claims that the services of popular (and successful) online platform operators are "essential" for the business activities of other companies do not meet the standards of the essential facilities doctrine. At the same time, new conditions and behaviours have emerged in digital markets, leading to the proposal of new theories of harm.[26] These new theories sometimes provoke controversy, as they do not align with established theories and methods of analysis. Some commentators argue that these new theories deviate too far from traditional approaches and introduce uncertainty for businesses operating in the market.[27]

The *Google Shopping* case highlights the complexities of applying Article 102 of the TFEU in digital markets, particularly when it comes to defining and addressing new forms of abuse like self-preferencing. In 2017, the EC ruled that Google had abused its dominance by promoting its own shopping service in search results while demoting rival comparison services.[28] The EC saw this practice as limiting consumers' choices and suppressing competition, leading

25 In cases involving certain behaviours, especially those related to a refusal to deal, competition authorities are required to meet the demanding criterion of "indispensability". This means that the resource or facility in question must be essential for other competitors to operate in the market, with no viable alternatives available. This principle aligns with the essential facilities doctrine, which holds that a dominant undertaking may be obligated to provide access to a resource only if it is deemed critical to competition in the market and if denying access would hinder effective competition or prevent market entry. See R. Molski, Formy nadużywania pozycji dominującej [Forms of Abusing a Dominant Position], in: A. Jurkowska-Gomułka, A. Piszcz (eds.), *Prawo konkurencji. System Prawa Unii Europejskiej. Tom 9* [Competition Law. System of the European Union Law. Volume 9], Warszawa, 2024, p. 409; R. Whish, B. Bailey, *Competition Law*, Oxford 2021, p. 715; I. Graef, Rethinking the Essential Facilities Doctrine for the EU Digital Economy, *TILEC Discussion Paper*, 2019, no. 2019-028, p. 6.

26 Examples of new forms of abuse identified in digital markets include platform appropriation and forced free riding. See OECD, *Abuse of Dominance in Digital Markets*, OECD Publishing, 2020, pp. 53–55; D. Condorelli, J. Padilla, Harnessing Platform Envelopment in the Digital World, *Journal of Competition Law & Economics*, 2020, vol. 16, no. 2, pp. 143–187.

27 P. Akman, The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law, *Journal of Law, Technology and Policy*, 2017, no. 2; I. P. Colomo, Self-Preferencing: Yet Another Epithet in Need of Limiting Principles, *World Competition*, 2020, vol. 43, no. 4, pp. 417–418.

28 Case AT.39740.

to a €2.42 billion fine and an order for Google to treat its own and rival services equally in search results.

Google argued that the aim of this design was to improve user experience, aligning with its right to innovate, which the U.S. Federal Trade Commission (FTC) also supported in its independent review.[29] However, the EC's decision sparked a debate over whether a platform should be required to treat competitors equally and about the legal basis for such a rule under Article 102 of the TFEU. Critics suggest that labelling Google's product design as abusive without clear standards undermines legal certainty, as businesses lack reliable criteria to guide their product innovations without risking post hoc legal challenges. This case raised questions about the limits of Article 102, with differing views on whether Google's actions constituted refusal to contract, tying or discrimination.[30] Additionally, the discrepancy between the EC's stance and that of the FTC underscores the global divergence in interpretations of competitive harm in digital markets, bringing into question the appropriateness of high fines and the clarity of antitrust obligations in the EU.[31]

The General Court (GC) in the *Google Shopping* case emphasised that legal certainty requires consistency in the application of EU law, without creating ambiguity or inconsistency.[32] The GC found that the EC's decision aligned with legal certainty requirements and granted the Commission broad discretion in defining abusive conduct. By analysing Google's practices based on unique, case-specific factors rather than a clear, consistent legal standard, the GC introduces ambiguity in how similar behaviours will be assessed in future, especially within the dynamic digital market. The Court's reliance on general criteria, such as "unjustified difference in treatment"[33] and "irreplaceable traffic"[34] offers little specificity, making it challenging for companies to predict the legality of their actions under Article 102 of the TFEU. Additionally, the GC's use of analogy to prior cases rather than establishing a distinct legal test,

29 Statement of the Federal Trade Commission Regarding Google's Search Practices, FTC no. 111-0163, p. 3.

30 P. I. Colomo, Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping, *Journal of European Competition Law & Practice*, 2020, vol. 10, no. 9, p. 541; B. Vesterdorf, Theories of Self-Preferencing and Duty to Deal: Two Sides of the Same Coin?, *Competition Law & Policy Debate*, 2015, vol. 1, no. 1, pp. 4–9; I. Graef, Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence, *Yearbook of European Law*, 2019, vol. 38, pp. 448–499; A. Valdivia, The Scope of the Special Responsibility upon Vertically Integrated Dominant Firms after the Google Shopping Case: Is There a Duty to Treat Rivals Equally and Refrain from Favouring Own Related Business?, *World Competition*, 2018, vol. 41, no. 1, p. 43; R. Nazzini, Google and the (Ever-Stretching) Boundaries of Article 102 TFEU, *Journal of European Competition Law & Practice*, 2015, vol. 6, no. 5, p. 301.

31 M. Eben, Fining Google…, p. 150.

32 Case T-612/17, *Google Shopping*, EU:T:2021:763, para. 194.

33 Ibidem, para. 197.

34 Ibidem, para. 195–196.

combined with a low threshold for anticompetitive effects (where potential effects are sufficient), means that businesses face unpredictability regarding compliance. This flexibility may allow for adaptation to complex cases, but ultimately leaves undertakings – especially those in rapidly evolving digital sectors – uncertain about how their competitive practices will be judged.

Consequently, the boundaries between different leveraging practices are often blurred, creating challenges in classifying specific conduct into distinct categories and in applying the appropriate legal standards to ensure fair competition and clarity in enforcement.

Limitations to fining policy resulting from the principle of legal certainty in proceedings concerning the novel theory of harm

The primary goal of the EC and NCAs in enforcing Article 102 TFEU is to protect competition and ensure that markets operate effectively for the benefit of both consumers and businesses. This encompasses objectives such as restoring competition within the market and deterring future violations. Through its decisions, the Commission and NCAs seek to reestablish competitive conditions and discourage both the offending party and other businesses from engaging in anticompetitive behaviour in future. Their decisions clarify prohibited conduct by analysing facts and law, while the fines highlight the potential consequences of infringements. Fines are an important means of achieving deterrence and avoiding future harm to competition (and consumers). For violations committed by an offender, a necessary condition for deterrence is that an expected fine, discounted for the probability of detection and punishment, exceeds the gain which the offender expected to obtain from violating EU competition law.[35]

The Commission and NCAs have significant discretion in deciding whether or not to impose a fine, and in determining the amount of the fine to impose. However, this power is not unlimited; they can only impose a fine upon undertakings who have intentionally or negligently infringed Article 102 TFEU. The imposition of fines within a framework of legal ambiguity may fail to fulfil its intended function.[36] The principle of specificity (offences and penalties must be defined by law), enshrined in Article 49 CFR and Article 7 European Convention for the Protection of Human Rights and Fundamental Freedoms, has to be fulfilled. The form of culpability, either in the form of intent (conscious violation of competition law) or negligence (failure to exercise due diligence to avoid violations), constitutes grounds for imposing a financial penalty for infringing Article 102 TFEU. Consequently, it can potentially be utilised to protect legal certainty.

35 W. P. J. Wils, Optimal Antitrust Fines: Theory and Practice, *World Competition,* 2006, vol. 29, no. 2, p. 183.

36 M. Eben, Fining Google…, p. 133.

However, the concept of culpability is interpreted so broadly in EU case law that it is doubtful this criterion could fulfil its intended purpose. According to the Court of Justice, an undertaking is aware of the anticompetitive nature of its conduct if it is cognizant of the factual elements that justify the finding of a dominant market position, as well as the Commission's assessment of abuse of this position.[37] Prior awareness of violating competition rules is therefore not decisive, and culpability may exist even if the undertaking is unaware of the EC's interpretation of these rules (and thus does not realise the unlawfulness of its behaviour).[38] Consequently, this criterion of intent or negligence, as defined, does not sufficiently safeguard legal certainty.

That said, the EC and NCAs should refrain from imposing heavy fines in the case of novel and complex business behaviour, in particular in the absence of clear legal tests established in case law. Imposing a penalty for precedent-setting violations of competition law, where the unlawful nature could not have been foreseen by the undertaking, may violate the principle of *nullum crimen sine lege* (no crime without law). The principle of legal certainty arguably requires the Commission to exercise caution when imposing sanctions for breaches of Article 102 of the TFEU. When the law is unclear or has not been clarified through previous decisions or case law, it may be fair to waive or substantially reduce the fine. This respect for legal certainty can coexist with the EC's goal of effective enforcement and deterrence. By providing clear guidance on prohibited conduct, legal certainty actually enhances deterrence while allowing undertakings the freedom to pursue new initiatives. Punishing behaviour for which it was not clear *ex ante* that it constituted illegal conduct could deter procompetitive conduct as well. Undertakings would refrain from adopting novel practices out of fear that they be deemed illegal in future. This could reduce incentives to innovate and decrease activities which might provide benefits to competition and consumers.[39] This is particularly important in dynamic markets, where the risk of false positives is said to be higher, and companies may therefore want to exercise more caution.

The EC Guidelines on setting fines[40] do not list justified doubts regarding whether behaviour constitutes an infringement as a mitigating factor in determining financial penalties. However, since these guidelines do not contain an exhaustive list of such factors, the Commission has the possibility to consider this circumstance. Consequently, the EC could reduce the amount of the fine in cases of a new type of abuse, where the standard for *ex post* legal and economic assessment did not previously allow for a rational prediction of

37 Case C-322/81, *NV Nederlandsche Banden Industrie Michelin*, EU:C:1983:313, para. 107.

38 Case C–280/08 P, *Deutsche Telekom AG*, EU:C:2010:212, para. 39.

39 M. Rato, N. Petit, Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?, *European Competition Journal*, 2013, vol. 9, no. 1, p. 22.

40 Guidelines on the method of setting fines imposed under Article 23(2)(a) of Regulation 1/2003, OJ 2006 C 210, pp. 2–5.

non-compliance with Article 102 TFEU. An additional legal basis for such a decision could be point 36 of the Guidelines, which allows the EC, in certain cases, to impose a symbolic fine.

The CJEU has also acknowledged that the Commission can impose a symbolic fine, or completely forego the imposition of a fine, in the absence of a clear legal precedent.[41] In the *Motorola* case,[42] the EC decided not to impose any fine because there was no preceding decisional practice or case law clarifying the confusing legal application. Similarly, in the *Facebook* case, the Federal Cartel Office (*Bundeskartellamt*) indicated that fining proceedings had not been instituted because it sufficed to achieve changes in the future behaviour of companies to the benefit of competitors and users, and because the case in question was complex and involved a number of legal and economic issues.[43] The President of UOKiK (Polish Competition Authority) decided not to impose a penalty in Decision No. DOK-3/2016 of 30 December 2016, due to the precedent-setting nature of the case, in which the President of UOKiK assessed, for the first time, the issue of exchanging confidential information during negotiations related to the public procurement system.

While the lack of precise definitions for prohibited practices in antitrust law does not hinder the imposition of purely administrative sanctions (such as an order to cease certain conduct), the imposition of significant financial penalties requires adherence to the principle of specificity in defining prohibited acts. Thus, to uphold this principle, antitrust authorities should refrain from imposing fines for unnamed anticompetitive practices where there are no sufficiently developed interpretive rules indicating the unlawfulness of the conduct.[44] Polish court rulings have similarly indicated that the President of UOKiK should avoid imposing financial penalties if the decision is precedent-setting or based on a new interpretation of the law.[45]

Therefore, if the infringements fall within an area of law where the competition rules have never been clearly stated, this fact can be reflected in the amount of the fine. In such cases, competition authorities could adopt purely declaratory decisions, without punishing the undertaking. Administrative proceedings are a suitable approach, as they may be a way to clarify the law when no precedent exists, and the undertaking could not have reasonably foreseen

41 See Case C-62/86, *Akzo Chemie*, EU:C:1991:286, para. 163; Case T-228/97, *Irish Sugar*, EU:T:1999:246, para. 291.

42 Case AT.39985, para. 561.

43 Bundeskartellamt press release of 2 July 2019, Facebook FAQs. See https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6 (accessed: 09 September 2019).

44 M. Król-Bogomilska, *Zwalczanie karteli w prawie antymonopolowym i karnym* [Combating Cartels in Antitrust and Criminal Law], Warszawa 2013, pp. 178–179.

45 This case law originated in consumer matters but is also relevant to antitrust cases. See Judgments of the Court of Competition and Consumer Protection (SOKiK) of 14 March 2019, Case no. Ama 64/15, and of 14 March 2019, Case no. XVII Ama 32/16.

that the conduct fell within the scope of Article 102 of the TFEU. However, the EC and NCAs may decide to initiate fining proceedings in cases of recurrent infringements or the potential for significant harm.

Conclusions

The principle of legal certainty plays a crucial role in addressing novel anticompetitive practices, particularly in the digital economy, where technological advancements often outpace existing legal frameworks. Legal certainty ensures that laws are clear and predictable, allowing undertakings to understand what behaviour is lawful and what may attract penalties under competition law. In addressing novel anticompetitive practices, antitrust authorities face the challenge of balancing flexibility with legal predictability. While the open-textured nature of EU competition law – particularly Article 102 of the TFEU – allows authorities to address previously unknown practices, it also introduces uncertainty for undertakings. The application of such laws to novel situations may not always be straightforward, leaving undertakings unsure whether their actions will be deemed anticompetitive.

The standard of legal certainty applied in the *Google Shopping* case was low and overly formalistic. The GC's decision allows the Commission wide discretion in determining abusive conduct, largely based on a formal analysis (consistency) rather than substantive clarity (predictability). This approach leaves undertakings uncertain about the specific criteria that distinguish anticompetitive practices from legitimate competition, creating challenges for businesses trying to align with competition law in novel scenarios. While the GC's approach allows for adaptation, it sacrifices the higher standard of legal certainty that could better guide undertakings through the complexities of digital markets.

Having said that, the role of antitrust authorities in imposing fines is a sensitive issue in this context. Antitrust authorities must navigate this balance carefully, ensuring that their decisions foster competition without stifling innovation. The imposition of severe financial penalties does not fulfil its preventive function if even cautious and law-abiding undertakings cannot foresee that their conduct may be penalised. This is especially true when the practice in question involves new or innovative business models, where antitrust intervention is particularly susceptible to the risk of false positives. If a dominant undertaking perceives that its success in enhancing specific services will be penalised, it may be less inclined to pursue innovative solutions in future.

Though fines serve as a deterrent and encourage compliance, imposing heavy fines on undertakings for practices that are not clearly illegal *ex ante* could discourage innovation and create undue fear in the market. For example, as seen in both *Motorola* and *Facebook*, a more restrained approach – such as issuing symbolic fines or declaratory rulings – can mitigate risks to innovation while ensuring that competition laws remain adaptive. Furthermore, adopting clear legal tests for specific behaviours, such as those seen in self-preferencing or refusal to deal cases, can enhance predictability for companies and strengthen the overall deterrent effect. Antitrust authorities should therefore exercise discretion in cases involving novel practices, potentially opting for declaratory decisions or symbolic fines when legal precedents are lacking. This approach ensures that competition law continues to evolve alongside market changes, while upholding the principle of legal certainty, ensuring fairness and promoting a healthy, competitive market environment. This sets the stage for understanding the delicate balance between enforcing competition law and maintaining legal certainty in the rapidly changing digital economy.

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13 Mitigation of fines by national data protection authorities

A case study of Bisnode – III OSK 2538/21

Dominika Kuźnicka-Błaszkowska

Introduction

The General Data Protection Regulation[1] (GDPR) is one of the first laws in the EU to aim for full applicability and enforceability in the field of personal data protection. The administrative fine for non-compliance with the Regulation is established in its Article 83. For the first time in this area, fines are directly applicable in the EU Member States (leaving them some autonomy over the procedural aspects of imposing fines on public bodies and setting their amounts[2]). GDPR fines serve as a crucial deterrent against violations while promoting compliance and accountability.[3] They may have a "chilling" effect, changing the perceived financial and business balance of the expected benefits and costs of non-compliance.[4] EU lawmakers consider administrative fines to be a simple, effective legal instrument at the disposal of public administration bodies, which pressurise the administered entities and effectively force them to respect their administrative legal obligations,[5] such as those arising from the GDPR.

1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (hereafter "General Data Protection Regulation" or "GDPR").

2 See e.g. Article 102 of the Polish Data Protection Act from 10 May 2018 (Dz. U. 2018 item 1000), which limits administrative fines placed on public bodies to PLN 100,000 (approx. EUR 25,000).

3 For the similar instrument in antitrust law, see e.g. W. J. Wils, Optimal Antitrust Fines: Theory and Practice, *World Competition*, 2006, vol. 29, no. 2, pp. 183–208.

4 W. Kotschy, in: C. Kuner, L.A. Bygrave, C. Docksey (eds.), *The EU General Data Protection Regulation: A Commentary*, Oxford 2020, p. 1184; A. Kociołek-Pęksa, W. Pęksa, O wielowymiarowości i niejednoznaczności sankcji w prawie. Teoretyczno-prawne i filozoficzno-prawne zagadnienia sankcji prawnej [On the Multidimensionality and Ambiguity of Sanctions in Law. Theoretical-legal and Philosophical-legal Issues of Legal Sanctions], *Przegląd Prawa Publicznego*, 2017, vol. 1, p. 9.

5 K. Nowicki, S. Peczkowski, Kilka uwag o szczególnym charakterze administracyjnych kar pieniężnych [Some Remarks on the Peculiarities of the Character of Administrative Fines], in: M. Błachucki (ed.), *Administracyjne kary pieniężne w demokratycznym państwie prawa* [Admin-

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As the Court of Justice of the European Union (CJEU) rightly points out, through their dissuasive effect, administrative fines strengthen the protection of natural persons with regard to the processing of personal data and are therefore "a key element in ensuring respect for the rights of those persons, in accordance with the purpose of that regulation, which is to ensure a high level of protection for such persons with regard to the processing of personal data".[6] The fines under Article 83 of the GDPR are dual in nature. On the one hand, they have administrative features and follow the spirit of regulatory fines. On the other hand, some of their characteristics are similar to criminal penalties.[7] In some instances, the financial burden of GDPR fines can surpass that of traditional criminal penalties.[8]

Data protection authorities (DPAs) have some discretion in determining the amount of an administrative fine imposed under the GDPR. In exercising this freedom, they must comply with the principle of mitigation of fines, which stems from the principle of proportionality. Data protection authorities often

istrative Fines in a Democratic State of Law], Warszawa 2015, p. 11; P. Majczak, Uwagi na tle kodeksowej regulacji kar administracyjnych [Remarks on the Regulation of Administrative Penalties in the Code of Administrative Procedure], *Acta Universitatis Wratislaviensis*, 2017, vol. 3798, p. 69; N. Joncheray, Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs To Be Addressed, *New Journal of European Criminal Law*, 2016, vol. 7, no. 2, pp. 190–209; A. de Moor-van Vugt, Administrative Sanctions in EU Law, *Review of European Administrative Law*, 2012, vol. 5, no. 1, pp. 5–41; M. Abu Gholeh, D. Kuźnicka-Błaszkowska, *Nakładanie administracyjnych kar pieniężnych w Rozporządzeniu o Ochronie Danych Osobowych. Aspekty praktyczne* [Imposing Fines under GDRP. Practical Aspects], Warszawa 2020, pp. 24–25; Article 29 Working Party, *Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679*, adopted on 3 October 2017, WP 253, p. 6.

6 Case C-683/21, *Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos*, EU:C:2023:949, para 78.

7 However, administrative fines shall not be treated as penalties of a purely criminal nature; the concept uses *per analogium* some instruments and ideas that traditionally originate from criminal law. See K. Nowicki, S. Peczkowski, *Kilka uwag o* (…) , p. 11. The analogy to criminal penalties is clearly visible in countries whose legal systems do not recognise administrative fines, such as Denmark and Estonia. According to recital 151 of the GDPR, the rules on administrative fines may be applied in such a manner that the fine is imposed by competent national courts as a **criminal penalty** (as in Denmark) or that the fine is imposed by a supervisory authority in the framework of a **misdemeanour procedure** (as in Estonia), provided that the application has an effect equivalent to administrative fines imposed by supervisory authorities. For more on the relation between administrative fines and criminal law, see *Case of Campbell and Feel v. The United Kingdom*, no 7819/77, 28 June 1984, *Case Engel and Others v. The Netherlands*, nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976; *Case Öztürk v. Germany*, no. 8544/79, 21 February 1984; Case *Kadubec v. Slovakia*, no 27061/95, 2 September 1998.

8 A. Wróblewski, Wina w odpowiedzialności administracyjnej w aspekcie prawa do sądu w rozumieniu art. 6 EKPC na przykładzie administracyjnych kar pieniężnych [Guilt in Administrative Liability in the Aspect of the Right to a Court Within the Meaning of Article 6 of the ECHR on the Example of Administrative Pecuniary Penalties], *Review of International, European and Comparative Law*, 2022, vol. 5, no. 20, p. 116.

miss this point in their decisions, and the lack of justification for the amount of a fine is sometimes contested by controllers and processors. Failure to respect this duty may also violate Article 47 of the CFR, which requires fining authorities to provide a sufficiently justified explanation for their decisions.[9] With the growing number and amount of fines, it is crucial to analyse what role the duty to mitigate fines plays in the process of imposing them.

These considerations on mitigating administrative fines are connected with the *Bisnode* case,[10] as an example of an objectively difficult case which produced an interpretation of one undefined term ("disproportionate effort" in the meaning of Article 14 of the GDPR[11]) and which raised questions about the process of setting fines. Additionally, the fact that the initial decision lacked justification for the amount of the fine led the controller to appeal. This case is particularly important considering the consequences of not justifying the amount of a fine – which may be annulment of the fine or reconsideration of the decision, as well as fault of the DPA. It is also particularly important to consider the key factors in validating a justification, and how they should be addressed by DPAs.

The Bisnode case (III OSK 2538/21)

In this case a company specialising in producing commercial reports was processing personal data obtained from public databases concerning individuals who carried out business activities. Bisnode processed over 7.5 million records containing personal data but failed to fulfil its information obligations under Article 14 of the GDPR. The company argued that providing such notifications would constitute a disproportionate effort, thereby justifying an exemption. The DPA imposed a fine of EUR 220,000, which seemed excessive to the controller, who raised the inappropriateness of the sanction as one of the grounds for appeal.

While imposing a fine on Bisnode,[12] the Polish DPA emphasised that it is extremely important that the controllers' non-compliance impacted an exceptionally large number of people towards whom the information obligation was not fulfilled. The consequences of failing to fulfil this obligation are also

9 See e.g. E. Kosta, I. Kamara, *The right to effective remedy in international data transfers of electronic evidence*, Review of European Administrative Law, 2023, no 1, pp. 57–83; A. Ward, Article 47 - Right to an Effective Remedy and to a Fair Trial, in: S. Peers *et al.* (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 2nd edn, Oxford – Portland 2021, pt C; Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982; C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG*, EU:C:1976:188, from 19 June 1990, C-213/89, *The Queen*, EU:C:1990:257.

10 Judgment of the National Supreme Court from 19 September 2023, III OSK 2538/21.

11 See M. Jabłoński, D. Kuźnicka-Błaszkowska, Disproportionate Effort' in the Meaning of Article 14 of the General Data Protection Regulation, *Przegląd Prawa Konstytucyjnego*, 2021, vol. 6, pp. 505–518.

12 Decision of Polish data protection authority from 15 March 2019, no. ZSPR.421.3.2018.

important: the ignorance of the data subjects about the processing of their data and their ability to exercise their rights guaranteed by the GDPR. The duration of the infringement should also be assessed negatively. Also important in this case is the fact that the infringement concerned a fundamental individual right, to which a higher amount of administrative fine applies under Article 83(5)(b) of the GDPR.

The Polish DPA particularly emphasised that the controller who was fined had made an informed decision to not fulfil its obligations under the GDPR, and that the infringement was therefore intentional. That was the main aggravating factor taken into consideration by the DPA. The DPA also pointed out that the fine itself should have a deterrent effect. The penalty is intended to deter both the controller and other entities from repeat or similar violations. When imposing this fine the DPA took into account both the repressive nature and the preventive nature of the fine.

The DPA justified the fine on the grounds that it should be substantial enough to prevent Bisnode from treating it as a mere business expense. Moreover, the effectiveness of this type of measure should result in financial hardship for the controller, which undoubtedly motivates the actions of an entity conducting purely commercial activity (including actions related to this infringement) and desiring to increase its profits or avoid additional, unnecessary financial outlays. The application of an administrative fine in this case was necessary considering that the controller, being aware of the existence of the violation, did not take or declare taking any actions aimed at rectifying it.

In the appeal, the applicant indicated the DPA's lack of proper justification for the fine, and therefore infringement of Article 83 of the GDPR. The regional court deciding on the appeal partially agreed with the appellant, pointing out that indeed the justification for the decision was missing an explanation of why the fine had been imposed. The regional court pointed out that the fact that the authority had invoked the need to deter other controllers suggests that the fine was not individualised in this case. In the opinion of the court, the fining criteria listed in Articles 83(5)(b) and 83(1) of the GDPR must refer to a specific entity that has violated the Regulation. Therefore, the amount of a fine cannot be influenced by a goal that the President of the Personal Data Protection Office would like to achieve in regard to other controllers. The intention to "effectively" discourage other entities from violating personal data protection law in future, as referred to in the contested decision, is therefore an unacceptable premise – both when deciding to impose an administrative fine and when determining its amount. Taking into account that the authority may apply an administrative fine, in accordance with Article 58(2)(i) of the GDPR in addition to or instead of the other measures listed in this Article, the deterrent nature or purpose of a fine – both when imposing it and determining its amount – should be related to the precisely defined circumstances of the case and the entity which, in the authority's opinion, has violated the law. For this reason, the court annulled the fine.

In its decision the DPA did not consider mitigating factors, which were then raised by the courts deciding on the appeal. In the final verdict, the Administrative Supreme Court[13] requested the DPA to reconsider the amount of the fine, considering the substantial changes that the Court made in the classification of the seriousness (gravity) of infringement. Unfortunately, neither the regional nor the Administrative Supreme Court debated further on the DPA's obligation to mitigate the fine; thus, it is up to scholars to fill the gap.

Source and legal character of the duty to mitigate fines for infringement of data protection laws

The principle of proportionality – and the corresponding duty to mitigate fines – constitutes a cornerstone of the EU legal framework. Proportionality is considered a general principle of EU law and the constitutional principle of the European Union.[14] It serves a protective function, guarding individuals against actions taken by Member States,[15] and it indicates the limits of EU bodies' discretionary power when they take authoritative decisions in relation to individuals.[16] It limits the freedom that Member States have when they take action based on EU law,[17] which may lead to infringement of the rights and freedoms of individuals. In sanctions cases the CJEU focuses on proportionality in the strict sense in relation to the gravity of the infringement.[18] Additionally, Article 49(3) of the European Charter of Fundamental Rights imposes the duty to ensure that a fine is proportionate.

The duty to mitigate a fine is not directly expressed in Article 83 of the GDPR, but can be interpreted from the "proportionality" directive imposed therein and derives from the basic principles of administrative law. This is also mentioned in recital 148 of the GDPR: "[i]n a case of a minor infringement or if the fine likely to be imposed would constitute a disproportionate burden to a natural person, a reprimand may be issued instead of a fine". If DPAs are allowed to refrain from imposing a fine, they also have some discretion in

13 III OSK 2538/21.

14 J. Maliszewska-Nienartowicz, *Zasada proporcjonalności w prawie Wspólnot Europejskich [Principle of Proprotionality in EC Law]*, Toruń 2007, pp. 67–77.

15 A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy [Application of EU Law by Courts]*, Warszawa 2010, p. 203.

16 A. Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej* [Principle of Proportionality as a Guarantee of Internal Market Freedoms], Warszawa 2009, pp. 71–80.

17 A. Frąckowiak-Adamska, Podwójne standardy badania proporcjonalności przez Trybunał Sprawiedliwości [Double Standards of Examining Proportionality by ECJ], in: C. Mik (ed.), *Zasady ogólne prawa wspólnotowego* [General Principles of EC Law], Toruń 2007, pp. 271–272.

18 J. Snell, *Goods and Services in EC Law: A Study of the Relationship Between Freedoms*, Oxford 2002, pp. 209, 212.

deciding on the amount of the fine itself. The proportionality rule requires a DPA to consider the circumstances of each individual case when imposing a fine (or refraining from doing so).[19] Given that the GDPR sets only maximum fine thresholds and outlines factors for consideration, DPAs must assess each case individually and avoid imposing the maximum fine by default. This is supported by the wording of Article 83 of the GDPR – "up to" – which indicates an obligation to consider the possibility of mitigating a fine. This criterion protects controllers who are subject to investigation from excessive fines.[20]

Mitigation test

Article 83 of the GDPR indicates that a supervisory authority must ensure in each individual case that administrative fines are effective, proportionate and dissuasive. Given these criteria, authorities must assess each case individually to determine whether a fine is warranted.[21] The criteria used in Article 83(1) of the GDPR follow the long-established jurisdiction of the CJEU regarding the regulation and imposition of sanctions by Member State authorities.[22] Additionally, the European Data Protection Board (EDPB) provides in its guidelines[23] clear and transparent recommendations for supervisory authorities in setting fines. The EDPB has emphasised that fines cannot be standardised as "price tags"; each case must be evaluated on its own merits. The previous Guidelines on the application and setting of administrative fines addressed the circumstances in which an administrative fine is an appropriate tool and interpreted the criteria set out in Article 83 of the GDPR.[24] When setting a fine, supervisory authorities shall give due regard to a list of circumstances that refer to the infringement (its severity) or the character of the perpetrator (Article 83(2) of the GDPR). The amount of the fine is therefore based on a specific evaluation carried out in each case and taking account of the parameters in the GDPR.

19 Cf. H. Satzger, *Die Europdisierungdes Strafrechts*, Carl Heymanns 2001, p. 372.

20 S. J. Golla, Is Data Protection Law Growing Teeth: The Current Lack of Sanctions in Data Protection Law and Administrative Fines under the GDPR, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 2017, vol. 8, no. 70, p. 75.

21 H. Wolff, The Implementation of Administrative Fines under the General Data Protection Regulation from the German Perspective, *International Journal for the Data Protection Officer, Privacy Officer and Privacy Counsel*, 2018, vol. 2, no. 11, p. 12.

22 Case 68/88, *Commission v. Greece*, EU:C:1989:399.

23 European Data Protection Board, *Guidelines 04/2022 on the calculation of administrative fines under the GDPR* (Version 2.1, Adopted on 24 May 2023; hereinafter "04/2022 Guidelines").

24 Article 29 Working Party, *Guidelines on the application and setting of administrative fines for the purpose of Regulation 2016/679*, WP 253 (hereinafter "WP 253 Guidelines"). The WP 253 Guidelines were endorsed by the EDPB in its first plenary meeting on 25 May 2018. See EDPB, *Endorsement 1/2018*, https://www.edpb.europa.eu/sites/default/files/files/news/endorsement_of_wp29_documents_en_0.pdf.

The gravity of an infringement

The GDPR requires a supervisory authority to give due regard to the nature, gravity and duration of an infringement, taking into account the nature, scope or purpose of the processing concerned, as well as the number of data subjects processed and the damage suffered by them, the categories of personal data affected and whether the infringement was intentional or negligent.[25] The gravity of the infringement is assessed based on the specific circumstances. As stated in Article 83(2)(a) of the GDPR, the nature of the processing, the "scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them" are indicative of the gravity of an infringement (damage suffered).[26]

The nature of processing refers to the methods of processing, which may be characterised by such factors as frequency, repeatability, temporality, scale, the degree of automation or context (non-profit vs for profit or conducted by state authorities vs a private business). Additionally, factors such as a clear imbalance between the data subjects and the controller (employment relationship, state-individual, patient-doctor, etc.) or where the purpose is to monitor or evaluate personal aspects or to take decisions or institute measures with negative effects for the data subjects shall be analysed by the supervisory authority and may lead to attributing more weight to the infringement.[27] In the case of Bisnode, the processing was constant and conducted by a private commercial company for profit. There is no doubt that it was mass-scale processing, but it would be difficult to prove that the data processed entailed higher risk. Apart from being unaware of the processing of their personal data (and therefore losing some control over it), the data subjects did not suffer negative consequences from Bisnode's processing of their data. This should be treated as a mitigating factor, but was not fully elaborated on in this case by either the DPA or the administrative courts of both levels.

Among the circumstances of a case to be considered, a DPA must look into the purpose of processing. The important question to be asked and answered during such investigation is whether the purpose of processing was lawful or unlawful. In this regard, the DPA may seek guidance on purpose limitations.[28] Nevertheless, it is not clear whether DPAs should in any way – other than for lawfulness and meeting the basic processing principles – test the purpose (i.e. commercial or non-profit etc.) of processing and whether it can aggregate the amount of a fine. In *Bisnode*, there is no doubt that the processing was legitimate and the controller had a lawful basis for its actions. The purpose of

25 04/2022 Guidelines, p. 17.
26 Ibidem, p. 17.
27 Ibidem, p. 18.
28 Article 29 Working Party, *Guidelines on purpose limitation of 2 April 2013*, http://ec.europa.eu/justice/data-protection/article29/documentation/opinion-recommendation/files/2013/wp203_en.pdf [accessed: 20 December 2023].

processing was identified by the controller. However, non-compliance with its information obligations made it impossible for the data subjects to learn the purpose of this processing. In this case, the fact that the controller had a lawful basis for the processing was not treated as a mitigating factor. Indeed, the commercial purpose of the processing was thoroughly elaborated on by the Supreme Administrative Court – but in the context of fulfilling information obligations, not regarding the amount of the fine. In this case, it seems that the fact that the controller had a lawful purpose for processing should have been treated as a mitigating factor, whereas the commercial character of the purpose of processing should have been an aggravating factor.

The number of data subjects affected by an infringement is one of the factors which aggregates the amount of a fine. Generally, it is understood that the greater the number of data subjects affected, the more severe a sanction shall be imposed on the controller, as it may be an important indicator of systemic errors and a lack of proper data protection routines. The fine does not depend on proof of a causal link between the infringement and the damages, but the amount of the damages and the duration of the infringement are criteria to be taken into account.[29] The Polish DPA, when deciding on the *Bisnode* case, stated that the number of data subjects affected by non-compliance was an aggregating factor for the fine it imposed. Given the facts of the case, it would be difficult to argue that this particular aspect could in any way be treated as a mitigating factor. The court examining the appeal[30] claimed that the number of natural persons affected by the violation had impacted both the DPA's decision and the amount of the fine. Therefore, the number of people affected by the controller's behaviour should be accurate and should reflect the facts.

Another aspect requiring consideration is which categories of personal data are affected. Some types of personal data deserve special protection due to their importance for privacy and human intimacy. This is underscored in the GDPR's preamble and is further emphasised in Articles 9 and 10 of the Regulation. Therefore, the aggravating aspect may be processing of the types of data covered by Articles 9 and 10, national identification numbers, location data, data about private communication, gender or finances. In *Bisnode*, only ordinary data was processed. It was all available in the public register and used to conduct business activities. There was no data whose processing could have potentially led to the discrimination of the data subjects. Also, it is important to note that many of the records were already outdated. The justification of the decision did not indicate whether this was considered a mitigating factor for the amount of the fine. Nevertheless, the fact that no sensitive data was being processed should have decreased the administrative fine.

The "severity" of the infringement may depend on the effect or consequences of the infringement on the person concerned, for instance, whether an

29 P. Nemitz, *Fines under the GDPR,* EasyChair PrePrint, 2018, no 582, p. 8.
30 Regional Administrative Court in Warsaw from 11 December 2019, no. II SA/Wa 1030/19.

injury resulted in a particular data subject being exposed in a narrower group of people or even the public, and whether the violation can be reversed.[31] This shall be also considered in light of risk assessment, i.e. classifying the incident as no risk/risk/high risk, and decisions taken to notify a DPA and to inform data subjects of the incident. The severity of the infringement requires the controller to investigate hypothetical outcomes of non-compliance for the data subject and to predict the probability of negative consequences and threats for the rights and freedoms of the individual. The assessment of aggravating conditions shall rely on the actual risk to the rights and freedoms of the data subjects, which must be duly investigated and proved so as not to rely on presumptions.[32] It seems that the more sensitive the affected data is, the more severe the consequences may be; however, the controller shall carefully consider (taking into account the socio-political atmosphere in the given territory) whether infringement relating only to "ordinary" data will have serious consequences for the rights and freedoms of the data subject.[33]

The DPA in *Bisnode* did not pay enough attention to the severity of the infringement, focusing only on the data subjects' unawareness and loss of control over their data. Given that the data was available in a public registry even before Bisnode started collecting and processing it, the risks triggered by the disclosure of data were rather low. Surely, the databases created by Bisnode are more valuable than raw data in publicly available registers, but this does not increase the risks for a single data subject. This does not mean that data brokers should be allowed to collect and disclose data as they wish, because this exploits individuals, but the mere fact that data is collected by a broker does not increase the risk of processing. The DPA also concluded that there was no additional risk for the data subjects, but the decision itself does not mention this in the context of mitigating factors. This has not been further elaborated on by courts deciding on the case.

Character of infringement

The fact that the GDPR includes several undefined terms and is subject to quite broad interpretation creates some uncertainty towards its application and complicates the justification behind DPAs' decisions and the amounts of fines.[34] A regulatory offence in data protection requires the controller to prove that they have complied with all of the requirements of the GDPR (Article 24(1) and Article 5(2) of the GDPR). The burden of proof applies not only to civil proceedings, but also to administrative proceedings – meaning that it is for

31 P. Nemitz, *Fines…*, p. 8.

32 Regional Administrative Court in Warsaw from 19/04/2022, no. II SA/Wa 3024/21.

33 See e.g. Decision of the ICO from 05 July 2021, https://ico.org.uk/media/action-weve-taken/mpns/2620171/mermaids-mpn-20210705.pdf [accessed: 06 November 2023].

34 Golla, Is Data Protection Law Growing Teeth…, p. 74.

the controller to negate any accusations with sufficient evidence. The GDPR does not lay down further prerequisites to establish a breach or violation; simply having evidence of a violation committed by a controller is adequate.

The wording of Article 83(2) of the GDPR ("due regard") does not require either intent or negligence to be established in order to impose a fine at all. However, point (b), which refers to the "intentional or negligent character of the infringement", makes it possible to take into account the degree of fault on the part of the controller or processor. The CJEU in Case C-683/21 stands somewhat in contrast to the literal meaning of Article 83(2) of the GDPR: the Court stated that Article 83 must be interpreted as meaning that 1) an administrative fine may only be imposed under it where it is established that the controller has intentionally or negligently committed an infringement referred to in paragraphs 4 to 6 of the article, and 2) such a fine may be imposed on a controller in respect of personal data processing operations performed by a processor on behalf of that controller, unless the processor carried out those processing operations for its own purposes or processed the data in a manner incompatible with the framework of, or detailed arrangements for (i.e. general – such as GDPR – or specific – such as internal procedures – Author), the processing as determined by the controller, or in such a manner that it cannot reasonably be considered that the controller consented to such processing.[35] This judgment established new standards in this area and was greatly welcomed by academics and practitioners, because questions about the requirements for proving guilt or negligence had remained unanswered for years.[36] Based on the CJEU judgment, it becomes clear that the more signs of organisational negligence (and *a fortiori* of intent) can be found, the more this degree of fault can be attributed to the board or management of the company, rather than merely to the possibly unforeseeable or unavoidable misconduct of an individual without significant authority.[37]

35 Case C-683/21, *Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos*, EU:C:2023:949, para 85-86.

36 See e.g. P. Nemitz, in: E. Ehmann, M. Selmayr, *Datenschutzgrundverordnung* (2nd ed.), 2018, Art. 83 Rn. 9 and 14; M. Bergt, in: J. Kihling, B. Buchner, *Datenschutz-Grundverordnung*, (2nd ed.), 2018, Art. 83, Rn. 31. The CJEU ruling in the above-mentioned case is in line with the findings of the Polish Constitutional Tribunal, which stated in 2008 that the premise for imposing an administrative fine should be a subjective element of guilt, and the entity against which the charges are addressed should be provided with the opportunity to defend itself and demonstrate that the failure to satisfy the obligation was a consequence of circumstances for which it is not responsible, in order to interpret the sanctioning provisions in a way that extends the citizens' procedural guarantees. Judgment of Polish Constitutional Tribunal from 01 March 2008, no. SK 75/06, OTK-A 2008, 2/30. Even in 1994, the same court emphasised the need to introduce a possibility for a party to an investigation to "demonstrate that failure to fulfil an obligation is the result of circumstances for which he is not responsible". See Constitutional Tribunal from 01 March 1994, U 7/93. BOTK.

37 P. Nemitz, *Fines…*, p. 9.

This approach is especially important in a situation in which an entity subject to punishment did everything reasonably expected in order to avoid violating the norms of substantive administrative law.[38] A lack of guilt does not mean that a DPA cannot impose a fine – it only means that the amount may be lower and the DPA may be more likely to show restraint and use measures other than a financial penalty. This was also pointed out by the EDPB in their guidelines, which provide that in cases of intentional infringement the supervisory authority is likely to attribute more weight to this factor.[39] In case the supervisory authority does not establish intention in a given case, it shall be further investigated what level of negligence (if any) an entity has presented; at best, negligence shall be considered neutral.[40]

In *Bisnode* the facts were slightly different. There was no security breach nor data leak. In this case, the controller misinterpreted the law – Article 14 of the GDPR to be exact. It is impossible to assess whether this was a mistake (i.e. supported by the opinion of an external law office) or an intentional action to avoid the cost of informing many data subjects about the processing. Nevertheless, the standard is to require business organisations to follow the law and to consider any risk of misinterpreting specific obligations a standard business risk. In this particular case, the controller argued that complying with its obligations from Article 14 would have created a financial burden for the company and therefore considered that informing the data subjects about the processing required disproportionate effort.

However, it must be noted that the modified approach towards negligence and the intention in imposing administrative fines is moving this institution further from the concept of objective administrative liability and introducing the subjective element of guilt. This shall be further considered by the CJEU and national courts when interpreting the element of intention/negligence in GDPR infringements, as it certainly changes the scenario and the process of imposing fines.

Individual circumstances of the case

Article 83(2) of the GDPR requires DPAs to take into account aggravating and mitigating factors and to assess each case on an individual basis. After assessing the nature, duration, gravity and intentional or negligent character of a violation, DPAs must look into circumstances specific to the case.

Firstly, controllers are obliged, in case of infringement, to do whatever they can in order to reduce the consequences of the breach for the individual(s) concerned.[41] This is in line with a risk-based approach and requires the affected

38 A. Wróblewski, *Wina…*, p. 125.
39 04/2022 Guidelines, p. 20.
40 Ibidem, p. 20.
41 WP 253 Guidelines, p. 12.

entities to implement timely, effective measures to ensure that individuals' rights and freedoms are protected to the greatest extent possible after an infringement. However, this does not require controllers to pay a ransom to stop further data leaks, for example. In fact, such actions may encourage criminals to illegally obtain personal data for ransom. Instead, if possible, the affected entity shall block further access to data, implement additional security measures or provide the data subjects with tools which will allow them to monitor the use of their data. As the EDPB points out, measures implemented prior to the supervisory authority's investigation becoming known to the controller or processor are more likely to be considered mitigating factors than measures which were implemented after that moment.[42] In *Bisnode*, even though the controller cooperated fully with the DPA, the company did not take any actions to prevent further infringements. If they had, the fine would have been lower. But in this and similar cases, taking action to prevent further infringements, i.e. by notifying data subjects, would in practice mean admitting their fault. In this case the controller from the very beginning tried to prove that the company was fully compliant with the GDPR, making it understandable that no actions were taken in this regard.

A DPA, according to Article 83(2)(d), shall investigate the degree of responsibility of the controller or processor. This requires assessing whether and to what extent the affected entity did what was required of it in order to comply with data protection law. Such assessment shall take into consideration: residual risk for the freedoms and rights of the data subjects, the impairment caused to the data subjects and the damage persisting after the adoption of the measures by the controller as well as the degree of robustness of the measures adopted.[43] Additionally, technical and organisational measures implemented in the organisation and the possibility of (in)directly identifying the data shall be considered.[44] In this context the accountability rule plays a vital role. Unlike in criminal procedures – and despite the criminal nature of fines imposed under the GDPR – it is the controller who needs to prove that data has been processed according to the state of the art.

Furthermore, while imposing a fine, a DPA shall also consider whether the controller has committed any violations of personal data protection law in the past. Any previous violations of the same type constitute a reason to apply more severe sanctions. This regulation is intended to discipline an individual who, despite previous penalties, does not comply with applicable legal norms.[45] In addition to administrative penalties, all types of sanctions are considered while

42 04/2022 Guidelines, p. 27.
43 Ibidem, p. 27.
44 Ibidem, p. 27.
45 M. Karasińska, Administracyjne kary pieniężne w ogólnym postępowaniu administracyjnym – analiza prawna [Administrative Fines in General Administrative Procedure – Legal Analysis], *Zeszyty Programu Top*, 2017, vol. 15, no. 1, p. 9.

assessing the need to implement this aggravating measure. In *Bisnode*, no previous violations had been established. The DPA duly noted this fact, but it does not seem to have been considered a mitigating factor.

Corrective measures

When an infringement of the Regulation has been established, the first step for the supervisory authority is to assess which corrective measure should be used.[46] Administrative fines are not the only option; Article 58 of the GDPR offers a number of different measures. The supervisory authority can issue warnings, reprimands or orders, and can withdraw certifications or impose fines. The GDPR generally encourages or envisages a warning being issued prior to a fine being imposed.[47] In addition to formal DPA warnings, there may be a variety of notices and warnings prior to a formal complaint and investigation.[48] Nevertheless, if issues, warnings and notices do not lead to changes in the behaviour of a controller or processor, the DPA is free to impose a fine. This may also be done if the DPA did not issue interim measures before imposing a financial penalty.

Apart from the above, a supervisory authority is entitled to exercise one or more of its corrective powers. Depending on the circumstances of the case, a DPA may 1) order the controller or processor to comply with the data subject's requests to exercise their rights pursuant to the GDPR; 2) order the controller or processor to bring processing operations into compliance with the provisions of the GDPR, where appropriate, in a specified manner and within a specified period; 3) order the controller to communicate the personal data breach to the data subject; 4) impose a temporary or definitive limitation, including a ban on processing; 5) order that the personal data be rectified or erased, that processing be restricted to Articles 16, 17 and 18 and that the recipients of the personal data, pursuant to Articles 17(2) and 19 of the GDPR be notified of such actions; 6) withdraw a certification or order the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or to order the certification body not to issue certification if the requirements are no longer met; 7) impose an administrative fine pursuant to Article 83 of the GDPR, in addition to or instead of measures referred to in this paragraph, depending on the circumstances of each individual case; or 8) order the suspension of data flows to a recipient in a third country or to an international organisation.

The corrective measures chosen by a supervisory authority shall be tailored to the given situation and, while imposing them, the authority shall assess

46 WP 253 Guidelines.

47 See recital 151, Art 58(2)(a) of the GDPR.

48 A. Schreiber, Feeling Fine! Harmonisation and Inconsistency in EU Supervisory Authority Administrative Fines, *Journal of Data Protection & Privacy*, 2019, vol. 2, no. 4, p. 384.

both the risks to individual rights and freedoms and the possible consequences of imposing corrective measures for the business. The supervisory authority may impose corrective measures during or after its investigation. It seems reasonable to expect supervisory authorities to impose corrective measures before imposing fines, especially for a controller's first violation. If the controller complies with the corrective measures, the amount of the fine shall be lower. But this scenario can only work if the controller admits its non-compliance and is ready to face the consequences. If not, corrective measures may worsen the controller's position during an investigation and leave almost no room to stand against accusations. In *Bisnode*, corrective measures were not implemented prior to the fine. This is generally allowed, but the DPA would be expected to explain why it imposed a fine rather than corrective measures and why it decided that corrective measures were insufficient. This was neither explained by the DPA in its decision nor raised by the courts in their final judgments in the case.

Level of sanctions

Article 83 of the GDPR generally includes two levels for an administrative fine. The first one relates to "less" significant offences (such as processing children's personal data with an infringement of Article 8 of the GDPR, non-compliance with certification mechanisms, lack of a joint-controller agreement, infringement in privacy by default and others), which are subject to administrative fines of up to EUR 10,000,000, or in the case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year. The more severe infringements (e.g. non-compliance with basic data protection principles, lack of a lawful basis for processing, transfer of personal data to a third country without valid transfer mechanisms or exception in place and others) are subject to administrative fines of up to EUR 20,000,000, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher. While the nature and seriousness and all aggravating and mitigating measures of the infringement shall be considered, the supervisory authority ultimately needs to rely on the annual turnover as a basis for calculations in its assessment. In general, the higher the turnover, the more severe the fine. This may seem unfair or even exploitative towards large companies, but in the end, breaches caused by them usually affect the most data subjects. Such an approach may also reflect the potentially more severe consequences for data subjects and the tendency for bigger players to calculate the financial risk of non-compliance into the cost of doing business. This may raise some questions about equality before the law, however.[49]

49 A. Dekhuijzen, Policy Rules for Establishing the Amount of Administrative Fines under GDPR: Risks and Rewards of the Pioneering Approach Taken by the Dutch Data Protec-

Supervisory authorities are expected to tailor administrative fines within the entire available range, up to the legal maximum, in order to impose fines which follow the general principles.[50] Both the EDPB and the CJEU agree that this is fair to reflect the size of the undertaking as the starting points in the process of imposing a fine and therefore take into account its turnover and the fact that the turnover of an undertaking can indicate its size and economic power.[51] It is important to mention that it is indeed the severity of sanctions which brings administrative fines under the GDPR closer to criminal penalties.[52]

Between administrative fines and criminal penalties

Given the fine imposed on Bisnode (and the generally quite high fines which may be imposed under the GDPR) and its impact on the financial stability of the controllers (which in the end may be more severe than a criminal penalty in the traditional meaning), it is important to examine whether they should be treated as purely administrative, purely criminal or at the intersection of these two: administrative with some criminal features. This discussion is not only theoretical in nature, but it has valid consequences for individuals (considering the possible applicability of Articles 47-49 of the EU Charter of Fundamental Rights) and bodies imposing the fines (the principles which should be followed while imposing a fine differ for administrative and criminal proceedings).

The first aspect which differentiates fines under the GDPR from regular administrative fines is the matter of guilt. Traditionally, administrative fines are based in principle on the strict subordination of administration to the law;[53] there is no expectation of fault or loss. The literal wording of Article (2)2 of the GDPR ("due regard") does not require intent or negligence of the controller for a fine to be imposed. However, as stated above, the CJEU held that only wrongful infringements of the GDPR can result in a fine on the controller. The concept of intention or negligence is typical of criminal proceedings and is an immanent part of any conviction. While deciding on a fine, a DPA is obliged to consider mitigating aspects. This is not a standard for administrative proceedings, but rather typical of criminal investigations. In *Bisnode*, the DPA did not examine the matter of guilt or comprehensively

tion Authority, *Computer Law Review International*, 2019, vol. 20, no. 3, DOI: 10.9785/cri-2019-200303.

50 04/2022 Guidelines, p. 23.

51 European Data Protection Board, Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR from 28 July 2021; CJEU from 09 September 2011, no. T-25/06.

52 O. Lynskey, The Europeanisation of Data Protection Law, *Cambridge Yearbook of European Legal Studies*, 2016, vol. 19, pp. 252–286.

53 L. Klat -Wertelecka, Sankcja egzekucyjna w administracji a kara administracyjna [Enforcement Sanction in Administration and Administrative Fine], in: M. Stahl, R. Lewicka, M. Lewicki (eds.), *Sankcje administracyjne. Blaski i cienie* [Administrative Sanctions. Pros and Cons], Warszawa 2011, pp. 70–71.

analyse the mitigating measures, which theoretically brings this decision closer to an administrative proceeding.

The application of administrative sanctions cannot constitute retribution for an act, as is the case with criminal liability; at most it can serve as a coercive measure to ensure the implementation of administrative tasks.[54] GDPR fines serve both a punitive and deterrent function, blurring the line between administrative and criminal penalties.[55] Additionally, the amount of a fine is certainly in many cases much higher than the average criminal penalty, and on top of that, GDPR fines are often published on DPA websites, which may harm the good name of the punished entity.[56] Therefore, due to their severity, they definitely play a repressive role, typical of criminal penalties.[57]

The main principle of any criminal proceeding is “innocent unless proven guilty”, and the public prosecutor is responsible for gathering all evidence to prove that a crime has been committed. The accountability principle, one of the basic principles in the GDPR, shifts the burden of proof onto the person subject to investigation. This does not mean that the DPA is not obliged to properly audit and prove non-compliance, but that the controller/processor must also prove a lack of negligence in documentation. On this point, the Administrative Supreme Court made an interesting observation, stating that if a controller has not provided specific information during a proceeding, the DPA shall fill in the gap and investigate factors which determine the matter of compliance and the amount of the fine.

The boundary between administrative sanctions and criminal penalties is often blurred, with lawmakers retaining discretion over their classification.[58] The European Court of Human Rights has established a test to determine whether a certain administrative fine has a criminal character. The factors which shall be considered are 1) the statutory classification of the case under national law, 2) the criminal nature of the act and 3) the type and severity of the sanction.[59] The first factor will not always be applicable, so in its absence the latter two shall be considered (joint consideration is required if neither of them gives a clear answer).[60]

54 Polish Constitutional Tribunal from 18/04/2000, no. K 23/99.

55 04/2022 Guidelines, p. 39.

56 R. Stankiewicz, Administracyjne kary pieniężne w prawie energetycznym (wybrane zagadnienia) [Administrative Fines in Energy Law (Selected Issues)], *Studia Iuridica*, 2012, vol. 55, p. 44.

57 M. Szpyrka, *Europejskie standardy stosowania kar pieniężnych na przykładzie polskiego prawa telekomunikacyjnego* [*European Standards for the Application of Financial Penalties on the Example of the Polish Telecommunications Law*], Warszawa 2020, p. 55.

58 D. Fleszer, Administracyjne kary pieniężne [Administrative Fines], *Annuals of Administration and Law*, 2022, vol. 1, pp. 89–100.

59 5100/71.

60 A. Błachnio-Parzych, *Zbieg odpowiedzialności karnej i administracyjno-karnej jako zbieg reżimów odpowiedzialności represyjnej* [Concurrence of criminal and administrative-criminal liability as a concurrence of repressive liability regimes], Warszawa 2016, p. 75.

Nevertheless, considering the aspects described above, it is reasonable to classify fines under the GDPR as administrative with criminal features. Data protection authorities imposing fines shall follow standard administrative principles; however, they shall bear in mind specific aspects of GDPR fines and establish higher standards in justifying the fine, e.g. by reflecting the principles which govern criminal proceedings, including those arising from Articles 47-49 of the Charter of Fundamental Rights. This does not stand in contrast to national and international law,[61] but indeed supports European and democratic principles as well as high standards in the area of human rights.

Consequences of non-observance

In general, the fact that a DPA has not observed the duty to mitigate has valid consequences for the future of the entity subject to fines. Article 83 of the GDPR is directly applicable and directly effective (considering the CJEU judgment in Case C-205/20, under which it was established that provisions of EU secondary law which require proportionality in sanctions are directly applicable[62]), and the requirement to properly justify a fine restricts the procedural autonomy of Member States by imposing specific obligations on DPAs (stemming from Article 47 of the CFR). The administrative fines shall be applied in a "European manner", which may differ from the way they are usually regulated in EU Member States.[63] This requires that fining decisions must be appealable to a national court(s) with full jurisdiction to review the amount of fines (Article 47 of the CFR). However, it is up to the principle of national procedural autonomy whether a court hearing such an appeal will remand the case back to the authority for further deliberations or will adjust the fine so that it is compatible with the standards resulting from the principle of proportionality.

None of these options leads to financial or other liability of a DPA, even though imposing a fine may have a negative impact on the value of a given controller.[64] The possible mistakes of DPAs in determining fines may be validated by other Member States' supervisory authorities or the EDPB, if this body issues a binding decision in the case. However, this mechanism will only

61 M. Biszczanik, Postulat posiłkowego stosowania zasad prawa karnego a odpowiedzialność z tytułu administracyjnych kar pieniężnych [The postulate of the subsidiary application of the principles of criminal law and liability for administrative fines], *Studia Prawa Publicznego*, 2024, vol. 46, no. 2, p. 97, DOI: 10.14746/spp.2024.2.46.5.

62 Case C-205/20, *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, 8 March 2022,

63 J. Reichel, J. Chamberlain, The Relationship Between Damages and Administrative Fines in the EU General Data Protection Regulation, *SSRN Electronic Journal*, 2019, DOI: 10.2139/ssrn.3447854, https://www.ssrn.com/abstract=3447854.

64 A. Ford, A. Al-Nemrat, S. Ali Ghorashi, J. Davidson, The Impact of GDPR Infringement Fines on the Market Value of Firms, *Information & Computer Security*, 2023, vol. 31, no. 1, pp. 51–64.

occur if the consistency mechanism or the one-stop shop mechanism is triggered. This will happen only if the processing takes place in more than one Member State.

A binding decision of the EDPB cannot replace the decision of a leading supervisory authority. Unfortunately, there are no mechanisms which may force a leading supervisory authority to implement a binding decision of the EDPB into a final one. However, not following an EDPB binding decision in this regard may be a serious obstruction of the law and contradicts the consistency mechanism. Surely, such an action will not go unnoticed by the European Commission and may lead to profound consequences of a political nature. Additionally, binding decisions issued by the EDPB, including ones requiring broader investigation, do not compromise the independence of the lead supervisory authority or its ability to prioritise tasks. The recent CJEU ruling on the Irish DPA appeal stresses that the cooperative mechanism between national authorities supports the EDPB's role, and that the lead supervisory authority must submit matters to the EDPB for a binding decision when authorities cannot reach consensus.[65] Interestingly, it is not clear whether a party subject to investigation may appeal an EDPB decision, or only a supervisory authority that has standing to appeal. Considering that a binding decision is not final and must be incorporated into a decision of the leading supervisory authority, a party subject to investigation shall not have the possibility to appeal because they are not a party to the EDPB's binding decision. The entity subject to investigation may only appeal the final decision of a supervisory authority, and in such a scenario, the same consequences of non-observance are applicable (reformatory verdict or cassation judgment).

It is not clear whether the court deciding on the appeal may change the interpretation given by the EDPB and incorporated into a DPA's decision. It seems that there are no formal obstacles which would stop courts considering appeals of DPA decisions from following a different interpretation, leading to a reformatory verdict or cassation judgment. EDPB decisions are binding for supervisory authorities, but not national courts. Nevertheless, in such a case it is strongly encouraged for the court deciding on the appeal to seek answers to preliminary questions from the CJEU, rather than going a step too far and wearing the shoes of the EDPB. This is due to the following reasons: firstly, changing the interpretation of GDPR provisions made by the EDPB through national courts would contradict one of the main goals of regulation: unifying the approach towards data protection matters in all Member States. Secondly, considering the media impact of EDPB binding decisions and the lack of such in the majority of national courts' verdicts (plus the fact that these verdicts are usually not officially translated), there is a risk that the final judgment in a given case will not be known to the broader public and will not be followed

65 Joined Cases T-70/23, T-84/23 and T-111/23, *Data Protection Commission v European Data Protection Board*, EU:T:2025:116, 29 January 2025

by other DPAs or national courts (this is formally not required, but should be considered a matter of good practice which leads to the unified practice of various bodies).

Conclusions

There is no doubt that the GDPR obliges DPAs to mitigate fines imposed on controllers or processors. There are certain factors that may be considered in determining a fine, but none is a leading factor. Each case shall be assessed individually, not only in relation to the factual circumstances of the case, but also considering the individual characteristics of the person under investigation. In *Bisnode*, the DPA did not sufficiently consider mitigating factors, but focused on aggravating ones. The DPA's justification in the Bisnode case, which primarily emphasised punishment and deterrence, highlights the fine's quasi-criminal nature. As a result, DPAs should be held to higher standards when considering mitigation factors. DPAs must ensure transparency in their decision-making processes, providing clear justifications for both mitigating and aggravating factors in their rulings.

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14 The *ne bis in idem* principle and the legal liability of natural persons for bid rigging (The case of Polish competition and criminal law)

Grzegorz Materna

Introduction

The development of competition law is increasingly assigning importance to the rules governing the imposition of financial sanctions. The reasons for this state of affairs are the steadily rising penalties imposed on entities responsible for anticompetitive practices[1] and the basic structure of the European competition protection system, which features a multiplicity of competition protection authorities enforcing EU and national laws. In the decentralised model of enforcing competition rules,[2] it is possible that the European Commission as well as national competition authorities of Member States are involved in investigating the same business activity affecting the EU's territory.[3] Moreover,

1 It is symptomatic that the ten highest fines ever imposed (since 1969) by the European Commission for establishing cartels resulted from decisions issued in the 21st century. See https://competition-policy.ec.europa.eu/document/download/b19175c3-c693-410b-b669-27d4360d359c_en?filename=cartels_cases_statistics.pdf.

2 EU competition rules are enforced by the Commission and by national competition authorities designated by each of the EU Member States under the obligation set out in Article 35 of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4/01/2003, pp. 1–25; hereinafter: "Regulation 1/2003"). National competition authorities, dependent on a transborder or purely internal character of the identified conduct, apply EU competition rules (Articles 101 and 102 of the TFEU) and their national counterparts (in cases which may affect trade between Member States) or national laws only (Article 3 of Regulation 1/2003).

3 Regulation 1/2003 provides for detailed rules of cooperation, as well as rules preventing the duplication of investigations by several competition authorities (see Articles 11–16). However, even in the case of an ongoing investigation by a national competition authority, the Commission can still initiate its own proceeding regarding the same type of conduct by the same undertakings, but by narrowing the scope of its proceedings to exclude the territory of the Member State where the national investigation has already started. The CJEU stated recently that "the competition authorities of the Member States are relieved of their competence to apply Articles 101 and 102 TFEU in the case where the Commission initiates proceedings for the purposes of adopting a decision finding an infringement of those provisions in so far as that formal act relates to the same alleged infringements of Articles 101 and 102 TFEU, committed

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the same activities may be investigated and sanctioned on the basis of various regulations pursuing different, or at most complementary, objectives or arising from the need to protect diverse aspects of legitimate public interests.[4] Consequently, specific business conduct that affects EU markets may be repeatedly assessed and sanctioned on the basis of various competition laws and/or other regulations, both European and national.

All of the above explains the prominence of clear rules regarding the duplication of proceedings or sanctions against the same entity and the proportionality of measures taken by competition authorities against infringements of competition law. In the field of competition law the principle of *ne bis in idem* gives rise to various important questions. This article refers to a particular issue of this broad matter in the context of Polish law, which places natural persons under multiple sources of legal liability for bid rigging.

The purpose of this article is to examine whether the Polish regulations applicable to bid rigging meet the standards of *ne bis in idem* resulting from the jurisprudence of the Court of Justice. The particularity of this issue is manifested by the overlap of administrative (competition law) and purely criminal liability for such offences. In competition law, the prohibition against bid rigging is essentially addressed to undertakings (regardless of their legal form, therefore including natural persons). According to the Polish Competition Act,[5] competition liability also partly applies to individuals without the status of an undertaking who are so-called "managing persons".[6] Whereas norms

by the same undertaking or undertakings on the same product market or markets and the same geographical market or markets during the same period or periods as those concerned by the proceeding or proceedings previously brought by those authorities" (Case C-857/19, *Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky*, EU:C:2021:139, para. 38). The CJEU confirmed this approach, stating that the Commission does not have to necessarily investigate the whole of the EEA territory, because a different approach could "deprive that institution of the broad discretion which it enjoys when adopting such a decision" (Case C-815/21 P, *Amazon.com e a. v. Commission*, EU:C:2023:308, para. 36).

4 To show just one of the most recent such examples, Articles 101 and 102 of the TFEU, which aim to protect undistorted competition in the market, can be applied to undertakings providing online platform services, which are also subject to the obligations established in the Digital Markets Act (Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828; OJ L 265, 12 October 2022, pp. 1–66), which "aims to complement the enforcement of competition law" and "pursues an objective that is complementary to, but different from that of protecting undistorted competition in any given market, as defined in competition-law terms" (recitals 10–11).

5 The Act of 16 February 2007 on competition and consumer protection (Journal of Laws of 2024, item 594) (hereinafter: "Polish Competition Act").

6 Under the Polish Competition Act, various categories of individuals (not undertakings) bear liability for various violations of a procedural nature (e.g. individuals authorised by the undertaking in question to represent it before the authority, an employee of an undertaking who impedes or blocks an inspection, individuals requested for information, appointed witnesses or experts). See G. Materna, Criminal Liability of Managers in the Polish Competition Law –

of criminal law, including the norms regarding unlawful influence on tender results (Article 305 of the Polish Penal Code[7]), apply to natural persons regardless of their other characteristics. Notwithstanding the above, according to the Act of 28 October 2002 on criminal liability of collective entities for punishable offences,[8] the final, binding confirmation of a violation of Article 305 of the Penal Code by a natural person can be cause to follow-up liability of legal entities on behalf of which the natural person was acting if the undertaking benefitted or could have benefitted from that conduct, even non-financially.[9] By studying these regulations, the similarities and differences in their subjective fields of application can be determined. Despite various measures intended to limit duplication of the same person's liability for bid rigging, it definitely has not been ruled out under Polish law.

The author's intention is to introduce the *ne bis in idem* principle from the perspective of Polish competition rules, to present the legal liability of natural persons for bid rigging in competition law and criminal law, to identify areas of multiple (criminal and antimonopoly) liability of natural persons under the competition law regulations, case law and jurisprudence and to conclude by identifying problems related to the duplication of legal liability of natural persons for bid rigging and proposing potential solutions in that regard.

The *ne bis in idem* principle in competition law

The perspectives of both EU and Polish law must be considered in order to analyse the application of the *ne bis in idem* principle in competition law, from the perspective of enforcement by the Polish competition authority (President of the Office of Competition and Consumer Protection [*Prezes Urzędu Ochrony Konkurencji i Konsumentów*], hereinafter "PCA").

EU law

Ne bis in idem is one of the fundamental principles of EU law.[10] It has been repeatedly recognised in the jurisprudence of the Court of Justice of the European Union (CJEU) as a principle that must be observed in proceedings for the imposition of fines under EU competition law.[11] The Court held

Development and the Perspective of Procedural Guarantees, *Studia Iuridica*, 2023, vol. 100, p. 231.

7 Journal of Laws of 2025, item 1714.

8 Journal of Laws of 2025, item 383.

9 Article 3.

10 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission*, EU:C:2002:582, para. 59.

11 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others*, EU:C:2002:582; Joined Cases

that it "precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision".[12] This aims to ensure "legal certainty and fairness" (once a given person's activity has been subject to investigation and punishment, that person has the "certainty that will not be tried again for the same offence").[13]

As the Court has held, the application of the *ne bis in idem* principle in competition law is subject to a twofold condition: the "*bis*" condition means that there is a prior definitive decision, while the "*idem*" condition means that the prior decision and the subsequent proceedings (decisions) concern the same anticompetitive conduct.[14] The latter condition was for a long time verified in competition law-related cases by the threefold condition (in both cases, the facts, the offender and the protected legal interest must be the same).[15] This condition was not met when the proceedings in question related to anticompetitive practices for separate products or geographic markets,[16] e.g. successive decisions issued by different national competition authorities based on a finding of an anticompetitive object or effect in the territory of different Member States.[17] Consequently, the "*idem*" condition was not met for the enforcement of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) of an infringement that was the subject of decisions by the authorities of third countries.[18]

In the most recent competition law-related jurisprudence, the condition regarding the protected legal interest has been eliminated from the "*idem*"

C 204/00 P, C 205/00 P, C 211/00 P, C 213/00 P, C 217/00 P and C 219/00 P, *Aalborg Portland and Others v. EC*, EU:C:2004:6; Case C-397/03 P, *Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd*, EU:C:2006:328; Case C-289/04 P, *Showa Denko KK*, EU:C:2006:431; Case C-17/10, *Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže*, EU:C:2012:72; Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów*, EU:C:2019:283.

12 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others*, EU:C:2002:582, para. 59.

13 Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów*, EU:C:2019:283, para. 33.

14 Case C-857/19 *Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky*, EU:C:2021:139, para. 42.

15 Joined Cases C 204/00 P, C 205/00 P, C 211/00 P, C 213/00 P, C 217/00 P and C 219/00 P, *Aalborg Portland and Others*, EU:C:2004:6, para. 338; Case C-17/10, *Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže*, EU:C:2012:72, para. 97; Case C-857/19, *Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky*, EU:C:2021:139, para. 43.

16 Case C-857/19, *Slovak Telekom a.s. v. Protimonopolný úrad Slovenskej republiky*, EU:C:2021:139, para. 45.

17 Case C-151/20, *Bundeswettbewerbsbehörde v. Nordzucker AG and Others*, EU:C:2022:203, para. 58.

18 Case C-289/04 P, *Showa Denko KK*, EU:C:2006:431, paras 52–56.

test.[19] Also, in recent cases the *ne bis in idem* principle tends to be more closely related to ensuring the proportionality of cumulative penalties[20] than guaranteeing the certainty of not being held liable for the same infringement again. According to the most recent jurisprudence,[21] the imposition of a fine after a prior final and binding judgment of another authority does not violate the *ne bis in idem* principle if: 1) the possibility of cumulating proceedings and sanctions based on different provisions clearly resulted from the law; 2) there were clear and precise rules enabling the punished person to predict which acts and omissions may be subject to cumulative proceedings and sanctions and the fact that the authorities conducting these proceedings would coordinate them; 3) these separate proceedings were sufficiently coordinated and prompt; and 4) the amount of the accumulated sanctions was proportional to the gravity of the violations.

Application of the *ne bis in idem* principle in EU competition law is not considered obvious or simple.[22] The increasing association with the issue of proportionality has been criticised for weakening the essence of this legal principle[23] and actually eroding the guarantee of only being punished once for an act.[24] On the other hand, this approach is following the path marked by the case law of the European Court of Human Rights (also critically assessed[25])

19 "Legal interest protected [is] not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another". See Case C-524/15, *Criminal proceedings v. Luca Menci*, EU:C:2018:197, para. 36; Case C-151/20, *Bundeswettbewerbsbehörde v. Nordzucker AG and Others*, EU:C:2022:203, paras 39–40; Case C-117/20, *bpost SA v. Autorité belge de la concurrence*, EU:C:2022:202, para. 34; Case C-27/22, *Volkswagen Group Italia SpA, Volkswagen Aktiengesellschaft v. Autorità Garante della Concorrenza e del Mercato*, EU:C:2023:663, para. 67.

20 V. Felisatti, Il ne bis in idem domestico. Tra coordinazione procedimentale e proporzionalità della sanzione, *Diritto Penale Contemporaneo*, 2018, vol. 3, p. 141.

21 Case C-117/20, *bpost SA v Autorité belge de la concurrence*, EU:C:2022:202, paras 40-58; A.R. Martínez, An Inverse Analysis of the Digital Markets Act: Applying the Ne Bis in Idem Principle to Enforcement, *European Competition Journal* 2023, vol. 19, no. 1, pp. 86–115.

22 M. Libertini, Cumulative Enforcement of European and National Competition Law and the *Ne Bis In Idem* Principle, *Yearbook of Antitrust and Regulatory Studies*, 2019, vol. 12, no. 20, p. 238.

23 J. Della Valentina, Il Paradigma Del Ne Bis In Idem Tra Proporzionalità Assorbente, Rinnovata Concezione Processuale E Overlapping Protection, *Diritto Penale Contemporaneo*, 2022, vol. 3, pp. 219–227; M. Scoletta, Il Principio Di Ne Bis In Idem E I Modelli Punitivi 'A Doppio Binario', *Diritto Penale Contemporaneo*, 2021, vol. 4, pp. 180–204.

24 A. Zientara, *Prawnokarna ochrona przed nieuczciwą konkurencją w ustawie o zwalczaniu nieuczciwej konkurencji* [Criminal Law Protection Against Unfair Competition in the Act on Combating Unfair Competition], Warszawa 2023, p. 414.

25 A. Błachnio-Parzych, Ponowne sądzenie lub ukaranie za ten sam czyn a zasada ne bis in idem w orzecznictwie Europejskiego Trybunału Praw Człowieka – znaczenie wyroku w sprawie A i B przeciwko Norwegii [Second Trial or Punishment for the Same Act and the Principle of Ne Bis in Idem in the Case Law of the European Court of Human Rights – the Significance of the Judgment in Case A and B v. Norway], in: M. Błaszczyk, A. Zientara (eds.)

in such cases as *A and B v. Norway*,[26] where it was stressed that there is no duplication ("*bis*") of trial or punishment when the relevant proceedings are sufficiently connected in substance and in time so that they constitute a coherent legal response to the same infringement by the same person.[27] The admissibility of conducting separate proceedings as a response for the same acts by the same person depends on whether 1) the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved; 2) the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct; 3) the relevant sets of proceedings are conducted in such a manner as to avoid as much as possible any duplication in the collection and assessment of the evidence, notably through adequate interaction between the various competent authorities to ensure that the establishment of the facts in one set of proceedings is replicated in the other; and 4) the sanction imposed in the proceedings which was first finalised is taken into account in the subsequent one, so as to prevent the individual concerned bearing an excessive burden. This risk is least likely to occur when there is an offsetting mechanism designed to ensure that the overall amount of any penalties is proportionate.[28]

Article 50 of the Charter applies to institutions and bodies of the Union as well as to the national authorities of the Member States, as far as they are implementing Union law.[29] Moreover, according to Article 2(1) of Directive 2019/1,[30] proceedings concerning infringements of Articles 101 or 102 of the TFEU, including national competition authorities' exercise of the powers referred to in this Directive, shall comply with general principles of EU law and the Charter. Therefore, the *ne bis in idem* principle applies to the PCA

Interdyscyplinarność – w nauce najciekawsze rzeczy dzieją się na styku różnych dziedzin. Księga jubileuszowa Profesor Małgorzaty Król-Bogomilskiej [Interdisciplinarity – in Science, the Most Interesting Things Happen at the Interface of Different Fields. Professor Małgorzata Król-Bogomilska's Jubilee Book] Warszawa 2021, pp. 13–14.

26 Judgment of the ECHR of 15 November 2016, *A and B v. Norway* (Application nos. 24130/11 and 29758/11).

27 According to the Court,

> the object of Article 4 of Protocol No. 7 is to prevent the injustice of a person's being prosecuted or punished twice for the same criminalised conduct. It does not, however, outlaw legal systems which take an "integrated" approach to the social wrongdoing in question, and in particular an approach involving parallel stages of legal response to the wrongdoing by different authorities and for different purposes.

See judgment of the ECHR of 15 November 2016, *A and B v. Norway*, para. 123.

28 Judgment of the ECHR of 15 November 2016, *A and B v. Norway*, para. 132.

29 Article 51(1) of the Charter.

30 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ L 11, 14/01/2019, pp. 3–33) (hereinafter: "Directive 2019/1").

when conducting investigations and imposing penalties for infringements of Articles 101 or 102 of the TFEU and respective provisions of national law.[31]

Polish law

Although the PCA is obliged to apply the *ne bis in idem* principle, as one of the fundamental principles of EU law, when it applies Articles 101 and 102 of the TFEU in parallel with respective provisions of the Polish Competition Act (Articles 6 and 9), Polish law does not provide clear rules in this respect. The Polish Competition Act itself does not specify any basis for applying the *ne bis in idem* principle to proceedings and fines imposed in purely domestic cases (i.e. when only national competition rules are infringed). Also inapplicable are provisions from other acts regarding imposing fines in administrative proceedings (competition proceedings are excluded from the application of provisions in the Polish Code of Administrative Procedure[32] regarding the grounds for waiving a fine[33]). However, all the above does not mean that the *ne bis in idem* principle is not applicable in Polish competition law. A guarantee that no one shall be held criminally liable again for the same prohibited act is derived from the Constitution of the Republic of Poland, from the principle of a democratic state of law (Article 2).[34] It is stipulated that "creating a public authority with the competence to apply a repressive measure twice against the same entity for the same act would constitute a violation of constitutional regulations".[35]

The PCA is also bound by the rules arising from Article 4(1) of Protocol 7 of 22 November 1984 to the Convention for the Protection of Human Rights and Fundamental Freedoms,[36] which stipulates that no one may be tried or punished again in criminal proceedings before a court of the same State for an offence of which they were acquitted or convicted by a final judgment, in accordance with the law and criminal procedure of that State. Since Poland joined the Council of Europe, the case law of the European Convention for the Protection of Human Rights and Fundamental Freedoms

31 Articles 6 and 9 of the Polish Competition Act.

32 Journal of Laws of 2025, item 1691.

33 Article 189a § 2 of the Code of Administrative Procedure. In effect, the PCA is not bound by the rule provided in Article 189f § 1 para. 2 of the Code, which stipulates that "the public administration body, by way of a decision, waives the imposition of an administrative fine and limits itself to an instruction if, for the same conduct, an administrative fine was previously imposed on the party by a final decision by another authorised public administration body, or the party was validly convicted of a crime and the previous penalty meets the purposes for which an administrative fine would be imposed".

34 E. Hryniewicz-Lach, *Kara kryminalna w świetle Konstytucji RP* [Criminal Punishment in the Light of the Constitution of the Republic of Poland], Warszawa 2015, p. 195; Judgment of the Constitutional Tribunal of 21 October 2014, P 50/13, OTK-A 2014/9/103.

35 Judgment of the Constitutional Tribunal of 3 November 2004, K 18/03, OTK-A 2004/10/103.

36 Journal of Laws of 2003, no. 42, item 364.

(ECHR) "can and should be taken into account as an important source of interpreting the provisions of Polish domestic law".[37] These rules should set a standard guaranteed in the interpretation and application of national law, including competition law.

In the Polish constitutional jurisprudence,[38] no uniform position has been taken as regards the application of constitutional double jeopardy standards to administrative penalties. In older judgments it was pointed out that not every administrative penalty can be of a criminal nature,[39] and explicitly that the *ne bis in idem* principle does not apply when duplication of liability results from the application of a purely administrative sanction.[40] In more recent judgments, the Constitutional Tribunal has applied the *ne bis in idem* principle in cases imposing criminal and administrative sanctions.[41] Referring to the interpretations adopted in the EU jurisprudence, the Tribunal indicated that the constitutional concept of "criminal liability" has a broader meaning than that of the Penal Code, and therefore the principle in question also has a broad application.[42] It was observed that administrative sanctions can often be more severe than fines provided for by penal law.[43] Thus, the principle of not being held liable twice for the same action, which derives from the Constitution, may apply to sanctions based on public law – in particular administrative law – that provide for legal mechanisms of a repressive (quasi-criminal) nature, following a precise assessment.[44] This assessment requires that the nature of a specific legal institution is determined,[45] with the boundaries between sanctions of a criminal nature and other types of sanctions being determined by whether their essence is repression and prevention (criminal sanctions) or they have a restorative and preventive purpose (other types of sanctions).[46] A sanction does not have a penal nature if its repressive (punitive) function is only supplementary.[47] According to the latest jurisprudence of the Tribunal, although

37 Order of the Supreme Court of 11/01/1995, III ARN 75/94, OSNAPiUS 1995/9/106.

38 For more, see G. Materna, *Zmowy przetargowe w prawie ochrony konkurencji i prawie karnym* [Bid Rigging in Competition and Criminal Law], Warszawa 2016, pp. 371–375.

39 Judgment of the Constitutional Tribunal of 29 April 1998, K 17/97, OTK 1998/3/30.

40 Judgment of the Constitutional Tribunal of 4 September 2007, P 43/06, OTK-A 2007/8/95.

41 Judgments of the Constitutional Tribunal of 18 November 2010, P 29/09, OTK-A 2010/9/104 and of 20 June 2017, P 124/15, OTK-A 2017/50.

42 Judgments of the Constitutional Tribunal of 26 November 2003, SK 22/02, OTK-A 2003/9/97; of 03 November 2004, K 18/03, OTK-A 2004/10/103; and of 18/11/2010, P 29/09, OTK-A 2010/9/104.

43 Judgment of the Constitutional Tribunal of 18 November 2010, P 29/09, OTK-A 2010/9/104.

44 Judgments of the Constitutional Tribunal of 18 November 2010, P 29/09, OTK-A 2010/9/104 and of 12/04/2011, P 90/08, OTK-A 2011/3/21.

45 Judgment of the Constitutional Tribunal of 10 December 2002, P 6/02, OTK-A 2002/7/91.

46 Judgments of the Constitutional Tribunal of 12 April 2011, P 90/08, OTK-A 2011/3/21 and of 14 October 2009, Kp 4/09, Legalis 173558.

47 Judgment of the Constitutional Tribunal of 21 October 2014, P 50/13, OTK-A 2014/9/103.

the Constitution does not establish an *a priori* ban on the accumulation of penal and administrative sanctions, such accumulation may violate the *ne bis in idem* principle if both sanctions are of an identical (repressive) nature and pursue identical goals.[48] Even if the application of two different sanctions does not violate the *ne bis in idem* principle, it does not mean that the legislature has full freedom to regulate the scope and degree of penalties. The multiplication of sanctions – regardless of their nature – must comply with the principle of proportionality.[49]

The Constitutional Tribunal has not commented on the nature of sanctions imposed in competition law. However, in the common courts' jurisprudence the criminal nature of fines resulting from the Polish Competition Act has been questioned.[50] On the one hand, the literature unanimously holds that the financial penalties provided for in the Polish Competition Act are classified as quasi-criminal[51] or administrative criminal sanctions,[52] and that the *ne bis in idem* principle was listed in the catalogue of required standards of conduct before the PCA.[53] Likewise, less recent jurisprudence of the Polish Supreme Court confirmed that fines imposed by the PCA "constitute one of the forms of repressive liability, which, due to the severity of these penalties and their functions, should be treated in a manner similar to criminal liability".[54] However, in other judgments the Supreme Court stated that financial penalties imposed on the basis of the Polish Competition Act "do not have

48 Judgments of the Constitutional Tribunal of 21 October 2014, P 50/13, OTK A 2014/9/103; of 20 June 2017, P 124/15, OTK-A 2017/50; and of 4 July 2023, SK 23/21, OTK-A 2023/57.

49 Judgment of the Constitutional Tribunal of 20 June 2017, P 124/15, OTK-A 2017/50.

50 For more, see G. Materna, Prawnokarne źródła inspiracji w prawie ochrony konkurencji i konsumentów [Criminal Law Sources of Inspiration in Competition and Consumer Protection Law], *Studia Iuridica*, 2022, vol. 93, pp. 189–208.

51 B. Namysłowska-Gabrysiak, *Odpowiedzialność karna osób prawnych* [Criminal Liability of Legal Persons], Warszawa, 2003, p. 157; M. Bernatt, Prawo do rzetelnego procesu w sprawach ochrony konkurencji i regulacji rynku (na tle art. 6 EKPC) [The Right to a Fair Trial in Matters of Competition Protection and Market Regulation (Under Article 6 ECHR)], *Państwo i Prawo*, 2012, no. 1, pp. 55–58; Judgment of the Court of Appeals in Warsaw of 04 July 2012 (VI ACa 202/12), LEX 1238361.

52 M. Sachajko, Administracyjna kara pieniężna jako element systemu sankcjonowania naruszeń wspólnotowych oraz polskich zakazów praktyk ograniczających konkurencję [Administrative Fine as an Element of the System of Sanctioning Infringements of Community and Polish Prohibitions of Anti-competitive Practices], in: C. Banasiński (ed.), *Aktualne problemy polskiego i europejskiego prawa ochrony konkurencji* [Current Problems of Polish and European Competition Law], Warszawa, 2006, p. 200.

53 M. Bernatt, Gwarancje proceduralne w sprawach z zakresu ochrony konkurencji i regulacji, mających charakter karny w świetle EKPCz. Glosa do wyroku SN z dnia 14 kwietnia 2010 r., III SK 1/10 [Procedural Guarantees in Antitrust and Regulatory Cases of a Criminal Nature in the Light of the ECHR: Notes on the Judgment of the Supreme Court of 14 April 2010, III SK 1/10], *Europejski Przegląd Sądowy*, 2010, p. 44.

54 Judgment of the Supreme Court of 21 February 2018 (III SK 1/17), LEX 2539157, see also: Competition and Consumer Protection Court judgment of 5 June 2023, XVII AmA 85/21, LEX 4025398.

the nature of criminal sanctions".[55] According to the Court, antitrust liability does not have a criminal nature "in the broad sense" due to its low degree of repression[56] (the court took into consideration the severity of a specific sanction imposed in a particular case, and not the maximum fine that could have been imposed on the basis of applicable regulations[57]). The Court added that the function of competition law-based sanctions "is not limited to repression for violating statutory orders or prohibitions, but their preventive and disciplinary function is equally important, motivating the recipients of the sanctioned norms to respect them",[58] and that they do not constitute "retribution for an act, but have the nature of a coercive measure to ensure the implementation of executive and management tasks of the administration".[59]

It is difficult to understand why the Supreme Court concluded that antitrust liability is characterised by a low degree of repression, when penalties for an undertaking that restricts competition can reach up to 10% of its total worldwide turnover,[60] and for managers who contribute to the undertaking's restriction of competition, a financial penalty of up to PLN 2 million (EUR 465,000)[61] can be imposed in addition to purely administrative sanctions.[62] At the same time, the PCA itself describes these penalties as "measures of repression" or sanctions with a penal function.[63] In this context it should be recalled that the repressive nature of administrative penalties is not eliminated by the accomplishment of their various goals. The purposes of criminal penalties in the strict sense are not limited to "retribution", but include preventive, educational and general prevention purposes[64] (just like the penalties imposed by the

55 A. Redzik, P. Księżak (eds.), *Sąd Najwyższy. Izba Kontroli Nadzwyczajnej i Spraw Publicznych. Pierwszy rok działalności* [Supreme Court. Chamber of Extraordinary Control and Public Affairs. First year of activity], Warszawa, 2019, p. 58 [note from the editor – this Chamber does not constitute a court within the meaning of Article 47 CFR].

56 However, the court referred to the level of sanctions in that particular case. See Judgment of the Supreme Court of 29 January 2019 (I NSK 6/18), LEX 2643266 [note from the editor – this judgment was delivered by a composition of the SC which does not constitute a court within the meaning of Article 47 CFR].

57 Such an approach is contrary to the case law of the ECtHR. See ECHR Judgment of 04 March 2014, *Grande Stevens v. Italy*, no. 18640/10, para. 98.

58 Supreme Court judgments of 15 February 2019 (I NSK 4/18), LEX 2643239; of 29 January 2019 (I NSK 6/18), LEX 2643266 [note from the editor – this judgment was delivered by a composition of the SC which does not constitute a court within the meaning of Article 47 CFR].

59 Supreme Court judgment of 15 February 2019 (I NSK 4/18), LEX 2643239 [note from the editor – this judgment was delivered by a composition of the SC which does not constitute a court within the meaning of Article 47 CFR].

60 Article 106 para. 1 of the Polish Competition Act.

61 Article 106a of the Polish Competition Act.

62 Article 6a of the Polish Competition Act.

63 PCA's decisions no. DOZIK-8/2022 of 9 May 2022, para. 225; no. DOZIK-5/2022 of 16 March 2022, p. 32; and no. DOZIK-15/2021 of 30 December 2021, p. 49.

64 See Article 53(1) of the Polish Penal Code.

PCA). Also, in the light of the ECHR, for a sanction to have a criminal nature it is not decisive that the repressive purpose is its sole purpose, but rather that the main function is not to compensate for damages.[65]

Notwithstanding the above-mentioned jurisprudence, it must be underscored that lower courts, when deciding upon penalties imposed by the PCA, recognise the criminal nature of antitrust liability and consider the principle of *ne bis in idem* in cases of multiple liability of the same person for the same act.[66]

Legal liability of natural persons for bid rigging in competition law

Under Polish law, individuals may be subject to antitrust liability when they act as an undertaking conducting business activity and when they act as managers (when they influence an undertaking's business decisions). The scope of their responsibility is different. I discuss this topic in more detail below.

Natural person as an undertaking

The concept of an undertaking as the primary addressee of the prohibition against anticompetitive practices is defined in the Polish Competition Act (Article 4(1)).[67] It primarily covers legal entities and organisational units without legal personality to whom the law grants legal capacity when such entities conduct economic activity. The definition of an undertaking includes natural persons conducting economic activity, organising or providing public utility services that do not constitute economic activity or practising a profession in their own name and of their own accord.[68]

The Polish Competition Act prohibits undertakings from entering into agreements that restrict competition. In particular, it prohibits undertakings from entering a tender or colluding with the undertaking that organises a tender to fix the terms and conditions of bids, especially the scope of work or the price (bid rigging).[69] Bid rigging has been listed in the open statutory catalogue of competition-restricting practices (Article 6 of the Polish Competition

65 ECHR judgments of 23 October 2018, 47072/15, *Produkcija Plus Storitveno podjetje d.o.o. v. Slovenia*, para. 45 and of 4 March 2014, *Grande Stevens v. Italy*, no. 18640/10, para. 96.

66 Competition and Consumer Protection Court judgments of 29 September 2022, XVII AmA 83/20, LEX 3430257 and of 17 April 2023, XVII AmA 74/21, LEX 3560227 and of 5 June 2023, XVII AmA 85/21, LEX 4025398; judgment of the Court of Appeal in Warsaw of 3 February 2020, VII AGa 1121/18, LEX 3103030.

67 For more on the concept of an undertaking in Polish competition law, see G. Materna, *Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji* [The Concept of an Entrepreneur in Polish and European Competition Law], Warszawa 2009.

68 The Polish concept of an undertaking also covers natural persons who exercise control over at least one undertaking, even if that person does not conduct economic activity, when that person takes further actions that are subject to the merger control regulation (Article 4(1)(c)).

69 Article 6(1)(7).

Act). In addition to this specific legal basis, infringements of competition rules in tenders may also constitute the basis for an allegation of infringing the prohibition against agreements which fix prices or other trading conditions[70] or share markets.[71] Undertakings are bound by these rules regardless of whether they are legal or natural persons.

Competition law-based prohibition of tender collusion is systematically enforced in relation to undertakings that are individuals. Quite a substantial part of the PCA's judicial decisions relate to micro-enterprises: natural persons conducting business activity individually or in the form of civil law partnerships.[72] Of the nine total decisions issued in 2023 in cases concerning anticompetitive agreements, natural persons conducting business activity were addressees of six.[73] In 2022, there were five such decisions[74] out of seven concerning anticompetitive agreements. In 2021, there were seven decisions against natural persons conducting business activity[75] out of twelve regarding anticompetitive agreements. In 2020, five of the 14 decisions regarding anticompetitive agreements were against natural persons conducting business activity.[76]

In various bid rigging cases, the Authority found collusion between civil partnership partners and an individual running an independent business[77] or between an individual running an independent business and a few small and medium enterprises.[78] A characteristic feature of the decisions in Polish competition case law is collusive tendering by various formally independent micro-undertakings (often, self-employed natural persons performing economic activity individually) which turn out to be related by family ties. The examples include anticompetitive agreements concluded between wife and husband (in

70 Article 6(1)(1).

71 Article 6(1)(3).

72 For a critique on this topic, see P. Semeniuk, "Polskie zmowy przetargowe" – Krytyka ["Polish Bid Rigging" – a Critique], *internetowy Kwartalnik Antymonopolowy i Regulacyjny* 2013, vol. 1, no. 2, pp. 53–67.

73 Decision nos. RGD-10/2023 and RGD-12/2023 of 29 December 2023; RLU-7/2023 of 21 December 2023; DOK-5/2023 of 20 December 2023; RLU-5/2023 of 12 December 2023; and RGD-3/2023 of 24 May 2023.

74 Decision nos. RKR-3/2022 of 29 December 2022; RGD-12/2022 of 29 December 2022; RPZ-12/2022 of 28 December 2022; RŁO-8/2022 of 20 December 2022; and RWR-1/2022 of 21 July 2022.

75 Decision nos. RWR-5/2021 of 27 December 2021; RKT-7/2021 of 23 December 2021; DOK-7/2021 of 22 December 2021; DOK-5/2021 of 7 December 2021; RKT-5/2021 of 30 November 2021; RGD-6/2021 of 19 November 2021; and RPZ-4/2021 of 30 July 2021.

76 Decision nos. RKR-11/2020 of 30 December 2020; DOK-6/2020 of 30 December 2020; RLU-5/2020 of 11 December 2020; RKR-3/2020 of 4 August 2020; and RKR-1/2020 of 17 June 2020.

77 Decision no. RWR-1/2022 of 21 July 2022.

78 Decision no. DOK-3/2019 of 31 December 2019.

a state of legal separation),[79] father and son[80] or a civil partnership run by a married couple and a separate, individual business of their son.[81]

Managing persons

Polish competition law envisages antitrust liability of natural persons who are not undertakings but hold managerial positions thereof. As a result of the 2014[82] amendment to the Polish Competition Act, so-called managing persons[83] are subject to antitrust liability when they exert influence on an undertaking's business decisions during an infringement and intentionally permit an undertaking, through their acts or omissions, to breach the prohibitions of certain types of anticompetitive agreements prohibited under Article 6 of the Polish Competition Act or Article 101(1) of the TFEU (I expand on this issue below, as it pertains to the topic of this paper). The rules on managers' antitrust liability were adjusted in 2023 as part of a much larger set of amendments to the Competition Act aiming to implement Directive 2019/1. The new rules extend antitrust liability to managing persons of undertakings who exercise decisive influence over an undertaking directly involved in anticompetitive practice.[84]

The statutory concept of a managing person refers to "any person that is managing an enterprise, and in particular a person in a managerial position or a member of the management body of an undertaking".[85] This covers members of managing bodies, persons who hold a managerial function even when they are not members of the management body (e.g. a branch director) and persons who guide an undertaking's activities without formally performing managerial functions.[86] Moreover, some scholars note that the concept of a managing person can also be applied in certain situations to legal entities.[87]

Under competition law, managing persons who intentionally contribute to an undertaking's infringement of Article 6 of the Polish Competition Act or

79 Decision no. RKT-25/2011 of 6 September 2011.

80 Decision no. RGD-6/2021 of 19 November 2021.

81 Decision no. RGD-11/2015 of 15 December 2015.

82 Act of 10 June 2014 (Journal of Laws of 2014, item 945).

83 Article 4(3)(a).

84 Article 6(b)(4).

85 Article 4(3)(a).

86 G. Materna, Criminal Liability…, p. 232; G. Materna, A. Zawłocka, Materialne i procesowe zmiany w zakresie praktyk ograniczających konkurencję i naruszających zbiorowe interesy konsumentów [Material and Procedural Changes in Anti-competitive Practices and Practices Violating the Collective Interests of Consumers], *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2015, vol. 2, no. 4, pp. 17–19.

87 A. Piszcz, in: T. Skoczny (ed.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz* [Competition and Consumer Protection Act. Commentary], Warszawa, 2014, p. 115; A. Piszcz, *Sankcje w polskim prawie antymonopolowym* [Sanctions in Polish Antitrust Law], Białystok, 2013, p. 347.

Article 101(1) of the TFEU bear not only purely administrative responsibility (the PCA finds them liable for infringement),[88] but also financial responsibility (subject to a financial penalty of up to PLN 2 million).[89] Their liability is complementary to the undertaking's liability. When it is found that an undertaking entered into an anticompetitive agreement, the PCA is empowered to commence antitrust proceedings to determine whether the undertaking violated the prohibition of anticompetitive agreements and whether its manager(s) contributed to this infringement.[90] The managing person shall bear antitrust liability only when such liability is borne by the undertaking.[91]

The PCA systematically enforces competition law in relation to managing persons.[92] A managing person's liability only partially covers the spectrum of anticompetitive agreements as defined in Article 6 of the Polish Competition Act and in Article 101(1) of the TFEU. Their legal liability was limited to (only selected) practices listed directly in the statutory catalogues of anticompetitive agreements, more specifically in Article 6(1)(1)–(6) of the Polish Competition Act and in Article 101(1)(a)–(e) of the TFEU. Managing persons cannot be held liable, however, when the allegations against the undertaking that they managed are for uncategorised anticompetitive agreements.[93] Also, collusive tendering (as defined in Article 6(1)(7) of the Competition Act) was left beyond the scope of a managing person's antitrust liability. This does not fully eliminate the possibility of them being charged with bid rigging practices.[94]

Legal liability of natural persons for bid rigging in criminal law

The norms of criminal law apply to natural persons. An individual who commits an act prohibited and penalised by a statute in force at the time is subject to criminal liability.[95] Polish criminal law contains specific regulations dedicated

88 Article 6(a).
89 Article 106(a).
90 Article 88.
91 Articles 12(a) and 106(a)(2).
92 See Decision nos. DOK-5/2020 of 3 December 2020; DOK-6/2020 of 30 December 2020; DOK-8/2021 of 23 December 2021; DOK-4/2021 of 27 August 2021; and DOK-5/2023 of 20 December 2023.
93 In the official justification of the draft act introducing these provisions, it is explained that the catalogue of practices for which natural persons shall be punished should be closed "to eliminate the allegation of indeterminacy of the provisions imposing criminal sanctions". See Parliamentary paper no. 1703 of 30 August 2013, p. 36, http://orka.sejm.gov.pl/Druki7ka.nsf/0/9F27C3A04DCCA6E8C1257BE3003730DF/%24File/1703.pdf.
94 For more, see section 5 of this chapter.
95 Article 1(1) of the Polish Penal Code. It should also be noted that organisational units may bear subsequent quasi-criminal liability for the prohibited acts of a natural person related in a specific way to the organisational unit. According to the Act of 28 October 2002 on the liability of collective entities for acts prohibited under a penalty (Journal of Laws of 2024, item 1822), the final and binding confirmation of a violation of Article 305 of the Criminal Code can be cause for follow-up liability of legal entities (Article 4 and Article 16(1)(1)(a).

to crimes involving tenders (Article 305 of the Penal Code). These regulations have recently undergone significant changes. Its two amendments in 2022[96] and 2023[97] were aimed at concretising the provisions that had been criticised for being vague, extending the scope of application and solving certain problems related to the parallel application of competition law and criminal law.

Liability for bid rigging in criminal law

Article 305 of the Polish Penal Code defines various types of crimes against the fair conduct of tenders. According to Article 305(1), it is prohibited to obstruct or frustrate a tender or public procurement procedure. According to Article 305(2), it is prohibited to collude over a tender (or to disseminate information or to conceal important circumstances) in order to exert an unlawful influence on the result of an ongoing or upcoming tender. These activities are punishable when they are carried out to the detriment of the property owner, person or institution for which the tender is held or which conducts the tender proceedings, or to the detriment of the public interest. An offence that meets the criteria of Article 305(1) is punishable by imprisonment for up to three years. The offence specified in Article 305(2) is punishable by imprisonment for three months to five years. If the perpetrator commits the act specified in paragraphs 1 or 2 in order to obtain material or personal gain, they shall be subject to imprisonment for six months to eight years (Article 305(3)).

Categories of natural persons liable for bid rigging

In the light of the above regulations any natural person capable of incurring criminal liability may be subject to legal liability for the offence in question. Tender-related offences specified in Article 305 of the Penal Code therefore have the nature of common crimes (the exceptions are those specified in Article 305(2) as types of prohibited acts involving the concealment of specific information[98]).

Unlike competition law-based provisions on anticompetitive agreements, the application of penal law is not limited to activities of undertakings and persons acting in their name and on their behalf. The criminal regulation against bid rigging applies to persons performing various roles in connection with the tender, regardless of whether these persons have the status of an

96 Article 1(109) of the Act of 7 July 2022 (Journal of Laws of 2022, item 2600).

97 Article 4 of the Act of 9 March 2023 (Journal of Laws of 2023, item 852).

98 G. Materna, Zakres podmiotowy zakazu zmów przetargowych w polskim prawie ochrony konkurencji i prawie karnym [The Personal Scope of the Prohibition of Tender Collusions in Polish Competition Law and Criminal Law], *Przegląd Ustawodawstwa Gospodarczego*, 2013, vol. 12, p. 6 and the literature cited therein.

undertaking or not and regardless of whether these persons act in the name of an undertaking.[99]

In effect, among the possible addressees of Article 305 of the Penal Code the literature mentions[100] tender participants (i.e. persons who submit offers within a tender, as well as bidders when the tender takes the form of an auction[101]), those conducting the tender,[102] members of the tender committees,[103] those preparing the contract (specifying the essential terms) and appointed experts. Article 305 applies, for example, to a member of a tender committee who proposes a description for the winner of a contract that "aligns" with a favoured contractor, even if this proposal is later rejected by other members of the tender committee.[104] The Penal Code provisions on tender collusion can also be applied to persons that do not directly participate in the tender, on neither side nor someone acting on their behalf,[105] only if their activities may influence the course of a tender,[106] such as experts valuing the items subject to a tender.[107]

Before its latest amendment, the criterion for violating Article 305 of the Penal Code was acting to the detriment of the institution for which the tender was carried out. This narrowed the scope of criminal liability. Currently, Article 305 protects not only the property interests of those conducting a tender, but also of the bidders,[108] because exerting an unlawful influence on the tender result to the detriment of the public interest is also penalised (Article 305(2)).

99 Ibidem, pp. 6–7 and the literature cited therein.

100 Ibidem, p. 7 and the literature cited therein.

101 A. Marek, *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warszawa 2010, p. 656.

102 W. Wróbel, in: A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz, t. III, Komentarz do art. 278–363 k.k.* [Criminal Code. Commentary. Volume III], Warszawa 2008, p. 774.

103 M. Bojarski, in: O. Górniok (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warszawa 2006, p. 901.

104 M. Makowski, Przestępstwo zakłócenia postępowania o udzielenie zamówienia publicznego po nowelizacji art. 305 Kodeksu karnego. Część druga [The Crime of Disrupting the Public Procurement Procedure After the Amendment of Article 305 of the Penal Code. Part Two], *Zamówienia Pububliczne Doradca*, 2023, vol. 11, pp. 46–51.

105 R. Zawłocki, in: M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część szczególna, t. II,* [Criminal Code. Commentary. Volume II], Warszawa 2013, p. 881. It is indicated that at least one participant in the agreement should be a person who can influence the course of the tender. See A. Bartosiewicz, R. Kubacki, Prawnokarna ochrona przetargu publicznego [Criminal Law Protection of Public Tenders], *Monitor Prawniczy*, 2002, vol. 20, p. 945.

106 W. Wróbel, in: A. Zoll (ed.), *Kodeks karny*….

107 O. Górniok, *Przestępstwa gospodarcze. Rozdział XXXVI i XXXVII Kodeksu karnego. Komentarz* [Economic Crimes. Chapter XXXVI and XXXVII of the Penal Code. Commentary], Warszawa 2000, p. 95. Cf. Order of the Supreme Court of 07 May 2012, V KK 402/11, OSNKW 2012/8/84.

108 O. Oczkowski, in: V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz* [Criminal Code. Commentary], Warszawa 2023. See also M. Makowski, Przestępstwo zakłócenia…, pp. 44–52.

The scope of persons that may be held liable for violating Article 305 is expanded by the fact that criminal law identifies and sanctions various forms of crimes. Criminal liability covers not only perpetrators of the offence prohibited by Article 305 of the Penal Code, but also persons directing another person's performance of a prohibited act (directing perpetration) and instructing another person to perform such an act, taking advantage of that person's dependence on them (ordering the perpetration).[109] Criminal law also provides for the liability of an instigator, i.e. a person who, wanting another person to commit a prohibited act, induces that person to do so,[110] as well as liability for aiding and abetting a person who, intending for another person to commit a prohibited act, facilitates its commission by their conduct.[111]

Duplication of criminal and antimonopoly liability of natural persons

Variants of concurrent legal liability for bid rigging

The existing provisions against bid rigging (Article 6(1) of the Polish Competition Act, Article 101(1) of the TFEU and Article 305 of the Penal Code) do not rule out overlaps of the same individual's legal liability in the same bid rigging case.[112] In relation to natural persons, the overlapping legal liability of the same entity primarily occurs in cases of anti-competitive tender agreements between natural persons conducting business activity as a self-employed person or as partners in a civil partnership: in such cases the liability under competition law (Article 6(1)(7) of the Polish Competition Act) and criminal law (Article 305 of the Penal Code) may overlap. Duplication of liability for tender collusion may occur when at least one participant in the collusion was a self-employed person or a partner in a civil partnership.

The overlapping legal liability of the same natural person is also not excluded in case of anti-competitive tender agreements, regardless of the status of the undertakings participating in them, when it comes to managers of the undertakings participating in the collusion (natural persons with the status of a managing person in the meaning of Article 4(3)(a) of the Polish Competition Act). Although managing persons are not liable if the undertaking they manage violates the prohibition of Article 6(1)(7) of the Polish Competition Act, liability under competition law and criminal law may overlap when the PCA classifies a given anticompetitive tender agreement as one of the practices listed in the statutory catalogue of anticompetitive agreements other than bid rigging

109 Art. 18(1) of the Penal Code.

110 Art. 18(2) of the Penal Code.

111 Art. 18(3) of the Penal Code.

112 For an overview of all variants of the concurrence of legal liability for bid rigging, see G. Materna, *Zmowy przetargowe*…, pp. 388–405.

(other than Article 6(1)(7) of the Polish Competition Act)[113] or when bid rigging is part of a complex (single and continuous) practice including various activities that meet the criteria of prohibited practices.[114]

Natural persons' criminal and antitrust liability for bid rigging is not a purely theoretical possibility; such cases have already occurred. For example, in its decision from 31 December 2013 (no. RBG-47/2013), the PCA found a violation of Article 6(1)(7) of the Polish Competition Act and imposed penalties on natural persons running agricultural farms who agreed that in exchange for remuneration and a share in the land sold at an auction organised by the Polish Agricultural Property Agency, some of them would resign from bidding in favour of another participant of the agreement. Regardless of sanctions being imposed in that administrative proceeding, the participants of the collusion were also indicted and tried by a criminal court for violating Article 305 of the Penal Code in a separate criminal case.[115]

Another situation where there was a cumulation of two liability regimes, i.e. resulting from the Polish Competition Act and the Criminal Code, can be seen in the written justification of the judgment of the Court of Appeal in Warsaw from 3 February 2020.[116] The judgment relates to the PCA's decision from 7 October 2014 (no. RKR-21/2014). In this case the competition authority found that three self-employed persons running independent businesses (each of them was providing winter maintenance services for public roads) colluded on public tenders for winter road maintenance conducted by a certain local Road Administration Office. The undertakings agreed on the conditions of their respective offers and to take other steps in order to cause the public contract to be awarded to one of them. In assessing this anticompetition case, the Appeal Court referred to the judgment of the criminal District Court from 6 June 2016 in a separate, criminal case,[117] in which the same three natural persons were found guilty of committing offences under Article 305(1) of the Penal Code. In the criminal proceedings, similarly to the proceedings before the PCA, it was found that the undertakings, through agreed conduct, led to the selection of a winner of the tender.

113 As explained above, agreements corresponding to Article 6(1)(7) may also correspond to other categories of prohibited agreements, e.g. market sharing (Article 6(1)(3)). See section 3.2 above.

114 For more, see section 3.2 above.

115 Judgment of the District Court in Toruń of 8 September 2014, VIII K 1801/13, unpublished, upheld by the Regional Court in Toruń in its judgment of 19 February 2015, IX Ka 664/14. See also Global Forum on Competition. Fighting Corruption and Promoting Competition. Contribution from Poland, DAF/COMP/GF/WD(2014)15), p. 5, point 19, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)15&docLanguage=En.

116 Judgment of the Court of Appeal in Warsaw of 3 February 2020, VII AGa 1121/18, LEX 3103030.

117 Judgment of the Regional Court in N. of 29 September 2016, II Ka 345/16, which upheld the judgment of the District Court in N. of 6 June 2016, II K 366/13.

Not every activity that meets the conditions for a violation of the prohibition against bid rigging in competition law also entails a violation of Article 305 of the Penal Code. The reason is that the grounds for finding violations of the two prohibitions are not identical. In specific cases, this may protect a given natural person from multiple liability (however, it may not protect against being charged repeatedly, because it may be that determining which conditions for liability are met can only occur in the course of concurrent antitrust or criminal proceedings).

In competition law, a finding of an infringement by an undertaking has an objective character, does not depend on the premise of guilt and requires proof of at least negligence for a fine to be imposed. This extends the conditions of antitrust liability in relation to Article 305 of the Penal Code, the violation of which requires a finding of intent. On the other hand, it is worth noting that the liability of managing persons in Polish competition law is based on the principle of deliberate intent, as with Article 305 of the Penal Code.

In competition law, the grounds for finding an infringement, also in case of tender agreements, are that the object or effect is prevention, restriction or distortion of competition.[118] The criminal law regulation of tender-related agreements is aimed at protecting a differently defined legal interest. It is intended to protect the mechanisms of economic circulation,[119] which include the ability of undertakings to conduct free and equal economic activity.[120] The premise for the application of Article 305 of the Penal Code is a threat to the interests of the individual participants in a tender. The amendment from 2022,[121] consistent with the proposals articulated in the literature,[122] extended the application of Article 305 of the Penal Code to acts performed to the detriment of a generally defined public interest (previously, the condition was a threat to the interests of the property owner or the entity or institution for which the tender is held).[123] Consequently, it cannot be excluded that in a specific case the same agreement which may affect the result of the tender and violate the public interest protected by Article 305 of the Penal Code will not infringe competition law (it will not restrict competition at all or will be

118 For more about this condition as regards bid rigging agreements, see G. Materna, *Zmowy przetargowe…*, pp. 160–250.

119 Judgment of the Supreme Court of 19 May 2011, WA 6/11, LEX 3666379.

120 R. Zawłocki, Podstawy odpowiedzialności karnej w obrocie gospodarczym, in: R. Zawłocki (ed.), *System prawa handlowego. Tom 10, Prawo karne gospodarcze* [System of Commercial Law. Volume 10. Commercial Criminal Law], Warszawa 2012, p. 64.

121 Article 1(109) of the Act of 7 July 2022 (Journal of Laws of 2022, item 2600).

122 G. Materna, *Zmowy przetargowe…*, p. 114.

123 Before the amendment, Article 305 of the Penal Code in practice did not criminalise collusion which adversely affected economic circulation by infringing the interests of other bidders who were not colluding, if at the same time they did not affect the interests of the property owner or entity or institution for which the tender was held.

exempt from the prohibition in Article 8 of the Polish Competition Act and Article 101(3) of the TFEU).[124]

With the entry into force of the 2022 amendment of the Penal Code,[125] the discrepancy in the treatment of non-public tenders has been eliminated. Previously, only competition law protected against bid rigging in both public and private tenders. Currently, Article 305 of the Penal Code also does so.

Elimination of concurrent legal liability for bid rigging in the light of competition law

Despite the numerous legislative changes, there is still no comprehensive regulation of the imposition of fines in proceedings on competition-restricting practices;[126] specifically, there is no comprehensive regulation regarding the concurrence of legal liability in competition law and criminal law for bid rigging. For unexplained reasons, the general principles in the Polish Code of Administrative Procedure on the multiplicity of sanctions[127] (which provide such rules in the case of fines imposed by other authorities) do not apply to the PCA.[128] In effect there is no complex statutory regulation on the concurrence of legal liability in both competition law and criminal law. No provisions have been introduced as regards the legal liability of a natural person acting as an undertaking. For such persons, who were previously subject to criminal liability under Article 305 of the Penal Code, the Polish Competition Act does not provide for any specific exclusion against the PCA initiating administrative proceedings and finding that the same activity is an infringement of competition law. This does not mean that Polish competition law does not address in any way the issue of concurrent legal liability for bid rigging. Such provisions do exist, but they address the matter in a limited way.

The law includes provisions intended to protect managing persons against double legal liability for taking part in tender collusion. The scope of a managing person's antitrust liability does not cover collusive tendering (as defined in Article 6(1)(7) of the Competition Act). Moreover, in the official justification of the draft act introducing these provisions, it was explained that the legal

124 For example, competition law may not violate an agreement within one economic entity, which has not yet been addressed in criminal law. Certain types of tender agreements other than classic secret cartel agreements infringe competition law only if they can demonstrate their anticompetitive effects. This is basically the case with consortium agreements (see the judgment of the Court of Appeal in Warsaw of 8 June 2016, VI ACa 651/15). For more, see G. Materna, *Zmowy przetargowe…*, pp. 236–250.

125 Article 1(109) of the Act of 7 July 2022 (Journal of Laws of 2022, item 2600).

126 M. Król-Bogomilska, *Kary pieniężne w prawie antymonopolowym w ustawie o ochronie konkurencji i konsumentów, w europejskim prawie wspólnotowym* [Fines in Antitrust Law in the Competition and Consumer Protection Act and in European Community law], Warszawa 2001, p. 254.

127 Article 189f(1)(2).

128 For more reasons, please see section 2.2 (e.g. footnote 40).

grounds for natural persons' liability for bid rigging are already provided for in the Polish Penal Code.[129] Therefore, the aim was clearly to avoid the double liability of managers under competition law and pursuant to Article 305 of the Penal Code.[130] This shows the visible effort made by the legislature to not subject managers to antitrust liability in tender collusion cases. In reality, however, the Polish Competition Act does not fully eliminate the possibility of a manager being charged with collusive tendering. The reasons are the following:

The PCA's discretion in the legal qualification of anticompetitive agreements leaves room for qualifying anticompetitive agreements which distort competition in tender proceedings (agreements corresponding to Article 6(1)(7)) as an infringement of the prohibition against another specific category of agreements, if the tender agreement in question meets their criteria. This may be a case of the prohibition provided for in Article 6(1)(1) of the Polish Competition Act, which prohibits anticompetitive price agreements and agreements which fix any trading conditions. Bid rigging as defined in Article 6(1)(7) (fixing the terms and conditions of bids) is in fact nothing more than a detailed variant of the prohibition from Article 6(1)(1), which is limited to tender proceedings.

Managing persons are also not fully protected from liability under the Polish Competition Act in cases regarding complex cartels, which are not limited to pure tender collusion. On many occasions bid rigging may be only one manifestation of more complex competition law infringement, including many restrictive activities with characteristics of various types of agreements listed in the statutory catalogue of prohibited practices (Article 6 of the Polish Competition Act). Upon finding such an infringement, the PCA can investigate and fine the undertaking for all manifestations of infringement, but the manager can formally be fined only for the "non-bid-rigging" part of the anticompetitive conduct. However, due to the PCA's discretion in determining the amount of the penalty and the fact that a single fine is imposed on a specific entity for an anticompetitive practice – and not separate fines for each manifestation – in such a situation it is difficult to establish that a penalty does not take into account bid rigging. To the best of the author's knowledge, such proceedings have been used so far by the PCA in at least two decisions.[131] This way, the declared exclusion of antitrust liability of managing persons for collusive tendering becomes purely formal, and not real.[132]

As shown above, a managing person's double liability for bid rigging (under antitrust and penal law) has not been entirely eliminated, which is generally in

129 Parliamentary Paper no. 1703 of 30 August 2013, p. 35.

130 G. Materna, Criminal Liability…, p. 233.

131 Decision nos. DOK-8/2021 of 23 December 2021 and DOK-5/2020 of 3 December 2020.

132 See also the description of an example taken from the PCA case law: G. Materna, Criminal Liability…, pp. 246–247.

line with the current CJEU approach, under certain conditions, to issues of multiple liability of the same entity. However, the existing Polish regulation in that regard cannot be said to comply with the current interpretation of the *ne bis in idem* principle. Above all, the PCA's ability to penalise managers for bid rigging does not result from the official declarations of legislators.[133] It would therefore be difficult to argue that this is justified by the need to achieve any specific goals or by the need for a specific legal reaction in cases of particular harm from the perspective of the axiology of tender law. For the same reasons, such specific conditions developed by CJEU are also not met, as the unambiguity of the possibility of cumulating sanctions on managers based on competition law and criminal law or the punished person's ability to predict, based on clear and precise rules, what acts and omissions may be subject to cumulative proceedings and sanctions.

This issue of managers' multiple liability in bid rigging cases has not been addressed in the latest amendments to the Polish Competition Act,[134] which came into force on 20 May 2023. With this amendment, lawmakers only ensured that the benefits of the leniency programme in tender cases also apply to leniency applicants in criminal proceedings. The new law excluded criminality under the Penal Code of natural persons who were leniency applicants or who acted on behalf of an undertaking that was a leniency applicant,[135] and it introduced rules on the exchange of information between antitrust and penal law institutions in order for prosecutors to establish grounds for the perpetrator of bid rigging to not be penalised under penal law.[136] No mechanism was introduced to safeguard the proportionality of the fines determined under the Competition Act, when the same natural person is the subject of antitrust and penal proceedings.[137] Also, no complex statutory mechanism of cooperation between the PCA and criminal law enforcement agencies has been introduced so far. On the one hand, information obtained in the course of proceedings before the PCA can be used in criminal proceedings subject to public prosecution[138] and the PCA is required to immediately inform a public prosecutor or the police about the possible criminal offence.[139] On the other hand, no corresponding obligation has been imposed on public prosecutors, who are also not legally obliged to provide the PCA with relevant case files or information regarding criminal proceedings which could also serve as the basis for an antitrust case.[140]

133 See footnote 144.
134 Journal of Laws of 2023, item 852.
135 Article 305(6) of the Penal Code.
136 Article 113(l) of the Competition Act.
137 G. Materna, Criminal Liability…, p. 247.
138 Article 73(2)(1) of the Polish Competition Act.
139 The rule refers to all state and local government institutions (Article 304 § 2 of the Code of Criminal Procedure).
140 Such an obligation is imposed only on public administration authorities (Article 72 of the Polish Competition Act).

Duplication of criminal and antimonopoly liability of natural persons in the light of the competition case law and jurisprudence

Publicly available data only rarely allow a determination of whether and to what extent the duplication of criminal and antimonopoly liability of natural persons really takes place. It is therefore impossible to determine the exact number of cases in which the same natural persons were held liable for bid rigging in the same tender proceedings under both competition law and criminal law. Nevertheless, competition case law and jurisprudence allow us to conclude that the duplication of criminal and antimonopoly proceedings does occur in practice.

As results from the competition case law, the PCA has conducted proceedings regarding tender collusion in which it made use of evidence collected by the prosecutor's office in criminal investigations regarding the same activities of the same persons. In one of its decisions, the PCA confirms having profited from such evidence, but does not refer directly to either the allegations made in the course of the criminal investigation or to the progress of the prosecutor's investigation when its decision was issued.[141]

The PCA has also issued decisions with a finding of bid rigging by natural persons running individual business activities when the criminal court's judgments regarding collusion between the same individuals in the same tender proceedings had already been issued. For example, in decision no. RKT-04/2017 of 19 April 2017 it was found that two natural persons (undertakings) entered into tender collusion, infringing the Polish Competition Act. The PCA dismissed the defendants' application to suspend the proceedings until the previously issued criminal judgment regarding the same collusive behaviour had become final. The PCA found that for the purpose of the antimonopoly proceedings it is irrelevant that the criminal court[142] did not confirm the allegation of the infringement of Article 305 of the Penal Code. The PCA explained that the criminal case was discontinued due to the failure to meet the then mandatory condition for a tender offence: acting to the detriment of the tender organiser,[143] which is not an element of the description of the administrative tort of tender collusion, as defined in the Polish Competition Act (Article 6(1)(7)). This means – as explained in the decision – that the criminal court and the PCA are guided by different legal conditions, and consequently rely – to some extent – on different evidence when assessing violations of bid rigging provisions in the Penal Code and in the Polish Competition Act by the same parties. This may consequently result in a different assessment of liability

141 Decision no. DOK-2/2017 of 2 October 2017, which cites the proceedings of the Appellate Prosecutor's Office in Warsaw, ref. no. V Ds. 111/12.

142 Judgment of the District Court in Opole of 22 November 2016 (VII K 105/16).

143 With the 2022 amendments of the Penal Code, this is no longer a condition for finding a violation of its Article 305. See Article 1(109) of the Act of 7 July 2022 (Journal of Laws of 2022, item 2600).

based on competition law and criminal law.[144] Similar reasons can be found in another PCA decision.[145]

The issue of the duplication of criminal and antitrust liability of natural persons can only occasionally be found in the Polish jurisprudence. To date, the Polish Supreme Court has only commented on the lack of uniformity of the conditions for tender collusion in Article 6(1)(7) of the Polish Competition Act and the conditions for violating Article 305 of the Penal Code.[146] The most comprehensive position regarding the duplication of criminal and antimonopoly liability of the same person has been provided by the Warsaw Appeal Court in the written justification of the above-mentioned judgment of 3 February 2020.[147] The court issued the judgment on appeal against a PCA decision regarding collusion in public tenders for winter road maintenance between three natural persons running individual business activities (providing winter maintenance services for public roads).[148] The court confirmed the violation of the Polish Competition Act but reduced the fines imposed by the PCA, referring to the judgment of the criminal court issued after the PCA's decision in reference to the same tender collusion and finding the same three natural persons in violation of Article 305 of the Penal Code.[149]

The court noted the cumulative liability resulting from the imposition of administrative fines for tender collusion and the subsequent imposition of criminal fines on the same entities in a final criminal judgment for infringement of Article 305 of the Penal Code. The court stated that "from the constitutional point of view, the accumulation of administrative sanctions and criminal sanctions is generally permissible" due to the differences in the purposes of the two types of sanctions – while the purpose of a criminal sanction is retribution for a prohibited act (repressive function), the purpose of an administrative sanction is to prevent violations of the law (preventive function). The Court

144 Similarly, see Decision no. DOK-3/2018 of 21 December 2018. In a different case the Authority explained that discontinuing criminal proceedings and finding no grounds for a violation of Article 305 of the Penal Code is not an obstacle to establishing bid rigging collusion based on competition law, when the reason for the prosecutor's decision was the lack of evidence of the intention and purpose of the undertaking's representatives to obstruct specific tenders, which actually threatens the interests of the ordering party. See Decision no. RGD-4/2016 of 30 December 2016.

145 Decision no. DOK-10/2014 of 30 December 2014.

146 The Court stated that the very literal wording of both provisions indicates that the conditions for their violation are not identical, as the functions and purposes of both provisions are different. Consequently, for the Supreme Court it was obvious that not finding a violation of Article 305 of the Penal Code does not mean that there was no anticompetitive agreement referred to in the Competition Act. See Order of the Supreme Court of 29 March 2023, II NSK 15/23, LEX 3511646.

147 Judgment of the Court of Appeal in Warsaw of 3 February 2020, VII AGa 1121/18, LEX 3103030.

148 Decision no. RKR-21/2014 of 7 October 2014.

149 Judgment of the Regional Court in N. of 29 September 2016, II Ka 345/16, which upheld the judgment of the District Court in N. of 6 June 2016, II K 366/13.

then referred to the EU jurisprudence regarding Article 50 of the Charter of Fundamental Rights.[150] It drew attention to the importance of the principle of proportionality when accumulating several penalties.[151] It assessed that general objectives of the prohibition against bid rigging in competition law and criminal law converge to some extent (i.e. in terms of protecting the proper functioning of market mechanisms), but the specific interests protected by the two regulations are not identical. Subject to protection under Article 305 of the Penal Code is the property interest of institutions conducting tenders, while the Competition Act protects market competition in the public interest (protecting market mechanisms that support the ultimate goal of competition law, i.e. consumer welfare). The scope of application for the two prohibitions differs: some events identified as bid rigging under criminal law are not prohibited under antitrust regulations, and some are prohibited under both regulations. The nature, aim and effects of sanctions for infringements of competition and criminal law are manifold. Legal steps taken by the PCA primarily aim at compliance with the competition rules (bringing the anti-competitive practice to an end or removing its effects) and prevention, not repression. The Court found the above circumstances to justify the parallel enforcement of antitrust and criminal regulations, which complement each other as to the scope of penalising arrangements between various entities that may interfere with the course and results of the tender. The court found that the conditions set out in the case law of the Court of Justice had been met, as the coordination of competition and criminal proceedings was demonstrated (cooperation and exchange of information between the PCA and the criminal court was demonstrated, and the criminal court received the antitrust decision once issued and the PCA got access to the files of criminal preparatory proceedings at the earlier stage). The existence of rules ensuring that the severity of all imposed sanctions is limited to what is necessary is not guaranteed by Polish law. The court agreed with the position taken by the PCA that in the case of a crime and an administrative tort, 1) a fine should not be imposed in later proceedings if the final penalty imposed in the earlier proceedings is sufficiently severe considering the gravity of the infringement found or 2) a penalty can be imposed in the later proceedings only in an amount that will increase the total sanctions to the necessary level. The Court of Appeal assessed that such a mechanism was applied in this case (the point was that the court of first instance had reduced the fines imposed by the PCA by the amounts awarded by the criminal court).

The judgment of the Court of Appeal generally follows the current CJEU jurisprudence. However, its interpretation of selected conditions of legitimately cumulating legal liability for the same entity for the same practice raises

150 Case C-524/15, *Criminal proceedings v. Luca Menci*, EU:C:2018:197.

151 Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. v. Prezes Urzędu Ochrony Konkurencji i Konsumentów*, EU:C:2019:283.

doubts. The Court of Appeal ignored the requirement for "clear and precise rules making it possible [...] to predict that there will be coordination between the two competent authorities", instead remaining sufficiently satisfied with evidence of *de facto* cooperation between the PCA and the public prosecutor in a specific case. The Court of Appeal itself also confirmed that Polish law lacks rules which would ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence. Also, the Court did not analyse whether the two sets of proceedings (antimonopoly and criminal) were conducted "within a proximate timeframe".

Problems and potential solutions related to the duplication of legal liability of natural persons for bid rigging

The article has shown that on numerous occasions more or less real confluence of legal liability of the same entity in the same bid rigging case may appear. The present regulations allow for duplication of responsibility for bid rigging. It is possible when individuals acting as undertakings (examples of duplication of legal liability of such persons have indeed taken place) and it cannot be excluded in the case of managers.[152] On the other hand, the scope of persons potentially affected by cumulative liability was narrowed by the 2023 amendment,[153] which excluded criminal liability under Article 305 of the Penal Code for natural persons who are parties to the antitrust proceedings as leniency applicants or who acted on behalf of the leniency applicant.[154]

However, due to the application of Article 305 of the Penal Code being extended to private tenders and the premise of acting to the detriment of the tender organiser becoming less important (as a result of the 2022 Penal Code amendment[155]), the range of events when both regimes (antitrust and criminal) may apply to the same persons has increased. This confirms the relevance of analysing whether the adopted anti-bid-rigging model is compliant with the *ne bis in idem* principle, notwithstanding the ambiguous position of the Polish courts as to the criminal nature of proceedings and penalties imposed by the competition authority.[156]

The non-uniformity of the objectives realised by competition law and criminal law regarding bid rigging led me in my previous research[157] to mostly positive conclusions about the current model of counteracting bid rigging by means of competition law and criminal law. Indeed, the PCA's involvement in anticollusion activities, as well as that of the authorities and institutions

152 See sections 5.1–5.3 above.
153 Act of 9 March 2023 (Journal of Laws of 2023, item 852).
154 Article 305(6) of the Penal Code.
155 Article 1(109) of the Act of 07 July 2022 (Journal of Laws of 2022, item 2600).
156 See section 2.2 above.
157 G. Materna, *Zmowy przetargowe*..., pp. 432–441.

mandated to combat economic crime, may increase the chances of successfully combating bid rigging. It can ensure that as many persons involved in tender collusion as possible will be held liable (undertakings are liable under competition law, while managing persons and other natural persons are liable under criminal law). On the other hand, in my earlier research I proposed supplementing the regulations concerning liability for bid rigging with appropriate conflict-of-law rules. The essence of my proposal was that in the event of duplication of competition and criminal liability, competition liability should take precedence (in line with the principle of the subsidiarity of criminal law),[158] which should not exclude the conduct of criminal proceedings against individuals whom the competition authority has not initiated antitrust proceedings. I proposed that the law should provide a clear basis for discontinuing tender collusion proceedings against an individual subject to multiple liability regimes if a final decision has already been taken in the same case based on a different liability regime. Such a proposal supported the approach taken by the legislature (albeit inconsistently) to eliminate multiple liability of the same person for bid rigging.

With the evolving interpretation of the *ne bis in idem* principle, it is no longer required to rigorously eliminate multiple (competition and criminal) liability of natural persons for bid rigging. The cumulation of administrative and criminal liability of the same natural persons, as in the current model of counteracting bid rigging with instruments of criminal law and competition law, may be justified under certain conditions (as recognised by the Court of Appeal in Warsaw[159]). However, even if the present system of combating tender collusion in parallel is not inconsistent with this principle *per se*, the existing legal solutions are insufficient to meet all the conditions required by the jurisprudence. In reality, in Polish law there are no clear, precise rules, as requested by the CJEU[160] and the ECHR,[161] that would enable a person to predict that the authorities conducting proceedings would coordinate them, no guarantee that separate proceedings would be conducted in a sufficiently coordinated and timely manner, nor that the accumulated sanctions would be proportional to the gravity of the violations.

Taking into account all the above circumstances and arguments, the following potential solutions for the identified drawbacks of the present regulation could be considered:

Rules should be established for cooperation between the PCA and the criminal law enforcement authorities. Cooperation between these authorities

158 Judgment of the Supreme Court of 19 May 2011, WA 6/11, OSNwSK 2011/1/1020.

159 Judgment of the Court of Appeal in Warsaw of 3 February 2020, VII AGa 1121/18, LEX 3103030.

160 Case C-117/20, *bpost SA v. Autorité belge de la concurrence*, EU:C:2022:202.

161 Judgment of the ECHR of 15 November 2016, *A and B v. Norway* (Application nos. 24130/11 and 29758/11).

has been postulated for some time in the literature,[162] and the PCA established among its priorities the building of a “network for competition and consumers” composed of various authorities and organisations that, while pursuing their own goals, have convergent interests in combating anticompetitive or anticonsumer market activities (e.g. prosecutors, police, anticorruption agencies and agencies guarding state security).[163] Unfortunately, the statutory basis for cooperation and coordination of proceedings between such authorities is fragmentary and unclear. The only statutory rules on the exchange of information between antitrust and penal law institutions in bid rigging cases were introduced by the 2023 amendment[164] in order to guarantee the exclusion of leniency applicants from criminal liability. Existing individual examples of cooperation between interested authorities in individual investigations should be replaced with systemic coordination of activities and exchange of information, resulting from these authorities’ standard operational model in cases of tender collusion.

A mechanism should be established to safeguard the proportionality of the cumulative amount of sanctions. So far, no mechanism has been introduced to safeguard the proportionality of fines imposed under the Competition Act when the same natural person is the subject of antitrust and penal proceedings. Meanwhile, the Competition Act has already introduced such a mechanism in matters relating to the protection of consumer interests, when individuals are subject to multiple investigations. In such cases the PCA determines the fine, taking into account any sanctions imposed for the same infringement by other authorities in other EU Member States.[165] A similar mechanism could be set up in bid rigging cases.[166]

The proposed mechanism should also be applicable to fines imposed on “managing persons” in complex cartels that consist of tender collusion and other manifestations of infringement. As explained above,[167] despite the explicit exclusion of the PCA’s competence to penalise managers for their participation in tender collusion, managers are not fully protected from such a liability in the case of such complex infringements, and the declared exclusion of antitrust liability of managers for collusive tendering becomes purely formal, and not real.

The PCA should rigorously charge bid rigging under Article 6(1)(7) of the Competition Act and not under different provisions of this Article; even if this were the case, no charges should be brought against the managers.[168] The opposite position could lead to managers being liable for bid rigging contrary

162 G. Materna, *Zmowy przetargowe…*, pp. 431–432.
163 UOKiK, *Polityka ochrony konkurencji i konsumentów*, Warszawa, 2015, pp. 18–21.
164 Act of 9 March 2023 (Journal of Laws of 2023, item 852).
165 Article 111(5) of the Polish Competition Act.
166 G. Materna, Criminal Liability…, p. 247.
167 See section 5.2 above.
168 G. Materna, *Zmowy przetargowe…*, pp. 441–442.

to the legislature's intention,[169] and the condition required in the event of duplication of sanctions – that there are clear, precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties – not being met.

Conclusions

In the present context of national, European and conventional law, the *ne bis in idem* principle has to be considered by the PCA when it conducts investigations and imposes fines on the addressees of competition law-based prohibitions of restrictive practices (leaving aside divergent views of Polish courts about the character of administrative penalties imposed by the PCA). The principle in question has to be observed by the PCA as well as the criminal courts and public prosecutors.

In the Polish competition law, the *ne bis in idem* principle is gaining practical meaning for the legal liability of natural persons for bid rigging. In this particular case, competition law and criminal law can be and practically are applied in parallel to the same person's collusive behaviour. As explained in the chapter, the duplication of criminal and antimonopoly liability of natural persons may appear in the case of individuals with the status of an undertaking (individual undertaking or partner in a civil partnership) or managing person (manager of an undertaking participating in the collusion).

The Polish competition law does not address in any way the issue of concurrent legal liability for bid rigging for individuals acting as undertakings. Also, no mechanism was introduced to safeguard the proportionality of fines imposed under the Competition Act, when the same natural person is the subject of antitrust and penal proceedings, and the mechanism of coordinating concurrent proceedings by the competent authorities is not comprehensive at all.[170] The situation is not identical when it comes to the liability of managers. The scope of a managing person's antitrust liability does not cover collusive tendering as defined in Article 6(1)(7) of the Competition Act. However, the declared aim of avoiding double liability for managers, under the competition law and pursuant to Article 305 of the Penal Code, has not been fully achieved by the legislature. Firstly, there is a risk of charging managers with bid rigging under a different legal qualification (e.g. Article 6(1)(1) of the Competition Act, which concerns price fixing agreements and therefore may apply to price collusion in bidding). Also, managers of undertakings colluding in tenders are the subject of proceedings concerning complex infringement when bid rigging is only one of many manifestations of restrictive conduct (on such occasions, the PCA formally limits their charges to those unconnected with bid rigging, while the undertaking is fined for all manifestations of the infringement, bid

169 See section 5.2 above.
170 See section 5.2 above.

rigging included; however, as in each case a single fine is imposed on each entity for anticompetitive practice, and not separate fines for each manifestation, it will be difficult to establish that the penalty imposed on a manager does not take into account bid rigging). Notwithstanding the above, criminal law excludes from criminal liability under Article 305 of the Penal Code natural persons who are parties to antitrust proceedings as leniency applicants or who acted on behalf of a leniency applicant.

The duplication of liability for natural persons appeared in the competition case law and jurisprudence. There are examples of administrative proceedings before the PCA and decisions issued against participants of the same tender collusion that had already been investigated by the prosecutor's office or had been a subject of a criminal court's judgment. In the recent Polish competition jurisprudence, arguments can be found in favour of concurrent legal liability for bid rigging under both competition law and criminal law. The most comprehensive position in that regard was expressed by the Warsaw Appeal Court,[171] with clear references to the conditions that must be met for such dual liability, as they were set out in the newest judicial line of the Court of Justice regarding Article 50 of the Charter of Fundamental Rights.

The chapter argued that the existing legal solutions in Polish law are insufficient to meet all characteristics required by the jurisprudence of the CJEU and the ECHR. In order to change this state of affairs, potential solutions were proposed, including 1) establishing complex rules of cooperation between the PCA and criminal law enforcement authorities; 2) establishing a mechanism to safeguard the proportionality of the cumulative amount of sanctions; 3) applying the proposed mechanism to fines imposed on managing persons in complex cartels that consist of tender collusion among other manifestations of the infringement; and 4) implementing legislative measures to ensure that collusion fulfilling the criteria of Article 6(1)(7) of the Competition Act is not charged with different legal qualifications, in order to exclude that charges are brought against the managers for actions that meet the substantive conditions for bid rigging. Until the establishment of adequate, complex mechanisms of coordination, the PCA and the criminal law enforcement authorities can cooperate in good faith on the basis of existing regulations, as described in "Elimination of concurrent legal liability for bid rigging in the light of competition law" above.[172] A temporary solution may be to strengthen and formalise cooperation through agreements among administrative bodies and institutions involved in the fight against irregularities in tenders, as practised by the PCA in the recent past.[173]

171 Judgment of the Court of Appeal in Warsaw of 03 February 2020, VII AGa 1121/18, LEX 3103030.

172 See: the final paragraph.

173 G. Materna, *Zmowy przetargowe…*, pp. 86–88.

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Conclusions

Towards a common standard in national fining proceedings?

Dawid Miąsik

The research demonstrated an extensive impact of European general principles of law and fundamental rights on national fining legislation and national fining proceedings. The principles and rights under consideration impose significant duties upon national administrative authorities and national courts. Corollary to these obligations are the rights of individuals fined, which can be invoked not only before national courts but even at an earlier stage – before administrative authorities as demonstrated in Chapter 1. The national administrative authorities (NAAs) are under an obligation to apply EU law in all proceedings falling within the scope of EU law. This includes a variety of situations: 1) when a member State relies on overriding requirements of the public interest when imposing restrictions on the internal market's freedoms; 2) when NAAs impose fines for infringements of EU regulations; 3) when NAAs impose fines for infringements of national legislation implementing directives or decisions; 4) when NAAs act outside the scope of EU law but national legislation refers to EU law.

The vast majority of European general principles and fundamental rights apply irrespective of the criminal character of the fine. However, there are certain exceptions to this rule. This is the case of the principle of *ne bis in idem*, which applies in specific proceedings. As the approach of the Court of Justice (CJ) to the criminal character of fines imposed by administrative authorities is far from coherent, Chapters 1 and 8 propose a test of the criminal character of a fine based on the concept of administrative surplus. The concept of the criminal character of a fine imposed by an administrative authority is also important for the limits on the principle of consistent interpretation. This principle is the main tool for securing the effectiveness of EU law. It binds the national administrative authorities issuing fines. As EU law usually specifies that fines have to be "effective, proportionate and dissuasive", these vague criteria set a standard of interpretation for sanctions established in national law for a national authority. However, how far can an authority proceed with an extensive interpretation of national provisions concerning duties and responsibilities sanctioned by fines, if under the fixed jurisprudence of the CJ, consistent interpretation cannot lead to the establishment or aggravation of criminal liability? It is worth noting that until now the CJ has not yet expressed an explicit

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stance on the limits of consistent interpretation in national fining proceedings. On one hand, the case law of the CJ refers to the principle of legal certainty as demanding the restrictive interpretation of national law. On the other, the CJ permits the use of provisions formulated in a vague and general manner, granting the enforcing authorities a wide margin of interpretation. Therefore, Chapter 2 argued that the *Kolpinghuis Nijmegen* formula could be relativised. Otherwise, any result of consistent interpretation of, e.g. the concept of unfair commercial practices outside of the listed practices, should be considered as imposing or aggravating criminal liability if breach of the prohibition is sanctioned by fines determined in a similar manner to the fines imposed for infringements of EU competition rules. Therefore, the *Kolpinghuis-Nijmegen* formula in fining proceedings should be interpreted so as not to apply to situations when the individual subjected to a fine could have reasonably foreseen when committing an offence/infringement the interpretation adopted by the court. In this spirit it was also advocated in Chapter 12 that while European and national administrative authorities are entitled to prohibit novel anticompetitive practices, they should refrain from imposing fines in such instances.

Failure to observe the general principles of EU law or fundamental rights enshrined in the Charter results in national legislation being incompatible with EU law. Decisions issued by NAAs on the basis of such legislation also lead to the administrative decision being partially or totally incompatible with EU law. As a result, such a decision should be recognised as infringing EU law. To avoid this incompatibility, the respect of the principle of primacy is of utmost importance, both by the NAAs and by national courts. This may call for the disapplication of national provisions only in part if their incompatibility with EU law is limited. The use of the principle of primacy requires the presence of a directly effective norm of EU law. While general principles of law and fundamental rights in the Charter applicable to fining proceedings fulfil the conditions of direct effect, the CJ is very reluctant to confirm expressly their direct effect. So far it has done so in respect of Articles 20, 47 and 50 Charter of Fundamental Rights of the European Union (CFR) and the principle of non-discrimination. The CJ prefers to apply the principles and rights under consideration together with other – directly effective – provisions of the Treaty or secondary law or even to grant direct effect to vaguely formulated provisions of EU secondary law that merely reiterate the content of a general principle.

The recourse by national administrative authorities or courts to the principle of primacy makes it redundant for individuals to utilise other remedies developed in EU law, such as the reopening of proceedings under the *Kühne & Heitz* or *i-21 Germany* formulas. However, one can speak of the emergence of a variation of the remedy to reopen proceedings in the event of a particularly serious violation of fundamental rights. Further limits on the principle of *res judicata* and legal certainty when it comes to the binding force of final fining decisions result when there is a violation of the essence of the right to an effective remedy before a court as demonstrated in Chapters 3 and 11.

Not all general principles of EU law and fundamental rights grant individuals with an equally effective protection as the conditions for a successful application of certain general principles have been set at a relatively high threshold. Chapters 4 and 5 demonstrated that principles of legal certainty and its corollary – the principle of protection of legitimate expectations – promise individuals protection against arbitrary enforcement and promote clarity, predictability and transparency of legal provisions and the policy of their application. Yet in practice, the claims based on both of these principles, raised either in direct challenges or through preliminary references, have rarely been accepted. So it seems that the biggest chances of success have only those claims that are based on *lex mitior* in the case of the principle of legal certainty or that concern the departure from fining guidelines issued by national administrative authorities. It is equally difficult to challenge successfully a fining decision on the basis of a breach of the principle of equality as demonstrated in Chapter 6. While it is easy to establish a breach of the principle of non-discrimination, both in respect of the wording of national legislation and its use in practice (in the case of indirect discrimination), the principle of equality requires a significantly more complex analysis of various elements and interests. It does not automatically award a right to be fined with the same or a similar fine as another entity in a similar case. Apart from that, the differentiated treatment can be easily justified by the NAA imposing a fine.

On the other hand, there are general principles of EU law and fundamental rights that offer substantial protection to individuals fined for infringements of EU law or national implementing legislation. The principle of proportionality serves as the best example, given its broad coverage and extensive evaluation of various aspects not only of national fining legislation but also of the fining decision itself. This principle tests the consistency of national legislation, its adequacy to solve specific problems by means of fines and the gravity of response taking the form of a financial sanction. Proportionality may even be used to question compatibility with EU law of the very obligation imposed by national law and sanctioned by a fine. That is the case of national provisions falling within the scope of internal market rules. However, the test of proportionality of fines is applied with varying intensity. It is applied much less strictly towards sanctions provided for directly in an act of EU law. The principle of proportionality also shows an interesting feature: while generally being a principle of substantive law, its respect requires national courts to be empowered to adjust the fine to the requirement of necessity. This may call for an alteration in the legal qualification of the fined infringement and hence this general principle of EU law makes also an impact on the institutional and procedural rules of the Member States.

General principles of EU law and fundamental rights undergo a constant process of development. The principle of ne bis in idem provides one of the best examples, with several novel and thus unresolved issues, despite being one of the most debated principles. As demonstrated in Chapter 8, the protection awarded by Article 50 of the CFR has shifted over the years. It now protects individuals only from disproportionate fines resulting from duplication of fining proceedings within the same Member State or in different Member States. This change is motivated by the need to secure the effectiveness of EU law – the effectiveness which could be lowered in the case of imposing fines that are not dissuasive. This shift raises significant practical problems given the new requirements imposed by the CJ and concerning the requirement that "the sets of proceedings in question have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe". If fining proceedings before different authorities are conducted sequentially, even partially at a judicial stage, there is no room for coordination. It may also turn out that the authority first to impose a fine and close the administrative stage of fining proceedings would in the end violate Article 50 of the CFR if its fining decision becomes final later than a fining decision of another authority, acting in a different Member State yet punishing an individual for the same actions. In the case of proceedings conducted parallelly, it remains to be seen how to achieve the degree of coordination between proceedings demanded by the CJ, since the authorities may be unaware of double prosecution or EU law may lack any legal instruments allowing for coordination (particularly between authorities of different Member States responsible for enforcement of different – yet overlapping – rules). Here an adventurous use of Article 4(3) of the Treaty on European Union may be required as suggested in Chapter 8, coupled with extensive ex officio activities of the fining authority that became – irrespective of the source – aware of another pending or completed proceedings. This calls also for a cautious approach of national fining authorities to cases concerning undertakings operating at a European level, since fining proceedings in one Member State may also encompass the behaviour taking place in another Member State.

Usually those general principles of EU law and fundamental rights protected under the Charter that overlap do not award individuals additional protection. This is the case of legal certainty, proportionality, non-discrimination, equality and rights of defence. However, in some instances the overlap has a significant importance for individuals and for the duties of national administrative authorities. This is the case of the principle of good administration as demonstrated in Chapter 9. As a general principle of EU law it binds also national authorities, while as a fundamental right it binds only the institutions of the EU.

Some of the general principles and fundamental rights concern substantive aspects of national sanctions and fines in particular. For example, legal certainty and proportionality impact the interpretation of both the provisions concerning obligations sanctioned by fines and the fining provisions. On the other hand, the rights of defence and the principle of good administration concern procedural standards. However, they do not enter national systems following the test of national procedural autonomy but as independent and directly effective European fundamental rights as discussed in Chapter 10. Both rights analysed in Chapters 9 and 10 play a crucial procedural role in shaping the framework of national procedures applicable to fining proceedings by imposing specific obligations upon administrative authorities and by granting individuals subjective rights. It is also interesting to note that both have been shaped in the case-law concerning European fining proceedings. Thus the standard developed for the European Commission as a fining authority trickles down upon national fining authorities. This results in the alignment of national procedural rules by testing their compatibility with European procedural principles and fundamental rights. Both the principle of good administration and the rights of defence share in common limited protection in case of their non-observance – their breaches do not automatically invalidate a flawed decision. National courts are empowered to invalidate such decisions or revoke them for reasoning only if infringement of these rights made an impact on the outcome of the case.

The standards resulting from the general principles of EU law and the EU's fundamental rights generally act as a shield by blocking the application of incompatible national legislation. Article 47 of the CFR and the right to an effective remedy before a court stand out. They also work as a sword granting individuals the right to challenge any fining decision irrespective of national institutional and procedural autonomy. This right also demands that any court hearing such an appeal should have full jurisdiction to examine all aspects, both procedural and substantive, of the fining decision. Just as the principles of legal certainty, good administration and rights of defence, it is an umbrella principle. It encompasses various specific rights and remedies which are not limited to the judicial stage of fining proceedings. Several of these specific rights also bind administrative authorities, with the duty to reason the fining decision being the most important one. Since the right to an effective remedy is essential for the enforcement of other general principles and fundamental rights analysed in this book, its infringement calls for the application of extraordinary remedies, including the emerging remedy of non-execution of final fining decisions in case of violation of the essence of this right – the right to a remedy before an independent and impartial court established by law.

The study has shown the constantly evolving nature of the general principles and fundamental rights applicable to national fining proceedings. The number of preliminary references concerning the subject matter of this book demonstrates that this topic raises significant problems in the national practice of enforcing EU law. The jurisprudence of the CJ developed so far in this area constitutes a significant body of specific rules – based on general principles of EU law – that gradually but steadily tend to form an extensive code regulating the interpretation and application of national procedural and substantive provisions in the course of fining proceedings. The common standard resulting from this jurisprudence, despite evolving constantly, is already there. Yet the examples derived from the Polish practice show a minimal awareness of the duty to respect all European general principles of EU law in the course of national fining proceedings.

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