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Administrative Punitive Power of the EU: Regulation No 2988/1995 on the Protection of the European Union's Financial Interests in Light of the Case Law of the ECJ and the ECtHR*

This article analyses the EU's administrative punitive power, focusing on Council Regulation No 2988/1995 as a "regulatory code" for protecting the Union's financial interests. It examines the distinction between remedial measures and punitive sanctions, emphasising the application of fundamental criminal law guarantees – specifically the principles of legality, culpability, proportionality, and ne bis in idem – in light of ECJ and ECtHR jurisprudence. The study concludes that EU administrative sanctions represent an efficient, subsidiary alternative to national criminal law, fostering a trend towards decriminalisation.

Potestà punitiva amministrativa dell'UE: il Regolamento n. 2988/1995 sulla tutela degli interessi finanziari dell'Unione europea alla luce della giurisprudenza della CGUE e della Corte EDU.

L'articolo analizza la potestà punitiva amministrativa dell'UE, concentrandosi sul Regolamento del Consiglio n. 2988/1995 quale "codice di regolamentazione" del potere sanzionatorio UE per la tutela degli interessi finanziari dell'Unione. Viene esaminata la distinzione tra misure ripristinatorie e sanzioni punitive, ponendo l'accento sull'applicazione delle garanzie penalistiche fondamentali – specificamente i principi di legalità, colpevolezza, proporzionalità e ne bis in idem – alla luce della giurisprudenza della CGUE e della Corte EDU. Lo studio conclude che le sanzioni amministrative europee costituiscono un'alternativa efficiente e sussidiaria al diritto penale nazionale, favorendo un processo di depenalizzazione.

1. *Introduction.* The EU legal system has a system of immediate protection of its financial interests, which consists of the power of the EU legislator to impose punitive administrative sanctions of a non-criminal nature.[1]

[1] JESCHEK, *Possibilities and limits of criminal law for the protection of the European Union*, in *Ind. pen.* 1998, 229; see BARATTI, *Contributo allo studio della sanzione amministrativa*, Milan 1984, 6 ff..; CERBO, *Le sanzioni amministrative punitive*, in *La "materia penale" tra diritto nazionale ed europeo*, edited by Donini-Foffani, Torino, 2018, 117 ff.; VITALE, *Evolution and current trends in EU administrative*

This form of protection is based on a supranational repressive system, consisting of financial penalties and *sui generis* penalties, which are non-pecuniary (disqualification measures) or, even if pecuniary, have a specific content.

The former (centralised sanctions) are provided for by EU legislation and applied by the EU authorities themselves.[2] In particular, pursuant to Articles 101 and 102 TFEU, the Commission has the power to impose financial penalties (fines and periodic penalty payments) on undertakings that have committed infringements of competition law covered by those provisions of primary law and transposed, without specific details, by secondary law sources.[3]

Although primarily in the field of competition, Council Regulation (EC) No 1/2003[4] (which repealed Regulation No 17/62[5]), while maintaining the central role of the EU bodies in the application of the penalties in question, provides for greater involvement of Member States in the application of EU competition rules in order to ensure, in accordance with the principles of subsidiarity and proportionality, a more effective application of those rules.[6]

Sui generis sanctions*,* on the other hand, although covered by certain EU regulations, must be applied by the competent authorities of the Member States, on the basis of the principles of their respective sanctioning systems (as established by Article 2(4) of Regulation (EC, Euratom) No 2988/95) (*decentralised sanctions*).[7]

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sanction proceedings, in *Riv. it. dir. pub. com.*, 2017, 151 ss.

[2] BERNARDI, *Politiche di armonizzazione e sistema sanzionatorio penale*, in *Atti del Convegno*, "*Spazio di libertà, sicurezza e giustizia*", Catania June 2005, edited by Rafaraci, Milano, 2006.

[3] MARTUFI, *La potestà punitiva nel diritto UE. Differenziazione dei modelli di tutela e modulazione delle garanzie penalistiche*, Torino 2024, 437.

[4] 16 December 2002 in OJ 2003, L1, 1; applicable from 1 May 2004 (Article 45).

[5] OJ 1962, No 13, 204. *Article 43 of Regulation 1/2003 provides:* Repeals. 1. Regulation 17 is repealed, with the exception of Article 8(3), which shall continue to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of this Regulation until their expiry.

[6] In particular, Article 5 establishes that the competition authorities of the Member States are empowered to apply Articles 81 and 82 of the Treaty in individual cases and may also impose penalties; Article 6 further confers on national courts the power to apply Articles 81 and 82 of the Treaty. Article 11 governs relations of "Cooperation between the Commission and the competition authorities of the Member States," while Article 15 governs "Cooperation with national courts."

[7] On this regulation, see MAUGERI, *Il regolamento n. 2988/95: un modello di disciplina del potere punitivo comunitario*, I parte – *La natura giuridica delle sanzioni comunitarie,* su *Riv. Trim. Dir. Pen. Ec.* 1999, III fasc., 527; II parte – *I principi*, su *Riv. Trim. Dir. Pen. Ec.* 1999, IV fasc., 928; LIGETI, *European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law,* in *Acta Juridica Hungarica* 2004, 199. About this model of sanctions TIEDEMANN, *Kautionsrecht der EWG – Ein verdecktes Strafrecht?*, in *NJW*, 1983, 2727 ff.; BARENTS, *The System of Deposits in the Common Agricultural Law: Efficiency vs. Proportionality*, in *Eur. L. Rev.*, 1985, 239 ff.; BRODOWSKI, *Supranationale europäische Verwaltungssanktionen: Entwicklungslinien, Dimensionen des Strafrechts,*

According to legal doctrine, the power of the EU institutions to introduce punitive sanctions should be based, for centralised sanctions, on Article 83 TEC (formerly Article 87 EEC), the only case in which it is expressly provided for,[8] and for decentralised sanctions on Article 229 TEC[9] of the same Treaty (previously Article 172), which, by attributing in general terms also a competence of substantive review to the Court of Justice for the sanctions provided for in the regulations adopted by the Council, confirms a power of sanction of the EU institutions additional to that provided for in Article 83 TEC.
It follows that the EU institutions may be recognised as having the power to impose sanctions in all cases where the legislation allows the Council to take «all necessary measures» or «any appropriate provision» in a certain sector or for the achievement of a certain objective; and indeed, according to some legal scholars, this EU power to impose sanctions should be recognised not only where a provision expressly authorises the Council to take the «necessary measures», but in all areas in which the EU institutions have regulatory powers, of which the power to impose sanctions is a «natural and necessary complement»[10], also in order to ensure, on the basis of a teleological interpretation of the Treaty, the effective achievement of the objectives underlying the EU's powers.[11] In its judgment in *Germany v Commission,* C 240/90,[12] the Court of Justice essentially accepted these arguments, establishing a general power of sanction for the EU authorities, which are entitled to introduce punitive ad-

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Legitimität, cit., 145.

[8] See KÄRNER, *Punitive Administrative Sanctions After the Treaty of Lisbon: Does Administrative Really Mean Administrative?*, in *European Criminal Law Review* 2021, 160 ff.; BERNARDI, *Il costo di sistema delle opzioni europee sulle sanzioni punitive*, in *Riv. it. dir. proc. pen.* 2018, 571 ff.

[9] Article 172: "Regulations adopted by the Council pursuant to the provisions of this Treaty may confer on the Court of Justice jurisdiction to hear and determine cases concerning the penalties provided for in those regulations."

[10] TESAURO, *La sanction des infractions au droit communautaire*, in *Riv. dir. eur.* 1992, 503–504; in this vein, VAN GERVEN-WILS, *La jurisprudence de la Cour de Justice et la protection des finances communautaires*, in *La protection juridique des intérêts financiers de la Communauté. Actes du Séminaire organisé par le Contrôle financier et le Service juridique de la Commission des Communautés européennes,* Luxembourg, 1990, 361; MELCHIOR, *Contribution à l'étude de la sanction des infractions aux règlements de l'la CEE* , in *Les frontières de la répression,* Bruxelles, 1972, 326; FORNASIER, *The punitive power of the European Communities and the protection of their financial interests,* in R.*M.C.* 1983, 404 – 405; HEITZER, *Punitive sanctions in European Community law,* Heidelberg, 1997, 141 ff.

[11] HEITZER, *cit.*, 144 – 145. This punitive power is also based on Article 100 – see STOFFERS, *Zusammenfassung der Podiumsdiskussion*, in *Die Bekämpfung des Subventionsbetrugs im EG-Bereich*, edited by Dannecker, Cologne, 1993, 209.

[12] See ECJ, 27 October 1992, *Germany v EEC Commission*, C 240/90, in *Riv. trim. dir. pen. econ.* 1993, 554 and in *Racc.* 1990, 554. See on this judgment MAUGERI, *Il regolamento n. 2988/95*, Parte I, cit., 549; PISANESCHI, *Le sanzioni amministrative comunitarie,* Padua, 1998, 20 ff.

ministrative sanctions by means of directly applicable regulations.[13]
This EU competence in the field of punitive administrative offences has, moreover, been recognised by the Court of Justice since the well-known *Greek Maize* judgment, Case 68/88,[14] in which, interpreting Article 5 of the EEC Treaty, it is stated that fidelity to the Treaties requires Member States to take all measures necessary to ensure the scope and effectiveness of EU law where an EU regulation does not contain any specific provision providing for a penalty in the event of infringement, thus implicitly recognising the EU's competence to impose penalties for infringements of its own law.[15]

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[13] Legitimacy that is considered extendable to EU sanctions in the strict sense. See GRASSO, *Recenti sviluppi in tema di sanzioni anmministrative comunitarie*, in *Riv. tr. dir. pen. ec.* 1993, 749; VOGEL, *Die Kompetenz der EG zur Einfuhrung supranationaler Sanktionen,* in *Die Bekämpfung des Subventonsbetrugs, cit.,* 170; *contra* seems to be the opinion of TIEDEMANN, *Anmerkung della sentenza Commissione c. Grecia, 21 September 1989*, in *NJW* 1993, 49; MEZZETTI, *La tutela penale degli interessi finanziari dell'Unione europea,* Padua, 1994, 225; LIGETI, *European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law,* in *Acta Juridica Hungarica* 2004, 207; see DE MOOR-VAN VUGT, *Administrative Sanctions of the EU*, in *Administrative Sanctions in the European Union*, edited by Jansen, Cambridge Anversa, 2013, 607 ss.; DUIJKERSLOOT-WIDDERSHOVEN, *Administrative law enforcement of EU law*, in *Research handbook on the enforcement of EU law*, edited by Scholten, Cheltenham, 2023, 38 ss. Finally, on the public law prerogatives underlying the EU's punitive power, see ECJ (Third Chamber), 26 September 2024, C-160/22 P and C-161/22 P, *European Commission v HB*.

[14] See KÄRNER, *Punitive Administrative Sanctions*, cit., 160 ff. on the ECJ case law; ID., *Interplay between European Union criminal law and administrative sanctions: Constituent elements of transposing punitive administrative sanctions into national law*, in *New Journ. Eur. Crim. L.* 2022, 43.

[15] See DE FRANCESCHI, *Le sanzioni nel diritto comunitario*, in *Dir. comun. e scambi intern.* 1990, 406. See ECJ, 21 September 1989, *Commission v Greece*, C-68/88, in *Racc.* 2965 ff.; in accordance with ECJ 2 February 1977, *Amsterdam Bulb,* C 50/75, in *Racc.* 137 ff.; ECJ, 27 February 1997, *Ebony Maritime v Prefect of Brindisi,* C-177/95, in *Racc.* 1111 and in *Riv. intern. dir. uomo* 1997, 809; ECJ, 8 June 1994, *EC Commission v United Kingdom,* C-383/92, in *ECR* 2479; on this point in doctrine, see TIEDEMANN, *EUGH: Strafrechtlicher Schutz der Finanzmittel der EG,* in *EuZW* 1990, 99; SÖLLNER, *Europarecht Völkerrecht Studien und Materialen Art. 5 EWG – Vertrag in der Rechtsprechung des Europäischen Gerichtshofes,* Munich 1985, 76; SPANNOWSKY, *Schutz der Finanzinteressen der EG zur Steigerung der Effizienz des Mitteleinsatzes,* in *JZ* 1992, 1160; BLECKMANN, *Die wertende Rechtsvergleichung bei der Entwicklung europäische Grundrechte*, in *Europarecht – Energierecht – Wirtschaftsrecht, Festschrift für Bodo Börner*, Köln – Berlin – Bonn – München 1992, 129 ss.; BERNARDI, *La difficile integrazione tra diritto comunitario e diritto penale: il caso della disciplina agroalimentare*, in *Ann. Un. Ferr.* 1996, vol. X, 118; ID., *"Europeizzazione" del diritto penale commerciale?,* in *Ann. Un. Ferr.* 1996, vol. X, 148 – 155 – 156; ID. *Les principes de droit international et leur contribution à l'harmonisation des systèmes punitifs nationaux*, in *Rev. dr. pen. et sc. crim.* 1994, 264; MENNES, *La fraude aux intérêts financiers de la Communauté*, in *Quelle Politique Penale pour l'Europe?*, edited by Delmas-Marty, Paris 1993, 138; FOURGOUX, *La fraude aux intérêts financiers de la Communaute: obligations des États membres et action de la Communauté*, in *Quelle Politique*, *cit.*, 143 ss.; CHITI, *Verso lo spazio giuridico europeo,* in *Quad. fond. Piaggio* 1997, n. 2, 83; HOFFMANN, *La Protection Des Interets Financiers Des Communautes Europeennes Dans La Jurisprudence De La Cour De Justice*, in *Riv. it. dir. pubbl. com.* 1998, 670 ss.; GRASSO, *L'armonizzazione e il coordinamento delle disposizioni sanzionatorie nazionali per la tutela degli interessi finanziari delle Comunità Europee*, in *Riv. it. dir.*

This punitive power should be the main instrument for protecting EU interests and the fundamental alternative to the use of criminal law with a view to decriminalisation.
EU law does not provide for a comprehensive regulation of centralised penalties, a gap that the case law of the Court of Justice has sought to fill with an integrative rather than a merely interpretative approach, drawing on the general principles common to the Member States which, as set out in Article 215 of the EC Treaty (later Article 288 TEC) and now Article 340 TEU, constitute one of the sources of EU law.[16]
The *sui generis* sanctions model was created, in particular, to protect the economic interests of the EU in the agriculture[17] and fisheries sectors, given the fundamental role that EU subsidies and aid play in ensuring the performance of these economic activities.[18]
The imposition of *sui generis* penalties, which are in addition to those provided for by national law, ensures a minimum level of repression of EU fraud,[19] even where the national authorities do not intervene.[20]
Furthermore, in order to respond to the need for harmonisation that has emerged in this area, due to the considerable differences between the repressive systems and the systems for determining penalties in the various countries[21], a general framework for such *sui generis* penalties was introduced by

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proc. pen. 1990, 841 ss.; ID., *L'incidenza del diritto comunitario sulla politica criminale degli Stati membri: nascita di una "politica criminale europea"?*, in *Ind. pen.* 1993, 87.

[16] See GRASSO, *La formazione di un diritto penale dell'Unione Europea*, in *Prospettive di un diritto penale europeo*, Milano Giuffrè 1998, 12.

[17] See GÖTZ, *Probleme des Verwaltungsrechtes auf dem Gebiet des gemeinsamen Agrarmarktes,* in *EuR* 1986, I, 29 ff.; MÖGELE, *Fehlerhafte Ausgaben im Rahmen der Gemeinsamen Agrarpolitik*, in *NJW* 1987, 1118.

[18] See SPANNOWSKY, *Schutz der Finanzinteressen der EG zur Steigerung der Effizienz des Mitteleinsatzes*, in *JZ* 1992, 1162; MÖGELE, *cit.,* 1118; GRASSO, *Comunità europee*, cit., 17 ff.

[19] On the concept of Community fraud, see, among others, DASSI, *Fondi strutturali, interventi finanziari e di sostegno*, in *Elementi di diritto comunitario*, edited by Draetta, Milano, 1995, 237; COGLIANDRO, *I controlli*, in *Trattato di diritto amministrativo europeo*, I, edited by Chiti-Greco, Milano, 1997, 260 ff.; SIEBER, *Eurofraud – Organised Fraud Against the European Communities,* in *Schweizerische Zeitschrift für Strafrecht*, 1996, 357 ff.

[20] Fraud against Community interests is often considered a victimless crime, which arouses little social disapproval, see MARTYN, *La frode comunitaria: un'analisi del fenomeno*, in *Rass. trib.* 1992, No 10, 71; on the use of administrative sanctions in relation to economic crime, see PALIERO, *La sanzione amministrativa come moderno strumento di lotta alla criminalità economica*, in *Riv. trim. dir. pen. ec.* 1993, 1021 ss.; DE FRANCESCO, *Le nuove pene interdittive previste dalla legge n. 689/1981: una svolta nella lotta alla criminalità economica?*, in *Arch. Pen.* 1984, 418 ss.

[21] TIEDEMANN, *Der Strafschutz der Finanzinteressen der Europäischen Gemeinschaft*, in *NJW* 1990, 2231; GRASSO, *La formazione*, cit., 12; MEZZETTI, *op. cit.*, 5 ff.; BERNARDI, *Europa senza frontiere e armonizzazione dei sistemi sanzionatori in materia di circolazione stradale*, in *Riv. it. dir. proc. pen.*

Council Regulation No 2988, adopted on 18 December 1995, on the protection of the EU's financial interests.[22]
It was inspired by proposals put forward in a study carried out by a group of European researchers, dedicated to the analysis of administrative penalty systems in the Member States of the EU.[23]
Regulation No 2988/1995 on the protection of the EU financial interests[24] was introduced as a code of the European Union's punitive power, also defined as the 'regulation code' of decentralised sanctioning powers[25], setting out the principles that delimit the direct punitive power of the European Union, of an administrative punitive nature, ranging from the principle of legality, to the principle of guilt, to the principle of proportionality and the principle of *ne bis in idem*.
The power to introduce such sanctions to protect the financial interests of the Union is now specifically regulated, first and foremost, in Article 325 TFEU, which, unlike Article 280 TEC, does not include the reservation clause that excluded any influence on national criminal law, and does not refer to minimum standards, such as Articles 82 and 83, but rather of dissuasive measures capable of ensuring effective protection of financial interests, and then specifies that the European Parliament and the Council shall adopt the necessary measures in the fields of prevention of and fight against fraud affecting the financial interests of the Union.
In this area, part of the doctrine therefore considers that it is not possible to activate the so-called emergency brake, the rules for which are «in no way referred to in the provision.»[26]
In this regard, it should first be noted that, according to some legal scholars, Article 325 TFEU (formerly Article 280), which confers on the EU authorities the power to introduce dissuasive and effective measures to protect the

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2005, 579 ff.

[22] OJ, L312/1, 23.12.95; MAUGERI, *Il regolamento n. 2988/95*, Parte II, *cit.,* 929 ff.; LIGETI, *op. cit.,* 199.

[23] *Study on administrative and criminal penalty systems in the Member States of the European Communities*, vol. I, *National reports*; *Summary report on administrative penalty systems in the Member States of the European Communities, ibid.*, vol. II. The research was funded by the Directorate-General for Financial Control of the Commission of the European Communities.

[24] OJ, L 312/1, 23.12.95; on this regulation, see MAUGERI, *Regolamento No. 2988/95*, cit., Parte I, 527 ff., Parte II, 928 ff.; LIGETI, *European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law,* in *Acta Juridica Hungarica* 2004, 199.

[25] Court of Justice, judgment of 1 July 2004, Gerken, C-295/02, § 56.

[26] SICURELLA, *Questioni di metodo nella costruzione di una teoria delle competenze dell'Unione europea in materia penale*, in AA.VV., *Studi in onore di Mario Romano*, Napoli, 2011, vol. IV, 2569 ff.

financial interests of the Union, would confer direct criminal jurisdiction on the European Union in matters relating to the protection of financial interests[27] or would confer such jurisdiction when read in conjunction with Article 86 TFEU (in particular, paragraph 2 refers to «offences defined by regulation»), which governs the establishment of the European Public Prosecutor's Office (at least in the sense that the Union would be competent to establish criminal offences by regulation, but not penalties).[28] This interpretation cannot be accepted because, beyond the questions of interpretation (the reference in Article 86(2, a to regulations defining offences affecting financial interests is rather ambiguous, in that the provision, with the expression "offences defined by the regulation," seems rather to refer merely to the offences identified and listed in the regulation establishing the European Public Prosecutor's Office, in order to determine its powers),[29] the consideration that such broad supranational jurisdiction cannot be established indirectly and implicitly, without a clear and unambiguous legal basis (and without related general principles and procedural provisions), is an insurmountable obstacle, given the fundamental political choice, including in terms of the waiver of national sovereignty, that it implies.

Furthermore, the regulation in question is adopted according to a special legislative procedure that requires unanimity in the Council, but in which the European Parliament must limit itself to approving the Council's decisions, without guaranteeing the substantive democracy required by the rule of law.[30]

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[27] MEYER, *Die Lissabon-Entscheidung des BVerfG und das Strafrecht*, in *NStZ* 2009, 658: *"eine Kompetenz zur Setzung unmittelbar wirksamer Strafnormen per Verordnung bei der Betrugsbekämpfung zum Schutz ihrer Finanzinteressengem Article 325 AEUV";* TIEDEMANN, *Gegenwart und Zukunft des Europäischen Strafrechts,* in *ZStW* 2004, 116, 945 – 955.

[28] «The European Public Prosecutor's Office shall be competent to detect, investigate and prosecute, where appropriate in liaison with Europol, the perpetrators of offences affecting the financial interests of the Union, as defined in the Regulation referred to in paragraph 1, and their accomplices.» In this regard, see SOTIS, *op. cit.*, 1164; in relation to Article III-274 of the Constitutional Treaty, BERNARDI, *"Riserva di legge" e fonti europee in materia penale*, in *Annali dell'Università di Ferrara, Scienze giuridiche, Nuova Serie*, vol. XX, 2006, 5; MANACORDA, *Los extrechos caminos de un derecho penal de la Unión europea. Problemas y perspectivas de una competencia penal "directa" en el Proyecto de Tratado constitucional*, in *Criminalia*, 2004, 208 ff.

[29] In this regard, see GRASSO, *La Costituzione per l'Europa e la formazione di un diritto penale dell'Unione europea*, in *Lezioni*, cit., 697; cf. SOTIS, *op. cit.*, 1162 ff., who draws attention to the ambiguity of the expression, as demonstrated by the fact that in the Spanish and French versions refer to financial interests as defined in the regulation governing the powers of the European Public Prosecutor's Office.

[30] GRASSO, *La Costituzione per l'Europa*, cit., 700 ff.; similar position SICURELLA, *Questioni di metodo*, cit., 27 – 28; BÖSE, *Strafen und sanktionen im Europäischen Gemeinschaftsrecht*, Köln, Berlin, Bonn, München, 1996, 293-296.

2. *The importance of the Regulation.* The Regulation expressly enshrines the fundamental principles of the Community legal system, already developed by Community case law, thus rising to the status of general law or a "regulatory code" for EU sanctions; in short, it represents a first example of the regulation of EU punitive power.

It was originally intended to apply only to *sui generis* sanctions,[31] but, since its enactment, there have been calls for its extension to *EU* sanctions in the strict sense,[32] in relation to which, in practice, it has served as a reference framework, especially as regards the fundamental principles that must govern the application of sanctions. As repeatedly stated by the Court of Justice, the Regulation in question lays down «general rules for controls and penalties to protect the Community's financial interests»[33]. Indeed, as recently reiterated, «it is appropriate to recall that, in accordance with Article 1 of Regulation No 2988/95 and as is apparent from the third recital of that regulation, Regulation No 2988/95 introduces «general rules [...] relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to [EU] law', in order to '[counter] acts detrimental to the [EU's] financial interests [...] in all areas»'[34].

In adopting that regulation, the legislature sought to lay down a series of general principles while requiring that all sector-specific regulations, such as Reg-

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[31] See GRASSO, *La formazione di un diritto penale dell'Unione*, in *Quaderni della Fondazione Piaggio* 2, 1997, 139

[32] TIEDEMANN, *Community Law,* cit., 221.

[33] ECJ, 13 March 2008, joined cases C-383/06 to C-385/06, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, in ECR, pt. I-1561, § 39; Court of First Instance, 6 May 2010, case T-388/07, *Comune di Napoli v European Commission*, § 43.

[34] ECJ, (Sixth Chamber), 6 February 2025, C-42/24, *Emporiki Serron AE – Emporias kai Diathesis Agrotikon Proionton v Ypourgos Anaptyxis kai Ependyseon, Ypourgos Agrotikis Anaptyxis kai Trofimon*, § 29; ECJ, Seventh Chamber, 10 April 2025, C-657/23, *M.K. v Ministerstvo zemědělství*, § 32; ECJ, (Third Chamber), 4 October 2024, C-721/22 P, 24 November 2022, *European Commission, PB, Council of the European Union*, § 51; ECJ, 2 March 2017, *Glencore Céréales France*, C-584/15, EU:C:2017:160, § 23 and the case-law cited.; 24 June 2004, *Handlbauer*, C-278/02, EU:C:2004:388, paragraph 31, and 22 December 2010, *Corman*, C-131/10, EU:C:2010:825, paragraph 36; ECJ (Third Chamber), 16 November 2023, C-196/22, *IB v Regione Lombardia, Provincia di Pavia*, § 43; ORDER OF THE COURT (Ninth Chamber), 28 June 2022, C-728/21, *OF v Instituto de Financiamento da Agricultura e Pescas IP (IFAP)*, § 16; ECJ (Fourth Chamber), 7 April 2022, C-447/20 and C-448/20, *Instituto de Financiamento da Agricultura e Pescas IP (IFAP) v LM (C-447/20), BD, Autoridade Tributária e Aduaneira (C-448/20), § 45.*

ulation No 2080/92, observe those principles.[35]
The Regulation thus performed a further harmonising function with regard to the administrative penalty systems of the Member States and even stimulated the adoption of this penalty model in States where it did not exist, promoting an interesting process of interaction between Community law and the law of the Member States.[36]
ECJ case law highlights the importance of the regulation in question, and attempts have been made to use it as an autonomous regulatory basis, allowing national authorities to adopt "measures" against irregularities and to apply sanctions on the basis of Articles 5 and 7 of Regulation No 2988/95, to persons not covered by a sectoral EU regulation;[37] «where a category of operators is not yet covered by EU sectoral rules such as Regulation No 3665/87 as regards refunds unduly received by exporters, Articles 5 and 7 of Regulation No 2988/95, in so far as they provide generally that an administrative penalty may be applied to operators other than the beneficiaries of export refunds, are directly applicable by virtue of the second paragraph of Article 288 TFEU»[38].
This solution is clearly not endorsed by the Court, but this attempt is emblematic of the role of general regulation of the Community's punitive power assumed by the Regulation in question, insofar as it seeks to derive not only the regulation of punitive power, but also the direct provision and applicability of sanctions to the subjects covered therein. The Court does not accept this interpretation and reiterates that the provisions in question «merely lay down general rules for supervision and penalties for the purpose of safeguarding the EU's financial interests»[39]; it being understood «that Articles 5 and 7 of Regulation No 2988/95 do not apply in such a way that an administrative penalty may be imposed on the basis of those provisions alone, since, if, in connection with the protection of the EU's financial interests, an administra-

[35] ECJ (Third Chamber), 16 November 2023, C-196/22, *IB v Regione Lombardia, Provincia di Pavia*, § 44; ECJ, 28 October 2010, *SGS Belgium and Others*, C-367/09, EU:C:2010:648, § 37; ECJ, 18 December 2014, *Somvao*, C-599/13, EU:C:2014:2462, § 33 and the case-law cited.
[36] BERNARDI, *I tre volti del "diritto penale comunitario"*, in *Riv. it. dir. pubbl. com.* 1999, 346–347; PISANESCHI, *Le sanzioni amministrative comunitarie*, Padua 1998, 163 and 109.
[37] ECJ, 28 October 2010, *Belgisch Interventie- en Restitutiebureau* v *SGS Belgium NV, Firme Derwa NV, Centraal Beheer Achmea NV*, C-367/09; ECJ, C-383/06 to C-385/06, *Vereniging Nationaal Overlegorgaan*, cit., § 39.
[38] ECJ, 28 October 2010, C-367/09, *Belgisch Interventieen Restitutiebureau v SGS Belgium NV, Firme Derwa NV, Centraal Beheer Achmea NV*, § 31.
[39] ECJ, 28 October 2010, *SGS Belgium and Others*, C-367/09, EU:C:2010:648EU:C:2010:648, § 36; Opinion of Advocate General Tanchev, 23 November 2017, C-541/16, *European Commission v Kingdom of Denmark*, § 44; ECJ (Third Chamber), 4 October 2024, C-721/22 P, *European Commission, PB v Council of the European Union*, § 55.

tive penalty is to be applied to a category of persons, a necessary precondition is that, prior to commission of the irregularity in question, either the EU legislature has adopted sectoral rules laying down such a penalty and the conditions for its application to that category of persons or, where such rules have not yet been adopted at EU level, the law of the Member State where the irregularity was committed has provided for the imposition of an administrative penalty on that category of persons.»[40]

The most recent legal doctrine observes that Regulation No 2988/1995 has not been able to establish a binding framework for subsequent EU legislative measures, as demonstrated by the fact that there are many examples of legislative texts on penalties (applicable to legal and natural persons), which not only exceed the list of types of penalties enumerated in Regulation No 2988, but, above all, fall outside the scope of the guarantees originally provided for in the aforementioned general rules on decentralised penalties.[41]

This is due to the decentralisation of supranational punitive power in favour of administrative bodies operating at domestic level; a decentralisation in favour of States, accompanied by the concentration of regulatory, sanctioning and supervisory powers in the hands of individual administrative authorities. In particular, sanctioning powers have been concentrated in the hands of independent administrative authorities of individual States, characterised by neutrality and technicality, removed from the political agenda of national decision-makers, and firmly positioned within the multi-level enforcement system outlined by EU law; it suffice to think, in this respect, of the financial sector and market abuse.[42]

3. *The type of sanctions and their nature.* In the European legal order, determining the scope of the concept of "criminal matter" is important in order to apply the fundamental principles and safeguards that must be respected by the European authorities in the exercise of their punitive power, but also by the States Parties in the application of EU law and in all cases where there is a connecting element requiring compliance with a minimum threshold of protection of certain rights. Such safeguards must not coincide with the lowest common denominator, but with the standard of the prevailing legal order and

[40] ECJ, 28 October 2010, C-367/09, *Belgisch Interventie*, cit.; Opinion of Advocate General Melchior Wathelet, 25 September 2018, C-349/17, *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus, Majandusja Kommunikatsiooniministeerium.*

[41] MARTUFI, *op. cit.*, 462 ff.

[42] *Idem.*

the general trend.
The European Court of Justice (also referred to as ECJ) and the Advocate General adopt the Engel criteria in their opinions in order to establish the punitive nature of a sanction and the extension of the relative safeguards.[43]
In the context of *sui generis* sanctions, Regulation No 2988 distinguishes between the measures provided for in Article 4, which pursue mere *restitutio in integrum* (sanctions or "remedial or reinstatement" measures),[44] and the administrative sanctions provided for in Article 5, which, by contrast, in addition to compensation, tend to impose a further financial sacrifice, that is, "punitive" sanctions.[45] The language used shows that the EU legislator does not

[43] Opinion of Advocate General *Cruz Villalón*, 12 June 2012, case C-617/10, § 72; Advocate General Campos *Sánchez-Bordona*, 12 January 2017, *Massimo Orsi*, Cases C-217/15 and C-350/, § 30/15, ff.; Advocate General *Bot*, 28 January 2016, C-81/15. See WEYEMBERGH-JONCHERAY, *Punitive administrative sanctions and procedural safeguards a blurred picture that needs to be addressed*, in *New Journal of European Criminal Law*, 2016, 190 ff.

[44] The "measures" listed in Article 4 include the withdrawal of an unduly obtained advantage, which entails the obligation to pay or reimburse the amounts due or unduly received (plus, where applicable, interest, which may be determined on a flat-rate basis), or «the total or partial loss of the security lodged in support of the application for an advantage granted or at the time of receipt of an advance.»

[45] Article 5 provides that intentional or negligent irregularities give rise to the application of the following administrative penalties:

(a) the payment of an administrative fine;
(b) the payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum is determined in accordance with a percentage to be set in the specific rules, and may not exceed the level strictly necessary to constitute a deterrent;
(c) the total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage (e.g. the penalty provided for in Article 9(2) of Regulation No 3887/92, namely total repayment of the amount of Community aid initially granted, plus interest; see ECJ, 4 May 2006, *Reinhold Haug and Land Baden-Württemberg*, C-286/05, § 22);
(d) the exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity (see ECJ, Emsland-Stärke GmbH, op. cit., § 49);
(e) the temporary withdrawal of the approval or recognition necessary for participation in a Community aid scheme;
(f) the loss of a security or deposit provided for the purpose of complying with the conditions laid down by the rules, or the replenishment of the amount of a security wrongly released;
(g) other penalties of a purely economic type, equivalent in nature and scope, provided for in the sectoral rules adopted by the Council in the light of the specific requirements of the sectors concerned and in compliance with the implementing powers conferred on the Commission by the Council.

See MAUGERI, *Il regolamento n. 2988/95*, Parte I, op. cit., p. 527 ff., who highlights some ambiguity in the distinction between compensatory measures and punitive sanctions. For an analysis of the types of Community sanctions, see MEZZETTI, *op. cit.*, p. 219 ff. See also ECJ, 21 June 2005, *Azienda Agricola Balconi Andrea (formerly Guido) and Others*, op. cit.

consider remedial measures to be penalties,[46] as specified by the case law of the Court of Justice: «As is clear from Article 4(1) of Regulation No 2988/95, those administrative measures may consist in the withdrawal of the wrongly obtained advantage by the obligation to repay the amounts wrongly paid without, however, constituting a penalty»[47].

In the *Bacău* case,[48] the ECJ specified that the obligation to return an advantage improperly received by means of an irregularity is not a penalty, but simply the consequence of a finding that the conditions required to obtain the advantage derived from EU rules have not been observed, with the result that advantage becomes unduly received.[49]

Consequently, «where the irregularities found result in the storage contract not being regarded as having been validly concluded for the purposes of obtaining the storage aid at issue, the national authorises are required to apply an administrative measure, within the meaning of the first indent of Article 4(1) of Regulation No 2988/95, which requires repayment of the aid unduly received»[50].

The Court has thus already accepted that an administrative measure consisting in recovering from an operator the advantage from which it had wrongly benefited may be adopted solely on the basis of Article 4 of Regulation No 2988/95[51] and that «according to Article 4(1) of Regulation No 2988/95, as a general rule, any 'irregularity' within the meaning of Article 1(2) of that regulation is to involve withdrawal of the wrongly obtained advantage by an obliga-

[46] See Court of First Instance, 12 October 1999, *Conserve Italia Soc. Coop. arl ex Massalombarda Colombani SpA*, T-216/96; HEITZER, *cit.*, 6 ff. and 127.

[47] ECJ, Seventh Chamber, 10 April 2025, C-657/23, *M.K. v Ministerstvo zemědělství*, § 33; ECJ (Eighth Chamber), 5 December 2024, Case C-506/23, § 36; ECJ, 7 April 2022, *IFAP*, C-447/20 and C-448/20, EU:C:2022:265, § 46; ECJ, 17 September 2014, *Cruz & Companhia*, C-341/13, EU:C:2014:2230, § 45.

[48] ECJ, 26 May 2016, *Județul Neamț and Județul Bacău*, joined Cases C-260/14 and C-261/14, § 50.

[49] Idem; ECJ (Fourth Chamber), 7 April 2022, C-447/20 and C-448/20, *Instituto de Financiamento da Agricultura e Pescas IP (IFAP) v LM* (C-447/20), BD, *Autoridade Tributária e Aduaneira* (C-448/20), § 82. See, to that effect, judgments of 4 June 2009 in *Pometon*, C-158/08, § 28; 17 September 2014, *Cruz & Companhia*, C-341/13, § 45 and the case-law cited, and 18 December 2014, *Somvao*, C-599/13, § 36; Opinion of Advocate General Sharpston, 5 February 2015, Case C-607/13, *Ministero dell'Economia e delle Finanze Agenzia delle Dogane, European Commission v Cimmino and Others*, § 112; ECJ, 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, § 56; ECJ, 4 June 2009, *Pometon*, C-158/08, EU:C:2009:349, § 28; ECJ, 13 December 2012, *FranceAgriMer*, C-670/11, EU:C:2012:807, § 65; ECJ, 29 February 2024, *Eesti Vabariik (Põllumajanduse Registrite ja Informatsiooni Amet)*, C-437/22, EU:C:2024:176, § 57.

[50] ECJ, 13 December 2012, *FranceAgriMer*, C-670/11, EU:C:2012:807, § 67

[51] ECJ (Third Chamber), 4 October 2024, C-721/22 P, European Commission, PB, Council of the European Union, § 48.

tion to repay the amounts wrongly received»[52].

This also applies to a legal person[53] . «It is true that the Court, in its judgment of 28 October 2010, *SGS Belgium and Others* (C-367/09, EU:C:2010:648), ruled out any direct effect for Regulation No 2988/95 as regards the administrative penalties provided for in Article 5 thereof, having regard to the wording of that provision and that of Article 7 of that regulation. ... However, the obligation to repay the amount of aid wrongly received does not constitute an "administrative penalty" within the meaning of Article 5 of Regulation No 2988/95, but rather an 'administrative measure' within the meaning of Article 4 of that regulation. That obligation is merely the consequence of the finding that the conditions required to obtain the advantage derived from EU law have not been complied with, which renders the aid undue.»[54]

The EU legal order also recognises the traditional pecuniary sanctions imposed by the EU authorities and envisaged in many regulations adopted by the Council in the area of competition on the basis of Article 103 TFEU (formerly 83 TEC).[55] The jurisprudence of the Court of Justice and the prevailing doctrine affirm their non-criminal nature in the strict sense.[56] There are numerous arguments that support this interpretation: EU regulations explicitly provide for the non-criminal nature of the decisions to impose such sanctions; the fines are imposed by the EU Commission and not by a court; the inconvertibility into imprisonment in case of non-payment; their failure to express social or ethical disapproval and the fact that they do not apply only to natural persons, contrary to the principle, still in force in criminal matters in some European countries, *societas delinquere non potest*[57].

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[52] ECJ (Third Chamber), 16 November 2023, C-196/22, IB v Regione Lombardia, Provincia di Pavia, § 47.

[53] Opinion of Advocate General Pitruzzella, 26 October 2023, C-437/22, R.M., E.M. other party, § 62.

[54] ECJ (First Chamber), 29 February 2024, C-437/22, *R.M., E.M., Eesti Vabariik (Põllumajanduse Registrite ja Informatsiooni Amet)*, § 33 – 34. The Court nevertheless held, in its judgment of 18 December 2014 in *Somvao* (C-599/13, EU:C:2014:2462), that, since Regulation No 2988/95 merely lays down general rules for supervision and penalties aimed at safeguarding the European Union's financial interests, the recovery of unduly paid aid must occur on the basis of other provisions, namely, where appropriate, on the basis of sector-specific provisions.

[55] SIEBER, *European Unification and European Criminal Law*, *Riv. trim. dir. pen. ec.* 1991, 974 – 975; OPPERMANN, *Europarecht*, Munich 1991, 222; RINALDI, *Council Regulation No 1/2003: an initial examination of the main new features and open questions of the reform on the application of Community competition rules*, in *Dir. del commercio intern.* 2003, 143.

[56] SGUBBI, *Diritto penale comunitario*, in *Dig. disc. pen.* IV, Turin 1990, 95; L. ARNAUDO, *Le sanzioni della disciplina della concorrenza: natura, limiti e prospettive di riforma*, in *Riv. it. dir. pubbl. com.* 1998, 617.

[57] TIEDEMANN, *Das Kautionsrecht der EWG – einverdecktes Strafrecht?* (*The EEC's right* to bail – hidden criminal law?), *NJW* 1983, 2727; *contra* HAGUENAU, *Sanctions pénales destinées à assurer le*

Furthermore, Article 299 (previously Article 256 TEC) establishes that the acts of the Council and the Commission, which impose a pecuniary obligation on persons other than States, shall be enforceable; and the enforcement shall be governed by the rules of civil procedure in force in the State where the sanction is carried out. This confirms the non-criminal nature of the sanctions in question, because the execution of penalties would otherwise not be possible in accordance with the rules of the civil procedure code.[58]

The ECJ has, nevertheless, emphasised that these sanctions «are meant to suppress illegal activities and to prevent any recurrence», and that «they have repressive and deterrent purposes, going beyond the mere reimbursement of amounts unduly paid»"[59]. Furthermore, they can be considered administrative punitive sanctions and included in the broad concept of "criminal matter" under the European Convention of Human Rights (hereinafter also ECHR).[60] Scholars stress the undoubtedly repressive effectiveness of financial penalties imposed by the Commission in very substantial amounts.[61]

Even if, as observed by Advocate Jacobs, in the absence of social disapproval (stigma), it is not possible to consider these sanctions criminal in the strict sense: insofar as the sanction in question is primarily intended to have a deterrent effect and does not give expression to social or ethical disapproval, it cannot be considered to be penal in nature.[62]

Advocate General Sharpston's opinion in case *KME Germany AG*[63], is very interesting in this regard. First, the Advocate, quoting the three Engel criteria, stresses that the formal classification in the legal system concerned is "no more than a starting point," and in relation to the second and third criteria (the nature of the offence and the degree of severity of the penalty), he exam-

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respect du droit communautaire, in *Rev. du marché commun et de l'Union européenne* 1993, 352 ff.

[58] GRASSO, *Comunità europee e diritto penale*, Milan 1989, 48 ff.; ID., *Nuove prospettive in tema di sanzioni amministrative comunitarie*, *Riv. dir. publ. com.* 1994, 863.

[59] ECJ, 27 October 1992, *Germany v. Commission*, *cit.*, 554; ECJ, 15 July 1970, *ActChemiefarma,* C-41/69, ECR 1970, 703; H. HAMANN, *Das Unternehmen als Täter im europäischen Wettbewerbsrecht*, Pfaffenweiler 1992, 182.; see GRASSO, *Recenti sviluppi,* cit., 742.

[60] TIEDEMANN, *Reform des Sanktionwesen auf dem Gebiete des Agrarmarktes der Europäischen Wirtschaftsgemeinschafts*, *Festschrift für G. Pfeiffer*, 1988, 114 – 115; GRASSO, *Comunità europee,* cit., 54 – 55; ID., *Nuove prospettive,* cit., 865; SGUBBI, *op. cit.,* 96 – 97; HEITZER, *op. cit.*, 21.

[61] See JESCHECK, *Possibilities and limits of criminal law for the protection of the European Union,* in *Ind. Pen.* 1998, 232; K. LIGETI, *European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law,* in *Acta Juridica Hungarica* 2004, 206 ff.

[62] In the case *Germany v. Commission*, 27 October 1992, C 240/90; the same Advocate Stix-Hackl, 27 November 2001, *Käserei Champignon Hofmeister GmbH & Co. KG v Hauptzollamt Hamburg – Jonas*, C-210/00.

[63] C-272/09 P.

ines, in accordance with the ECHR, whether the penalty is imposed under a general rule addressed to all citizens rather than to a group possessing special status and whether it is intended essentially as a punishment to deter re-offending rather than as pecuniary compensation for damage.[64]
In the light of those criteria, he concludes that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC falls under the "criminal head" of Article 6 ECHR as progressively defined by the European Court of Human Rights (also referred to as ECtHR). The prohibition and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application. The offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma; a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter, with no element of compensation for damage.
This opinion is particularly interesting because the Advocate affirms that if the fining procedure in the present case falls within the criminal sphere for the purposes of the ECHR (and the European Charter), it differs from the hard core of criminal law. Consequently, the criminal-head guarantees will not necessarily apply with their full stringency. This implies, in particular, that it may be compatible with Article 6(1) ECHR for criminal penalties to be imposed, at first instance, not by an "independent and impartial tribunal established by law" but by *an administrative or non-judicial body* which does not itself comply with the requirements of that provision, provided that the decision of that body is subject to subsequent control by a judicial body that has full jurisdiction and does comply with those requirements. This is affirmed by the ECHR in the *Menarini* case;[65] and moreover the available forms of appeal make it possible to remedy any deficiencies in the proceedings at first instance.
That Court has described "full jurisdiction" in that sense as including «the power to quash in all respects, on questions of fact and law, the decision of the body below»[66]. In the Advocate's opinion, the "unlimited jurisdiction" conferred upon the General Court by Article 229 EC and Article 17 of Regu-

[64] § 63.
[65] See § 6.1.
[66] Advocate General Bot, 21 June 2012, Case C-89/11 *PE.ON Energie AG v European Commission*, §§ 63 ff.

lation No 17 meets those requirements as regards appeals against the amount of the fine imposed, even if it is, as the Commission submits, a different concept from the "full jurisdiction" criterion of the European Court of Human Rights. It must be taken to cover also appeals against, for example, the actual finding of an infringement; unlimited jurisdiction to cancel, reduce or increase the amount, with no restriction as to the type of grounds (of fact or law) on which it can be exercised, must necessarily be subject to the guarantee required by Article 6 of the ECHR.[67]

Furthermore, the Engel criteria have been used by Advocate General Bot[68] in the *ThyssenKrupp Nirosta GmbH v European Commission* case. In the Advocate's opinion, the fines referred to in Article 23 of Regulation No 1/2003 are comparable in nature and size to criminal penalties, and the Commission's role, given its investigative, examination and decision-making functions, can be assimilated to that of investigating authorities in criminal proceedings against undertakings. «In my view, the procedure is therefore covered by "criminal" within the meaning of Article 6(1) of the European Convention for the protection of human rights and fundamental freedoms and must therefore be subject to the guarantees provided for by the criminal justice component of that provision» [69].

The Advocate emphasises that, in consideration of the aim of competition law (namely to protect economic public policy), the nature of the fines (both preventive and punitive in effect, with no element of compensation for damage) and their size (financial penalty of a high amount), such proceedings must, according to the European Court of Human Rights, be subject to the guarantees provided for in Article 6 ECHR. Noting the special nature of litigation in competition cases, the Court applies elementary principles of criminal law and the fundamental principles enshrined in Article 6 ECHR. Thus, in *Commission* v *Anic Partecipazioni*,[70] the Court recognised the applicability of the principle of personal liability to the competition rules. Then, in *Hüls* v *Commission*,[71] the Court referred to the principle of the presumption of innocence enshrined in Article 6(2) ECHR. In that case, the Court held that, given the nature of the infringements in question and the nature and severity

[67] In the same vein, ECJ, 18 July 2013, *Schindler Holding Ltd and others*, C-501/11 P, § 30 f.

[68] Advocate General Bot, 26 October 2010, Case C-352/09 P, *ThyssenKrupp Nirosta GmbH v European Commission.*

[69] § 49.

[70] Court (Sixth Chamber), 8 July 1999, Commission of the European Communities v Anic Partecipazioni SpA, C-49/92 P.

[71] ECJ, *Hüls AG v Commission of the European Communities*, C-199/92 P.

of the ensuing penalties, the principle of the presumption of innocence applies to procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.
Moreover, the Advocate highlights that particular attention should be paid to observance of the fundamental safeguards in Articles 47 to 49 of the Charter of Fundamental Rights of the European Union and to Article 6 ECHR. This approach, which allows the safeguards of criminal matters to be applied to EU punitive sanctions, is consistent with the principle of the rule of law, which seeks to limit any punitive power.
Returning to the second type of EU sanctions, which have a *sui generis* content, it is difficult to classify them within traditional types of sanctions, such as "total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only part of that advantage," "exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity," and so on. These penalties are considered by the Commission's Legal Service to be "administrative sanctions," a definition shared by the legal doctrine and by Advocate Stix-Hackl in the *Käserei Champignon* case.[72]
In relation to these kinds of EU sanctions, the criteria elaborated by the ECtHR have also been adopted by the ECJ in case C-489/10, *Łukasz Marcin Bonda*,[73] in order to establish their nature.[74] The ECJ specifically evaluated the nature of the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004; the Court affirms that the administrative nature of this sanction is not called into question by an examination of the case law of the European Court of Human Rights on the concept of "criminal proceedings."
On the basis of the first criterion, it is affirmed that the measures examined are not regarded as criminal in nature by European Union law, which must in the present case be equated with "national law" within the meaning of the case law of the European Court of Human Rights.
As regards the second criterion, in the opinion of the Court, it must be ascer-

[72] Advocate Christine Stix-Hackl, 27 November 2001, *Käserei Champignon Hofmeister GmbH & Co. KG v Hauptzollamt Hamburg – Jonas*, C-210/00, § 37 ff.
[73] *ECJ (Grand Chamber), 5 June 2012, C-489/10, Łukasz Marcin Bonda.*
[74] Idem; see KÄRNER, *Interplay between European Union criminal law and administrative sanctions*, cit., 68 who affirm that: «EU law does not provide for a coherent set of constituent elements that characterise an administrative sanction and allow for its distinction from criminal sanctions. The legislation uses the term administrative to refer both to the non-criminal nature of the sanctions and the central role of an administrative authority in imposing the sanctions.»

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

The Court highlights that the reduction of the amount of aid that may be paid to the farmer for the years following that in which an irregularity has been found is subject to the submission of an application in respect of those years; thus if the farmer makes no application for the following years, the penalty which may be imposed on him under Article 138(1) of Regulation No 1973/2004 becomes ineffective. That is also the case if the farmer no longer satisfies the conditions for the grant of the aid. Finally, the penalty also becomes partly ineffective where the amount of aid the farmer can claim in respect of the following years is lower than the amount of aid to be withheld pursuant to the measure reducing the aid wrongly paid. It follows that the second criterion mentioned in paragraph 37 of that judgement does not suffice to make the measures provided for in Article 138(1) of Regulation No 1973/2004 criminal in nature.[75]

Those penalties cannot be equated to criminal penalties on the basis of the third criterion (§ 44), in the opinion of the Court, because the sole effect of the penalties provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 is to deprive the farmer in question of the prospect of obtaining aid (§ 43).

The approach of this judgment is correct, but rather *formalistic*, because while recognising that it is not a criminal sanction in the strict sense, the ECJ also denies the possibility of including the examined administrative sanctions in the broad concept of "criminal-related matter," drawn up by the European Court, which also covers punitive administrative sanctions or even disciplinary sanctions if they have a punitive content, pursuing general and specific deterrence purposes.

The sanction entails the deprivation of "aid" (following an application) and, therefore, the deprivation of something which is not a legal right or a recipient's interest, as emphasised by the ECJ in the case examined. However, it

[75] Ibidem, §§ 41–42.

must be recalled that in agriculture and fisheries, this kind of aid is *vitally important for the survival of many economic activities* that base their own existence and development on these resources. This is precisely why Regulation No 2988/95 was drawn up to regulate, firstly, the EU's punitive powers in the field of agriculture and fisheries (although this regulation has now assumed a general value).

Article 5 of Regulation No 2988/95 requires the imposition of sanctions that are not merely reparative in nature (governed by Article 4) but, like the one involved in this case, are punitive in nature when they deny the possibility of obtaining economic aid (over and above the imposition of any increases, etc.).

In conclusion, going beyond appearances, it would be better to apply the safeguards of criminal matters to these *sui generis sanctions*.

Notwithstanding that, as reiterated in the well-known *Jussila* case concerning the applicability of the right to a public hearing in proceedings for the imposition of tax penalties, the ECtHR has chosen to affirm a clear dichotomy between offences falling within the core of criminal law and those falling within a more peripheral position, foreshadowing a partial attenuation of criminal protections for minor offences,[76] which could include those to which sui generis sanctions apply.

This approach is also accepted by the case law of the Court of Justice, as emerges from the words of Advocate General Colomer, who states that the fundamental principles of the European material constitution, developed by EU case law and recognised in the Charter, apply to all criminal matters, in the autonomous sense recognised by the European Court of Human Rights, i.e. both in relation to criminal law in the strict sense and in relation to punitive administrative law. «Although administrative penalties are not as severe as penalties in criminal law, the same general principles are applied in both systems. In my opinion in *Commission* v *Council*, I argued that the parallel between criminal and administrative penalties may also be found in the case law of the Court. The rigour with which the principles are applied varies, but it is clear that principles such as the presumption of innocence, the *ne bis in idem* rule, lawfulness and culpability are legislative constructs which are applicable to both criminal law and the penalties implemented by the administrative authorities»[77].

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[76] ECtHR, 23 November 2006, Jussila v. Finland, No 73053/01.

[77] Opinion of Advocate General Ruiz-Jarabo Colomer, 24 January 2008, C-55/07 and C-56/07, *Othmar Michaeler Subito srl and others*, § 56; Id., 26 May 2005, *Commission of the European Communities v Council of the European Union*, C-176/03, § 47; Id., 28 September 1999, C-387/97, *Commission of*

As regards the first group of cases, which fall within the core of criminal law, substantive and procedural guarantees must be applied in all their rigour, as no modulation of the level of protection is possible. The second group of offences, belonging to the "periphery" of criminal law, instead calls for a more attenuated safeguard in terms of procedural guarantees and (albeit with some ambiguity) also in terms of substantive guarantees. In identifying a dividing line between the different segments of criminal law, the *Jussila* ruling of the ECtHR emphasises, first and foremost, the consequences of the offence, depending on whether the applicable penalty regime may result in consequences that are more or less likely to stigmatise the perpetrator of the offence.

4. *The concept of irregularity.* Article 1 of Regulation No 2988 provides for a single, generic category of irregularity, defined as «any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or eliminating revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure».
«Since that concept forms part of a system intended to ensure the proper management of EU funds and the safeguarding of the European Union's financial interests, it must be interpreted uniformly and broadly in accordance with the objective pursued [...], which is to ensure that funds are properly and efficiently used in order to protect the financial interests of the European Union»[78].
More recently, the Court of Justice clarified that «It should also be noted that Article 1(2) of Regulation No 2988/95 defines the concept of 'irregularity' as any infringement of a provision of EU law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing

the European Communities v Hellenic Republic, [2000] ECR I-5047.

[78] ECJ (Third Chamber), 8 June 2023, C-545/21, *Azienda Nazionale Autonoma Strade SpA (ANAS) v Ministero delle Infrastrutture e dei Trasporti*, § 28, this has been affirmed in relation to Regulation No 1083/2006, after having stressed that «The concept of 'irregularity' is defined in Article 2(7) of Regulation No 1083/2006, and, in similar terms, inter alia in Article 1(2) of Regulation No 2988/95, as any infringement of a provision of EU law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure to the general budget». See, to that effect, ECJ, 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, §§ 59 and 63 and the case-law cited.

the general budget of the European Union or budgets managed by it»[79].
For an "irregularity" to exist, therefore, there must be a breach of a Community provision and the conduct *must be* such as to cause damage to the Community's finances; it is not necessary for damage to have actually occurred, as irregularities «which [...] would have» damage are punishable, regardless of whether such damage has actually occurred. In any event, the damage must be strictly economic in nature (a "reduction or loss of revenue" or "undue expenditure").[80] For example, «a failure to comply with the public procurement rules constitutes an irregularity, within the meaning of that provision, in so far as the possibility cannot be excluded that that failure will have an impact on the budget of the fund concerned.»[81] Thus, it must be held that behaviour capable of being classified as «acts of corruption carried out in the context of a procedure for the award of a public contract' is liable, by its very nature, to influence the award of that contract. Consequently, it cannot be ruled out that such behaviour may have an impact on the budget of the fund in question»[82].
The treatment of revenue (own resources) and EU expenditure (subsidies) is appropriately equated, unifying the relevant definition of fraud, since the conduct that may harm these assets is the same; in many national legal systems, however, the protection of revenue and expenditure is differentiated, with the former being covered by criminal tax or customs law and the latter by the classic offences of fraud or subsidy fraud or, in the Italian legal system, embezzlement.[83]

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[79] ECJ (Sixth Chamber), 6 February 2025, C-42/24, *Emporiki Serron AE – Emporias kai Diathesis Agrotikon Proionton v Ypourgos Anaptyxis kai Ependyseon, Ypourgos Agrotikis Anaptyxis kai Trofimon*, § 21. See ECJ (Fourth Chamber), 23 October 2025, C-294/23 P, 8 May 2023, *Republic of Bulgaria v. European Commission*, § 2.

[80] ECJ 21 June 2005, *Azienda Agricola Balconi Andrea (formerly Guido) and others*, joined cases C-162/03, C-185/03, C-44/04, C-45/04, C-223/04, C-224/04, C-271/04 and C-272/04. See ECJ 16 March 2006, *Emsland-Stärke GmbH*, C-94/05; ECJ 1 July 2004, *Gisela Gerken and Amt für Agrarstruktur Verden*, C-295/02, §49; ECJ 4 May 2006, *Reinhold Haug and Land Baden-Württemberg*, C-286/05, § 21.

[81] ECJ (Third Chamber), 8 June 2023, C-545/21, Azienda Nazionale Autonoma Strade SpA (ANAS) v Ministero delle Infrastrutture e dei Trasporti, § 38; see ECJ, 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere*, C-408/16, EU:C:2017:940, §§ 60 and 61 and the case-law cited.

[82] ECJ (Third Chamber), 8 June 2023, C-545/21, Azienda Nazionale Autonoma Strade SpA (ANAS) v Ministero delle Infrastrutture e dei Trasporti, cit., § 39.

[83] See HEITZER, *cit.*, 125. The PFI Convention maintains this distinction, contrary to the recommendations of the Comparative Study on the Protection of the Financial Interests of the Community (*Étude comparative sur la protection des intérêts financiers dela Communauté)*; see also DELMAS-MARTY, *Incompatibilités entre systèmes juridiques et mesures d'harmonisation : Rapport final du groupe*

The Court recently reiterated that «the concept of "irregularity", as referred to in Article 1(2) of that regulation, covers not only any infringement of a provision of EU law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the Union by attributing an unjustified item of expenditure thereto, but also infringements of provisions of national law which are applicable to operations supported by a fund, such as provisions determining the conditions for eligibility for the grant of aid.»[84]

The Court recently clarified that «it is apparent from Article 1(2) of that regulation that it is to apply only in the event of prejudice to the EU budget by reducing or losing revenue accruing from own resources "collected directly on behalf of the Union". While it follows from recital 8 of Directive 2006/112 and Article 2(1)(b) of Decision 2007/436 that revenue from the application of a uniform rate valid for all Member States to the harmonised VAT assessment bases constitutes own resources of the European Union, with the result that, according to the case-law of the Court, there is a link between the collection of VAT revenue in compliance with the EU law applicable and the availability to the EU budget of the corresponding VAT resources (judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 26), the fact remains that VAT cannot be regarded as collected directly on behalf of the European Union within the meaning of Article 1(2) of Regulation No 2988/95»[85].

A reading of Article 4 of the Regulation shows that the definition of irregularity must also include the concept of "abuse" referred to in the draft Regulation, which referred to a transaction that was formally legal and therefore not apparently carried out in breach of a Community rule (a breach required, on the other hand, for there to be an "irregularity" within the meaning of Article 1), but lacking in economic reality or contrary to Community interests; Article 4 provides that «acts which are found to have been carried out with the aim of

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d'experts chargé d'une étude comparative sur la protection des intérêts financiers de la Communauté, in *Seminar on the Legal Protection of the Financial Interests of the Community, Brussels, November 1993,* Dublin, 1994; whereas the *Corpus juris* unifies the definitions without separating revenue fraud from expenditure fraud.

[84] ECJ (Third Chamber), 16 November 2023, C-196/22, IB v Regione Lombardia, Provincia di Pavia, § 46; ECJ, 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, § 36, 37 and 43; ECJ, 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, § 52, 53 and 63.

[85] ECJ (Fifth Chamber), 13 July 2023, C-615/21, Napfény-Toll Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, § 31 ff.; see ECJ, 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, § 41.

obtaining an advantage contrary to the objectives of Community law applicable in the case in question, by artificially creating the conditions necessary to obtain that advantage, shall, depending on the case, result in the non-achievement or withdrawal of that advantage»: in practice, this echoes the definition of abuse in the draft regulation. It can therefore be said that the concept of irregularity, as accepted in the regulation, is not that of formal fraud, but of substantive (result-based) fraud, also including cases where, beyond formal compliance with the rules, the interests for which the subsidy was granted or, in any case, the interests considered worthy of Community consideration have not been pursued.[86]

5. *The protection of fundamental rights in the European Union.* In the European Union's legal order (previously the European Communities), there was initially no explicit provision for the protection of human rights; nevertheless, the ECJ established that fundamental rights were protected as part of the general principles of EU law, the observance of which is ensured by the Court itself. According to the ECJ, the sources of these human rights principles were the constitutional traditions common to the Member States and international treaties to which Member States have collaborated or acceded.[87] The European Convention on Human Rights played a key role in this.
It follows that fundamental rights have become an integral part of European law,[88] and the limitations, arising from their protection, have been imposed not only on the institutions of the European Union, but also on Member States' legal orders[89] – including in the enforcement of criminal law.[90] Some authors speak of «*ius commune*» in relation to fundamental rights or to the

[86]) See HEITZER, *op. cit.*, 126. Advocate *Alber* accepts a notion of irregularity in Article 1 that includes the possibility of abuse in his conclusions in the *Emsland Stärke* case (C-94/05), in which he states that Article 4(3) does not create a new legal institution, "but codifies a general principle of law in force in Community law;" see Opinion of Advocate Potares Maduro, 7 April 2005, *Halifax pic., Leeds Permanent Development Services Ltd, County Wide Property Investments Ltd v Commissioners of Customs and Excise,* C-255/02, note 70; ECJ 11 January 2007, *Von Dairy Products BV v Productschap Zuivel*, C-279/05, § 36; ECJ, 21 July 2005, *Eichsfelder Schlachtbetrieb*, ECR I-7355, § 39.
[87] See *Ordre des barreaux francophones*, C-305/05, 2007, § 29; *Silvio Berlusconi*, C-387/02, C-391/02 and C-403/02, 2005, § 67; *Booker Aquaculture,* C-20/00 and C-64/00, 2003, 65.
[88] See ECJ, *Grant*, C-249/96, 1998, in *Rep.* I, 623.
[89] ECJ, *Friedrich Kremzow*, *cit.*, 2645; ECJ, *Proc. pen./Maurin*, C-144/95, 1996, in *Rep.* I, 2909; GRASSO, *Recenti sviluppi,* cit., 753; SCHWARZE, *European Administrative Law*, London 1992, 435ff.
[90] ECJ, *Perfili*, C-177-94, 1996, in *Rep.*, I, 161; ECJ, *Tranchant*, C-91/94, 1965, *ibid.*, 3911; VERVAELE, *La fraude communautaire et le droit pénal européen des affaires*, Paris 1994, 16-14; BLECKMANN, *Die wertende Rechtsvergleichung bei der Entwicklung europäische Grundrechte*, in *Festschrift für Börner*, Cologne 1992, 36ff.

set of principles derived from the ECtHR's jurisprudence.[91]
Within the EU, then, fundamental rights represent «a common code of fundamental values», creating a «European public order» for both the European Union and its Member States.[92]
These fundamental rights must be respected by the Union's authorities in the exercise of their powers and, in particular, of the punitive power, as well as by the Member States in the application of EU law[93] and in all cases where there is a connecting element requiring compliance with a minimum threshold of protection of certain rights, which does not coincide with the least common denominator, but with the standard of the prevailing legal order and of the general trend (this will mean that newly recognised fundamental rights are protected in the national legal systems in which they operate, or that the standard of protection is raised).[94] The fundamental principles of Community law allow for greater uniformity of discipline in the various Member States, creating a true work of harmonisation of legal orders, including criminal law.[95]
In this direction, Advocate General Jacobs affirmed in *Wachauf* that «when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator»[96].
These fundamental rights have been solemnly recognised in the EU's Charter of Fundamental Rights (CFR), proclaimed on 7 December 2000 by the European Parliament, the Council and the Commission.[97] The CFR was part of the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004,[98] which was never ratified, but was incorporated into the EU legal

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[91] DE SALVIA, *L'elaboration d'un "ius commune"*, in *Protecting Human Rights*, Cologne, 1990, 556; SCHUTTE, *Die Regionalisierung des internationalen Strafrechts und der Schutz der Menschenrechte*, in *ZStW* 1992, 725ff.
[92] GRASSO, *La formazione*, cit., 13; see LABAYLE, *Human Rights, Inhuman Treatment and Capital Punishment,* in *JCP* 1990, 3452; see SUDRE-MONNET, *The European Community and Fundamental Rights*, in *JCP-La Sem. Jur.* 1998, No 1-2, 9ff.
[93] See TIEDEMANN, *Verfassungrecht und Strafrecht*, 1991, 15 ff.
[94] GRASSO, *La Costituzione per l'Europa e la formazione del diritto penale Europeo law*, in *Lezioni di Diritto penale europeo*, edited by Grasso-Sicurella, Milan, 2007, 670.
[95] BERNARDI, *Les principes de droit international*, in *RDPSC* 1994, 255; SIEBER, *Unificazione europea e diritto penale europeo,* in *RTDPE* 1991, 982-984; TIZZANO, *I diritti fondamentali e le Corti in Europa,* in *DUE* 2005, 844.
[96] *Wachauf*, C-5/88, 1989, in *Rep.,* 2628s.
[97] OJ C 364, 18 December 2000, 1ff.
[98] See MAUGERI, *Il sistema sanzionatorio comunitario dopo la Carta Europea dei diritti fondamentali,* in *Lezioni di Diritto penale europeo*, cit., 122; PEERS, *The Rebirth of the EU's Charter of Fundamental Rights*, in *Cambridge Yearbook Eur. Legal studies*, 2011, 13, 283.

order through the Lisbon Treaty («a Constitution that, deprived of its shape, is reincarnated, in fact, in a Reform Treaty»).[99]
Article 6 TEU, in its Lisbon version, establishes that « The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...], which shall have the same legal value as the Treaties». The Lisbon Treaty thus made the Charter legally binding, equating it with the Treaties.[100] Furthermore, Article 2 TEU states that the Union is founded on the values of respect for human rights, which are considered common values of the Member States.
The principles, as indicated in Article 6 TEU, are considered "common heritage" of the Member States, the acceptance of which is a condition for accession to the Union (Article 49).[101]
The ECJ has the competence to ensure not only the respect of fundamental rights, but more generically, of the principles of «common heritage». Some commentators speak of formalisation at the "constitutional" level of the Court's jurisdiction.[102] The ECJ has been called upon to perform this function in order to realise the purpose assigned to the Union to maintain and develop «an area of freedom, security and justice ... in which the free movement of persons is ensured» (Article 3 TEU).[103]
In some judgments, the Court of Justice has expressly referred to the Charter having the "same legal value" as the Treaties, as provided for in Article 6(1) TEU.[104]
In any case, however, it is established that the Charter does not extend to the field of application of Union law beyond the powers of the Union (or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties) (Article 51(2) CFR). This means that the possibility continues to be ruled out that the Court of Justice can assess the compatibility of national legislation with fundamental rights. Respect for fundamental rights is

[99] SCIANELLA, *Morte e reincarnazione di una Costituzione*, in *DPCE* 2008, 149.
[100] SAPIENZA, *Lisbona 2007*, in *Aggiornamenti Sociali* 2008, 134; FRAGOLA, *Observations on the Treaty of Lisbon*, in *DCSI* 2008, 217.
[101] LABAYLE, *Un espace de liberté, de sécurité et de justice*, in *Rev. trim. de droit eur.* 1997, 822.
[102] VINCENZETTI, *Le "human rights clauses" nell'adozione di sanzioni comunitarie*, in *Il Diritto dell'Unione Europea*, 2, 2005, 352; GRASSO, *La Costituzione per l'Europa,* cit., 646.
[103] LABAYLE, *Un espace de liberté, cit.*, 818.
[104] ECJ, *Abdulla and others,* C-175/08–C-179/08, 2010; *Chakroun,* C-578/08, 2010; *Kuciikdeveci,* C-555/07, 2010; *Melki-Abdeli,* C-188/10-C-189/10PPU, 2010; *Knauf-Gips,* C-407108P, 2010; *Commission v Germany,* C-271/08, 2010; *MeB,* C-400/10, 2010; *Volker-Schecke,* C-92/09–C-93/09, 2010; *DEB,* C-279/09, 2010; *Test-Achats*, C-236/09, 2010. See also *Chartry,* C-457/09, 2011, § 24; PEERS, *cit.*, 289.

necessary, however, in all those cases in which domestic legislation, while not constituting implementation of European legislation, would nonetheless have an impact in an area of EU competence or in areas already governed by Union law (i.e. there is an element of connection).[105]
Furthermore, these principles have been incorporated into Regulation No 2988 which constitutes, as affirmed before, a sort of Code of European (administrative) punitive power (Article 2). As the ECJ has held, «the Community legislature has, by adopting Regulation No 2988/95, laid down a series of general principles and has required that, as a general rule, all sectoral regulations comply with those principles.»[106] Furthermore, recital 37 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), states that: «this Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles».
These basic principles of the material European constitution, developed by the ECJ and recognised in the Charter, shall be valid for the whole area of criminal matters, according to the autonomous interpretation of the ECtHR, both in relation to criminal matters *strictu sensu* and in relation to the administrative punitive sector; as quoted before, Advocate General Colomer has stressed that «the same general principles are applied in both systems.»[107]
It nevertheless remains the case that, pursuant to Article 6(3) TEU, the fundamental rights as guaranteed by the ECHR and as resulting from the constitutional traditions common to Member States continue to «constitute general principles of the Union's law» («if not, moreover, there would be the risk of a dramatic impoverishment of the catalogue of fundamental rights and principles recognised in the Union [...]»).[108] It follows that the European legislator will find a general limit to his punitive choices (administrative or criminal) in the material constitution of the EU (including, of course, «respect for fundamental rights and the different legal systems and traditions of the Member States [...]» Article 67(1) TFEU): in a "constitutional approach to European criminal law," European criminal policy should not only not be put in con-

[105] GRASSO, *La Costituzione per l'Europa*, cit., 664.
[106] ECJ, *Gisela Gerken*, C-295/02, 2004, § 56; *Emsland-Stärke GmbH*, C-94/05, 2006, 50; *Rüdiger Jager*, C-420/06, 2008, § 61; Opinion, *ED & F Man Sugar,* 2005, C-274/04, § 11.
[107] Opinion, *Othmar Michaeler Subito srl and others*, C-55/07-C-56/07, 2008, § 56; Opinion, *Commission v. Council,* C-176/03, 2005, § 47.
[108] BERNARDI, *La aproximación constitucional al Derecho penal*, in *Rev.Pen.,* 2011, 21.

trast with the fundamental principles and rights elaborated in a European context, but it must address the protection of these rights and, more generally, goods that the European constitutional system highlights as worthy of preservation.[109] In this regard, reference may be made to the opinion of Advocate General Trstenjak in the *Maribel Dominguez* case.[110]

Furthermore, Article 6(2) TEU establishes that «[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treatie». This choice of EU accession to the European Convention "completes the process of progressive recognition of human rights in the European Union, crowning with the application, to the institutions of the Union, of the same mechanism of judicial control (external and specialised), already long operating in relation to the Member States."[111] It would give the EU standing before the ECtHR – which does not currently exist – when the real object of the action is an act of the EU, even if the action is formally brought against a Member State.[112]

In any case, the CFR shall not be interpreted as restricting the meaning and scope of rights guaranteed by Union law, international law and the international conventions ratified by the Member States, including the European Convention (Article 53).[113] Union law can indeed provide more extensive protection (the guarantee granted by the Convention represents a minimum guarantee) (Article 52(3)).[114]

Finally, it must be emphasised that the rights recognised in the Charter assume the character of fundamental rights, although not all are already recognised in European law; the CFR recognises rights of the latest generation, such as those on eugenic practices and on the prohibition of reproductive cloning of human beings (Article 3(2)). Moreover, the Charter contains some principles, such as those on the prohibition of the death penalty (Article 2(2)) or the prohibition of slavery (Article 5), that do not fit in an area where the

[109] BERNARDI, *La aproximación constitucional*, cit., 25.
[110] Opinion, *Maribel Dominguez*, C-282/10, 2011, § 94 ff.
[111] VILLANI, *Principi democratici e diritti fondamentali nella "costituzione europea",* in *La Comunità Internazionale* 4, 2005, 669; RAIMONDI, *La Carta di Nizza del 7 dicembre 2000 nel quadro della protezione dei diritti fondamentali in Europa,* in *Cass. Pen,* 2002, 1887; ECJ, *Bosphorus*, C-45036/98, 2005.
[112] VILLANI, *I diritti Fondamentali*, in *Dir.Un.Eur.* 2004, 111; RAIMONDI, *cit.*, 1887.
[113] RINALDI, *Regolamento del Consiglio No 1/2003*, in *Dir.Com.Int.* 2003, 112 – 113; FERRARO, *Le disposizioni finali della Carta di Nizza e la multiforme tutela dei diritti dell'uomo nel* spazio giuridico europeo, in *Riv. Ital. Dir. Pubbl. Comunitario* 2005, 547.
[114] See VILLANI, *I diritti fondamentali*, op. cit., 102; PEERS, *op. cit.*, 293ff.

EU may interfere, at least so far, although these principles are part of the common heritage of the Member States and of the rights protected by the ECHR.[115]
The CFR devotes Chapter VI to the issue of justice, dealing with the right to an effective remedy and to a fair trial, the presumption of innocence and the rights of the defence in due process, the principles of legality[116] and proportionality of penalties with respect to offences, and the right not to be tried or punished twice for the same offence (*ne bis in idem*).[117]

6. *The principle of subsidiarity.* Article 2 of Regulation No 2988 specifies, first of all, that administrative checks, measures and penalties shall be established only where necessary to ensure the correct application of EU law[118] («They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities' financial interests»[119]). This clause is expressly repeated in Article 5, with reference to the punitive administrative penalties provided for by the regulation (in cases of intentional or negligent irregularities). This clause appears to urge the EU legislator to adhere to the principle of subsidiarity, in the sense of limiting itself to resorting to controls or sanctions, whether compensatory (Article 4) or punitive (Article 5), only when it is not possible to achieve compliance with and application of EU legislation through other means of protection that are less intrusive with respect to fundamental rights. This principle of subsidiarity must therefore govern the choice of the EU legislator between the use of compensatory and punitive sanctions.[120]
The principle of subsidiarity (understood as the necessity of intervention)[121] is, moreover, an expression of the principle of proportionality[122] which, as

[115] PAGANO, *Dalla Carta di Nizza alla Carta di Strasburgo dei diritti fondamentali,* in *DPCE* 2008, 96.
[116] Inter alia ECJ, *Özlem Garenfeld*, C-405/10, Reference for a preliminary ruling, 2011, § 48.
[117] MAUGERI, *Il sistema sanzionatorio comunitario*, cit., 131ff. and 217ff.
[118] See ECJ 23 September 2004, C-297/02, *Italian Republic v Commission of the European Communities*; Court of First Instance 22 November 2006, *Italian Republic v Commission of the European Communities*, T-282/04, 55–59.
[119] ECJ (Third Chamber), 26 September 2024, C-160/22 P and C-161/22 P, European Commission v HB, § 61.
[120] See BERNARDI, *"Europeizzazione", cit.*, 175; BÖSE, *cit.*, 370 ff.; KORKKA-KNUTS-MELANDER, *Contours of a principled corporate sanction policy in the EU: Exploring a constitutionally justified balance between criminal and administrative sanctions*, in *New Journal of European Criminal Law* 2025, 44 ff.
[121] See HAGUENAU, *L'application effective du droit communautaire en droit interne*, Bruxelles 1995, 557 ff.; see ECJ, 13 November 1973, joined cases 63-69/72, *Werhahn v Council*, in ECR 1230.
[122] FIANDACA-MUSCO, *Diritto penale – Parte generale*, Bologna 2025, 29; CHITI, *Principio di sussidarietà, cit.*, 505; GRECO, *Incidenza del diritto comunitario sugli atti amministrativi italiani*, in *Trattato di*

emerges from an examination of the case law of the European Court of Human Rights, is the criterion used by the Court to decide whether state intervention (such as a sanction) affecting a fundamental right is arbitrary, constituting a violation of that right.[123] The European Court considers it a principle of law in general – and not limited to the area of fundamental rights (*Grundrechte*) – which therefore assumes a supra-constitutional status (*Uberverfassungsrang*).[124]

This principle has also been recognised in EU law, initially as an unwritten general principle, which has «the function of guaranteeing the essence of fundamental rights», preventing them from being compromised by unjustified and disproportionate (arbitrary) attacks, thus ensuring «the actualisation and effectiveness of subjective positions that can be classified as fundamental rights».[125] This principle was then expressly recognised by Article 3 B, para-

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diritto amministrativo europeo, cit., 590.

[123] See MAUGERI, *I reati di sospetto dopo la pronuncia della Corte Costituzionale n. 370 del 1996: alcuni spunti di riflessione sul principio di ragionevolezza, di proporzione e di tassatività*, in *Riv. Trim. Dir. Proc. Pen.* 1999, 944. Among others, ECtHR, *Handyside*, Série A, vol. 132, § 55; *Grigoriades v. Greece*, 25 November 191997, in *Recueil de Arrêts et Dêcisions* VII, No 57, 2575 ff.; *Zana v. Turkey*, 25 November 1997, *ibid.* 1997 VII, No 57, 2533 ff.

[124] OHLINGER, *Verfassungrecht*, 3rd ed., 1997, 286. In general on the principle of proportionality: PADOVANI, *La distribuzione di sanzioni penali e di sanzioni amministrative secondo l'esperienza italiana,* in *Riv. it. dir. proc. pen.* 1984, 954; PALAZZO, *I criteri di riparto tra sanzioni penali e sanzioni amministrative,* in *Ind. pen.* 1986, 46; ELLSCHEID-HASSEMER, *Strafe ohne Vorwurf. Bemerkungen zum Grund strafrechtlicher Haftung,* in AA.VV., *Abweichendes Verhalten,* II, *Die Gesellschaftliche Reaktion auf Kriminalität,* I, *Strafgesetzgebung und Strafrechtsdogmatik,* edited by Lüderssen-Sack, 1975, 283; ANGIONI, *Contenuto e funzioni del concetto di bene giuridico*, Milan 1983, 215; DOLCINI, *Sanzione penale o sanzione amministrativa: problemi di scienza della legislazione*, in *Diritto penale in trasformazione,* edited by Marinucci-Dolcini, Milan, 1985, 388.

[125] GRASSO, *La protezione dei diritti fondamentali nella Costituzione per l'Europa e il diritto penale: spunti di riflessione critica*, in *Lezioni di diritto penale europeo*, cit., 617 ff.; cf. GALETTA, *Discrezionalità amministrativa e principio di proporzionalità*, in *Riv. it. dir. publ. com.* 1994, 142; among others, see ECJ 28 April 1998, *Metronome Musik*, C-200/96, in *Racc.* I, 1953; *Petridi*, 26 March 1998, C-324/96, *ibid.* 1333; 18 May 1993, C-126/91, in *Riv. it. dir. publ. com.* 1993, fasc. 4, 833, with note by GALETTA; *Firma Otto Lingenfelser v Federal Republic of Germany,* 27 June 1990, *ibid.*, 2637 – 2657; *The Queen, ex parte E.D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP)*, 24 September 1985, C-181/84, *ibid.* IV, 2889; *Balkan-Import-Export*, 24 October 1973, Case 5/73, *ibid.*, 1092; in particular, they consider the principle of proportionality to be a general principle of Community law, inter alia *United Kingdom-Northern Ireland v Commission*, 5 May 1998, C-180/96, *ibid.*, 2265; *The Queen Intervention Board for Agricultural Produce, ex parte: Accrington Beefe a.*, 12 December 1996, C-241/95, *ibid.* I, 6699; *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, 12 November 1996, C-84/94, *ibid.* I, 5755; *Hüpeden v Hanzizollamt Hamburg – Jonas*, 4 July 1996, C-296/94, *ibid.* I, 3409; *ADM Olmühlen GmbH,* ECJ 7 December 1993, C-339/92, *ibid.* I, 6473; the conclusions of Advocate General *Capotorti* in Case 114/76 *Bela Mühle v Grows-Farm*, *ibid.* 1977, 1232; *Mannesmann v High Authority*, 13 July 1962, C-19/61, *ibid.*, 659; with specific reference to a criminal penalty *Konservenfabrik Lubella Friedrich Bücher GmbH &*

graph 3 of the Treaty, subsequently Article 5, paragraph 3 («The action of the Community shall not go beyond what is necessary to achieve the objectives of this Treaty») and is now expressly provided for in Article 5, paragraph 4, TEU, and is considered a fundamental right of the EU legal system.[126] On the basis of this principle, according to EU case law on fundamental rights, the technique of balancing interests and values is employed.[127]
Article 52 of the Charter of Fundamental Rights assigns to the right of proportionality the task of setting the parameters for the possibility of imposing limitations on fundamental rights, where they are «provided for by law», respect «the essence of those rights and freedoms», and are « necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others». The express provision of a limitation of a fundamental right by legislative means shall not constitute an impediment to the intervention of the Court of Justice, which may assess the conformity of the instrument with the principle of proportionality, because the Court's judgment also extends to internal rules.[128]

7. *The principle of legality.* Article 2(2) of the Regulation solemnly recognises

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Co. KG v Hauptzollamt Cottbus, 17 October 1996, C-64/95, *ibid.* I, 5105; *NMB France SARL and others v Commission of the European Communities*, 5 June 191996, C T-162/94, *ibid.*, II, 427; *Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos*, 29 February 1996, C-193/94, *ibid.*, I, 929; on measures to protect agriculture *Otto Pressler Weingut-Weingroßkellerei GmbH & Co KG v Bundesamt für Ernährung und Forstwirtschaft*, 21 January 1992, C-319/90, *ibid.* I, 203 – 218; *Firma Otto Lingenfelser v Federal Republic of Germany*, 27 June 1990, C-118/89, *ibid.* I, 2637; *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein,* 20 February 1979, C-120/78, *ibid.*, 649; *Buitoni/Forma*, 20 February 1979, C-122/78, *ibid.*, 677.

[126] See, for all, ECJ 17 December 1970, *Einfuhr- und Vorratsstelle Getreide/Köster*, C-25/70, in *ECR*, 1162, where it is stated that the principle of proportionality corresponds to a fundamental right, falling within the category of general principles of law whose observance is guaranteed by the European Court of Justice; 24 May 2007, *Maatschap Schonewille-Prins and Minister van Landbouw, Natuur en Voedselkwaliteit*, C-45/05, § 45 ff., which specifies that «where a choice is possible between several appropriate measures, the least restrictive must be chosen»; GRASSO, *Recenti sviluppi,* cit., 754; LUGATO, *Principio di proporzionalità e invalidità di atti comunitari nella giurisprudenza della Corte di Giustizia delle comunità europee*, in *Dir. comun. e scambi interni*, 1990, 74; SCHWARZE, *European Administrative Law*, *cit.*, 424 ff., in particular 427; GRABITZ, *Art.43*, in *Kommentar zum EWG – Vertrag*, München 1988, *Titel* II, *Die Landwirtschaft*, § 22, 5; HEITZER, *cit.*, 115 ff.; BÖSE, *cit.* , 370 ff.

[127] See MICHELETTI, *Carta dei diritti fondamentali dell'Unione Europea, interpretazione per principi generali e pluralismo giuridico*, in *Diritto comunitario e degli scambi internazionali* 2003, 289 and case law cited *therein*; MAUGERI, *I reati di sospetto*, *op. cit.*, 944; Id., *Le moderne sanzioni*, *cit.*, 625 ff. Among others, ECJ 20 July 2003, C-20/00 and C-64/00, *Booker Aquaculture Ltd, Marine Harvest McConnell and Hydro Seafood GSP Ltd and the Scottish Ministers*; BERNARDI, *Il costo di sistema delle opzioni europee sulle sanzioni punitive*, cit., 568 ff.

[128] FERRARO, *Le disposizioni finali, cit.*, 536 ff.

the principle of legality for EU sanctions, providing that a sanction may not be applied unless it has been introduced by an EU act prior to the commission of the irregularity.[129]

The principle of legality is solemnly affirmed in Article 7 of the European Convention on Human Rights as a fundamental right, which plays a prominent role in the Convention's system of protection, and which does not allow for derogations under Article 15, either in times of war or other emergencies[130]. The European Union legal order recognises that the principle of legality, as specified by Advocate General Ruiz Jarabo Colomer in his conclusions in joined cases C 74/95 and C 129/95, constitutes one of the principles common to the constitutional traditions of the Member States, which appears, at the same time, as a fundamental right of the citizens of those States and a basic principle of Community law itself[131]. It is referred to in Article 6(2) and (3) of the Treaty on European Union, which states that the Union «shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms» and that «fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the law of the Union», and implicitly in Article 2, which states that the Union is founded on the values «of respect for human dignity, freedom, democracy, equality and the rule of law»[132]. Finally, the principle of legality has been expressly recognised in the Charter of Fundamental Rights of the European Union in Article 49[133].

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[129] For more on this principle in EU law, see SCHWARZE, *European Administrative Law*, *op. cit.*, 867 ff.; PARISI, *Principio di legalità e tutela dei diritti della persona nello "spazio di libertà, sicurezza e giustizia"*, in *La dimensione internazionale ed europea del diritto nell'esperienza della Corte Costituzionale*, edited by Daniele, Napoli, 2006, p. 353, who develops the concept that mutual recognition serves as a «testing ground for compliance with the principle of legality in the European legal system».

[130] ECtHR, 21 January 2003, *Veeber v. Estonia (No 2)*, 45771/99, *ECHR* 37, § 30; ECtHR, 22 March 2001, *Streletz, Kessler and Krenz v. Germany,* 34044/96, 35532/97, 44801/98, *ECHR* 230, § 50; ECtHR, 22 March 2001, *K.-H. W. v. Germany*, 37201/97, *ECHR* 229, 45; ECtHR, 22 November 1995, *S.W. v. the United Kingdom*, Series A, No 335-B, 41–42, § 34–36; ECtHR, 22 November *19*1995, *C .R. v. the United Kingdom*, Series A, No 335-C, 68–69, § 32–34.

[131] In *Rec.* 1996, I, 6627; italics added. Most recently ECJ, 3 June 2008, *International Association of Independent Tanker Owners (Intertanko) and others v. The Secretary of State for Transport*, C-308/06, § 70; 22 May 2008 – *Evonik Degussa GmbH, formerly Degussa GmbH v Commission of the European Communities, Council of the European Union*, C-266/06 P; Opinion of Advocate General *Juliane Kokott*, 13 December 2007, *Marks & Spencer plc v Her Majesty's Commissioners of Customs and Excise*, C-309/06, § 40.

[132] See ADINOLFI, *Il principio di legalità nel diritto comunitario*, in *Dir. com. e degli scambi* intern, 2008, 1 ff.

[133] See SICURELLA, *Diritto penale e competenze dell'Unione Europea. Linee guida di un sistema inte-*

In EU case law, while affirming that «that principle must be observed in regard both to provisions of a criminal-law nature and to specific administrative instruments imposing or permitting the imposition of administrative penalties [...], such as penalties imposed under Regulation No 17»[134], it is emphasised that «the general principles of Community law and, in particular, the principle of *nullum crimen, nulla poena sine lege*, as applicable to Community competition law[135] [...] need not necessarily have the same scope as when they apply to a situation covered by criminal law in the strict sense»[136].

In criminal matters, Mr Colomer emphasises that this principle implies a double guarantee: the first, of a material nature and absolute scope, translates into the imperative requirement of the *a priori* determination of unlawful conduct and the corresponding penalties; the second, of a formal nature, concerns the status of the rules that typify such conduct and regulate penalties, which, in most Member States, take the form of law[137]. It should also be noted that this principle operates as an imperative for the legislator when defining offences and setting the corresponding penalties, and for the judge when examining offences and applying penalties in criminal proceedings. In other words, this principle comes into play when the state wishes to exercise its *ius puniendi* or to enforce decisions with a truly punitive spirit[138].

In interpreting the principle of legality enshrined in Article 7 of the ECHR, the European Court of Human Rights attaches particular importance to case law. The ECHR's emphasis on a substantive concept of law, which expressly

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grato di tutela dei beni giuridici sovrannazionali e dei beni giuridici di interesse comune, Milan, 2005, 142; BERNARDI, *Il principio di legalità dei reati e delle pene nella Carta europea dei diritti: problemi e prospettive*, in *Riv. it. dir. pubbl. com.* 2002, cit., 673 ff.; D'AMICO, *Principio di legalità in materia penale e diritto penale europeo*, in *La giustizia penale nella Convenzione, La tutela degli interessi finanziari e dell'ambiente nell'Unione europea,* edited by Ruggieri, Milan-Brussels, 2003, 55 ff.; Opinion of Advocate *Christine Stix-Hackl*, 12 July 2001, C-131/00, *Nilsson v Länsstyrelsen i Norrbottens län*; Advocate *Geelhoed*, 10 July 2003, C-58/02, *Commission of the European Communities v Kingdom of Spain*, § 39; Opinion of Advocate General *Kokott*, 10 June 2004, *Antonio Niselli*, C-457/02, §§ 54 and 64; concurring opinion of Advocate General *Colomer*, 12 September 2006, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, C- 303/05, paragraph 100; Article 49(1) is referred to by the applicant before the Court of First Instance, *5 April 2006, Degussa AG v Commission of the European Communities, supported by the Council of the European Union*, T-279/02, § 35; Advocate *Yves Bot*, 1 March 2007, *Britannia Alloys & Chemicals Ltd v Commission of the European Communities*, C-76/06 P, § 124.

[134] Court of First Instance, 8 July 2008, C-T-99/04, *AC-Treuhand AG*, 139.

[135] 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* [2005] ECR I-5425, paragraphs 215 to 223.

[136] *Ibid.*, 113.

[137] Advocate *Colomer*, *Advocaten voor de Wereld VZW*, cit., § 100.

[138] *Ibid.*, § 103.

recognises, not least in order to take account of common law traditions, the importance of the role of the judge in creating and shaping the law according to his or her discretion, is accompanied, however, in the tradition of the ECHR, by the affirmation of guarantees protecting the freedom of citizens vis-à-vis the judiciary itself. As highlighted in doctrine, the European Court is less concerned with guaranteeing legality as an expression of the separation of powers, focusing instead on the protection of legality/non-retroactivity (subject to a legal basis) as a guarantee of the individual's right to self-determination[139].
In this regard, it should be noted, first of all, that the Court has always emphasised the guaranteeing scope of the principle of legality under Article 7 of the ECHR, including all its sub-principles expressly aimed at protecting individuals from the risk of arbitrary proceedings and convictions. With regard to the role of the judge, the European Court has ruled not only that, according to the principle of legality, «only *a law may introduce a crime and establish a* penalty»[140] (italics added), but also that the term "law" refers to a concept that encompasses both "statute law as well as case-law"; the Court adopts a typically substantialist approach which, in order to reconcile the requirements of the various European legal systems to which the principles of the Convention must be applied, considers the legal and jurisprudential forms to be equivalent sources of criminal law[141] and, in any case, «the "law" is the enactment in force as the competent courts have interpreted it»[142]. «In this context, it must be reiterated that, as the Court has held on numerous occasions, the progres-

[139] MANES, *Common law-ization of criminal law'? The evolution of nullum crimen sine lege and the forthcoming challenges,* NJECL, 2017, 967.
[140] See ECtHR, 29 March 2006, *Achour v. France*, No 67335/01, § 41; 21 January 2003, *Veeber v. Estonia (No 2)*, No 45771/99, *ECHR*, § 31; 22 March 2001, *Streletz and others*, cit., § 50; 22 March 2001, *K.-H. W. v. Germany*, No 37201/97, § 45; 22 June 2000, *Coëme and others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, in *Recueil des arrêts et décisions* VII, 250, § 145; 8 July 1999, *Baskaya and Okçuoglu v. Turkey*, nos. 23536/94, 24408/94, in *CEDH* 42, § 36. See CHIAVARIO, *La Convenzione europea dei diritti dell'uomo nel sistema delle fonti normative in materia penale*, Milan, 1969, 86 ff.; BERNARDI, *Il principio di legalità*, cit., 683, who consider that Article 7 does not include the corollary of the reservation of law and the requirement for a written rule because this would conflict with the very essence of *common law*; ID., *Art. 7 ('No punishment without law')*, in *Commentario della Convenzione europea dei diritti dell'uomo*, edited by Bartole-Conforti-Raimondi, Padua, 2001, 297 ff.
[141] See BERNARDI, *Una nuova sentenza della Corte europea dei diritti dell'uomo in materia di imprevedibilità della condanna penale: il caso Navalnyye c Russia*, in *www.penalecontemporaneo.it*, 16 January 2018; GRASSO-GIUFFRIDA, *L'incidenza sul giudicato interno delle sentenze della corte europea che accertano violazioni attinenti al diritto penale sostanziale*, in *Dir. pen. cont.*, 2015, 21; MANES-CAIANIELLO, *Introduzione al Diritto penale europeo,* Torino, 2020, 271; see DI GIOVINE, *Come la legalità europea sta riscrivendo quella nazionale. Dal primato delle leggi a quello dell'interpretazione*, in *Dir. pen. cont.*, 2013, 1, 159 ff.
[142] Most recently, ECtHR, *Sacharuk v. Lithuania*, cit., 146.

sive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition»[143].

The Court emphasises the qualitative aspects of legality, no longer limited to the certainty of the law, but also concerning the accessibility and predictability of legal sources and related case law[144], highlighting the links between the principle of legality and that of guilt (the notion of law implies certain qualities of predictability and accessibility)[145], as already done by judgment No 364/1988 of the Italian Constitutional Court[146].

In this way, the European Court of Human Rights recognises the guarantees connected with the principle of legality, Article 7 of the ECHR, also in relation to the rule as interpreted, extending, in particular, the application of the principle of non-retroactivity *in malam partem* also to case law[147]. The «vari-

[143] ECtHR, *Sacharuk v. Lithuania*, cit., 144; ECtHR, 20 September 2011, *OAO Neftyanaya Kompaniya Yukos v. Russia*, No 14902/04, § 568.

[144] BALSAMO, *La dimensione garantistica del principio di irretroattività e la nuova interpretazione giurisprudenziale "imprevedibile": una "nuova frontiera" del processo di "europeizzazione" del diritto penale* – note to ECJ, Section II, 8 February 2007, case C-3/06 P, *Groupe Danone v. Commission delle Comunità Europee*, in *Cass. Pen.*, 2007, 5, 2202; GAMBARDELLA, *Condotte economiche e responsabilità penale*, Torino, 2018, 27. See recently ECtHR, Section II, 3 March 2020, *Parmak and Bakir v. Turkey*, applications 22429/07 and 25195/07, § 58 ff.

[145] ECtHR, 3 March 2020, *Parmak and Bakir v. Turkey*, cit., 58; 14 March 2013, *Kasymakhunov and Saybatalov v. Russia*, nos. 26261/05 and 26377/06, § 77; *Achour v. France*, 29 March 2006, No 67335/01, § 42; 22 March 2001, *Streletz and others*, cit., §§ 50 – 57; 13 July 1995, *Tolstoy Miloslavsky v. United Kingdom*, in *Publications of the European Court of Human Rights*, Series A, vol. 316-B, 71–72, § 37; 15 November 1996, *Cantoni v. France*, *Reports* 1996-V, 1627, § 29; *Coëme and Others*, *cit.*, § 145; 7 February 2002, *E.K. v. Turkey,* No 28496/95, § 51; 22 November 1995, *S.W v. United Kingdom*, § 36, series A No 335-B, §§ 41-42; 22 November 1995, *C.R. v. United Kingdom*, Series A nos. 335-B and 335-C, 68-69, § 33; *Baskaya and Okçuoglu v. Turkey*, *cit.*, § 36; *K.-H. W. v. Germany*, *cit.*, § 45.

[146] See MASSARO, *Determinatezza della norma penale e calcolabilità giuridica*, Napoli 2020, 152 ff.

[147] ECtHR, 10 October 2006, *Pessino v. France*, No 40403/02, §§ 15-37; ECtHR, 24 May 2007, *Dragotoniu Militaru-Pidhorni v. Romania*; 54 55 ECHR, 25 June 2009, *Liivik v. Estonia*, §§ 92 ff.; ECtHR, 8 July 1999, *Baskaya and Okçuoglu v. Turkey*; ECJ, 8 February 2007, *Groupe Danone v. Commission*, cit.; ECJ, 28 June 2005, *Dansk Rørindustri and others v. Commission*, §218. See BERNARDI, *Il principio di legalità*, cit., 681 ff.; ZAGREBELSKY, *La Convenzione Europea dei diritti dell'uomo e il principio di legalità nella materia penale*, in *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, edited by Manes-Zagrebelsky, Milan, 2011, 74 ff.; MANES, *Art. 7 ("No punishment without law")*, in *Commentario della Convenzione europea dei diritti dell'uomo,* edited by Bartole-Conforti-Raimondi, cit., 274 ff.; SCOLETTA, *Criminal legality in the European system of fundamental rights,* in *Europe and criminal law*, edited by Paliero-Viganò, Milan, 2013, 214 ff.; VIGANÒ, *Il principio di prevedibilità della decisione giudiziale in materia penale,* in *La crisi della legalità. Il «sistema vivente» delle fonti penali*, edited by Paliero-Moccia-DeFrancesco-Insolera-Pelissero-Rampioni-Risicato, Naples, 2016, 213 ff.; GRASSO, *Politiche penali e ruolo della giurisprudenza: la sfida della legalità*, in *La pena, ancora: fra attualità e tradizione. Studi in onore di Emilio Dolcini*, edited by Paliero-Viganò-Basile-Gatta, Milan, 2018, 57 ff.; MAZZACUVA, *Nulla poena sine lege*, in *Corte di Strasburgo e Giustizia penale*, edited by Ubertis-Viganò, Torino, 2016, 37 ff.; ADDANTE, *Il principio di prevedibilità al tempo della*

ous possible general interpretations are different rules – not just different interpretations! – and the prevailing or adopted one becomes *the* current rule»[148] (italics added); a sudden *reversal* in case law (especially if by a higher court) implies a violation of the principle of legality, just like a retroactive legislative reform. Based on the principle of the recognisability of the precept from a subjective point of view, in fact, for the ECtHR, «the individual may, at the time of deciding whether or not to act, legitimately rely on the interpretation of that rule provided by the domestic courts, thus having a specific right not to be surprised *ex post* by interpretative extensions of that same rule that were not foreseeable *ex ante*»[149] (it being understood, as mentioned, that the ECtHR itself calls for compliance with the legal provision in its interpretation, by referring to the essence of the offence[150]). The principle of *predictability* is affirmed, which lends itself to a «sort of legitimisation of so-called case law beyond the limits granted by a form of state in which the democratic-parliamentary principle should continue to be the backbone of the legal system»[151].

It being understood that the ECtHR clarifies that not only is the evolution of case law over time a physiological fact, the preclusion of which would risk preventing *"toute réforme ou amelioration"* of the law, but also that, given the plurality of jurisdictions spread across the territory, the coexistence of different interpretations of the law, even within the same jurisdiction, does not in itself violate the Convention; when interpretative differences arise within the

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precarietà, in *Arch. Pen.* 2019, 17 ff.; NAPPI, *La prevedibilità nel diritto penale*, Napoli, 2020, 470; cfr. MASSARO, *op. cit.*, 483.

[148] DONINI, *Fattispecie o case law?*, cit., 87, cfr. 81. Cf. DONINI, *Metodo democratico e metodo scientifico nel rapporto fra diritto penale e politica*, in *Riv. it. dir. proc. pen.*, 2001, 27 ff.; ID., *Europeismo giudiziario e scienza penale. Dalla dogmatica classica alla giurisprudenza-fonte*, Milan, 2011, chap. II, 87 ff. and 99 ff.; DEMURO, *L'interpretazione sistematica in diritto penale*, in *Riv. it. dir. proc. pen.*, 2018, 1121 ff. This new epistemic openness on the part of criminal lawyers is also perceived by the most attentive legal theorists: cf. PINO, *Legalità penale e rule of law*, in *Rule of law. L'ideale della legalità*, edited by Pino-Villa, Il Mulino, Bologna, 2016, § 1.3.

[149] VIGANÒ, *Il diritto giurisprudenziale nella prospettiva della Corte Costituzionale*, in *Sist. Pen.* 19 gennaio 2021, 14 ff.

[150] Most recently, ECtHR, *Sacharuk v. Lithuania*, cit., 144; *Vasiliauskas v. Lithuania* [GC], No 35343/05, § 155, ECHR 2015; 22 March 2001, *Streletz and others*, cit., § 50; *S. W. v. United Kingdom*, 22 November 1995, § 36, Series A No 335-B. See FIANDACA, *Prima lezione di diritto penale*, Rome-Bari, 2017, 148, who states that the criterion of the essence is inevitably linked to national law. It remains clear, in fact, that the predictability of judicial decisions does not imply the overcoming of legislative legality, having regard to the necessary prior knowledge of the precept; legislative and jurisprudential predictability should therefore not be conceived in terms of alternativeness; see NAPPI, *op. cit.*, 107 ff.

[151] PALAZZO, *La legalità tra principi fondamentali e teoria del reato,* in *Tra principi del diritto penale e teoria del reato. Per Giovanni De Francesco, Atti del convegno Pisa*, 6 May 2022, Pisa, 2022, 52.

jurisdiction that rules in the final instance, the natural occurrence of jurisprudential conflicts can become pathological – and therefore violate the principle of *"sécurité juridique,"* derived from the principle of *"procès equitable"* (Article 6 of the Convention) – in the following circumstances: when the differences in interpretation are *"profondes et persistantes"* – and therefore constitute a violation of Article 7 of the ECHR – and when domestic law does not provide for mechanisms *"visant à la suppression de ces incohérences"* or, even if such remedies exist, they have not been effectively applied[152].

With regard to the non-retroactivity *in malam partem* of case law, it is worth mentioning the judgment of the European Court in the case of *Del Rio Prada v Spain*[153], in which not only does the Court include the rules on *redención de penas*, relating to enforcement, within the concept of "*droit pénal matériel*", but the Court also observes that the interpretation *in malam partem* (*doctrina Parot*) by the *Tribunal Supremo* led to an extension of the sentence that was certainly "unforeseeable" for the applicant[154]. For the Italian legal system, the *Contrada* case is emblematic[155] in which the Court reiterates this notion of predictability of punitive intervention, which requires that changes *in* case law *in malam partem* cannot operate retroactively pursuant to Article 7 of the ECHR[156] – which therefore presupposes compliance with the principle of guilt[157]. In this case, the Court does not discuss the legal basis for external involvement in a mafia association, but rather, in the presence of contradictory

[152] VOGLIOTTI, *Nuovi problemi e nuove soluzioni per la penalistica contemporanea*, in *Sistema penale*, 30 gennaio 2024, 28 ff.

[153] ECtHR, 21 October 2013, *Del Rio Prada v. Spain*, application No 42750/09; *Yüksel Yalçınkaya v. Türkiye* [GC], No 15669/20, §§ 237-42, 26 September 2023; *Sacharuk v. Lithuania*, cit.; cf. ADDANTE, *op. cit.*, 31 ff.

[154] See MAZZACUVA, *La Grande Camera della Corte EDU su principio di legalità della pena e mutamenti giurisprudenziali sfavorevoli*, in *Dir. pen. proc.* 30 October 2013.

[155] ECtHR, 14 April 2015, *Contrada v. Italy*, No 66655/13, §§ 60 ff., 73 ff. See more recently NAPPI, *op. cit.*, 487 ff.; POMANTI, *op. cit.*, 189 ff.; see PERRONE, *Nullum crimen sine iure. Il diritto penale giurisprudenziale tra dinamiche interpretative in malam partem e nuove istanze di garanzia*, Torino, 2019, 171 ff.

[156] See, appropriately, VALENTINI, *La ricombinazione genica della legalità penale:* bio-technological strengthening *o manipolazione autodistruttiva? Su Taricco, Varvara e altre mine vaganti*, in *Dir. pen. cont.*, 2016, 20; ID., *Diritto penale intertemporale. Logiche continentali ed ermeneutica europea*, Milan, 2012, 150 ff.; ID., Case-law *convenzionale*, *cultura dei controlimiti e giustizia penale*, in *Riv. it. dir. proc. pen.*, 2014, 315 ff.

[157] See DONINI, *La personalità della responsabilità penale fra tipicità e colpevolezza. Una "resa dei conti" con la prevenzione generale*, in *Riv. it. dir. proc. pen.*, 2018, 3, 1599; ID., *Fattispecie o* **case law***? La "prevedibilità del diritto" e i limiti alla dissoluzione della legge penale nella giurisprudenza*, in *Quest. giust.*, 2018, 4, 79 et seq.; PALAZZO, *La sentenza Contrada e i cortocircuiti della legalità,* in *Dir. pen. proc.*, 2015, 9, 1064 ff.

interpretations, considers that it was not foreseeable for the defendant to be subject to criminal proceedings for external contribution[158]. The Court should verify whether the applicant suffered arbitrary treatment by the State as a result of his conviction, in that it did not respect his freedom to make an informed choice[159].

While emphasising the role of the judge, the European Court limits his or her discretion even where it attributes to the principle of legality the specific meaning of the principle of specificity, stating that the law must clearly establish the offence and the penalties, prohibiting not only analogy but also extensive interpretation[160] («while it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy»)[161] or, at least, allowing broad interpretation only to the extent that it was "reasonably foreseeable" as «the result of the development of a discernible line of case law or if its application in broader circumstances was in any case compatible with the essence of the offence»[162]. It is recognised that the progressive evolution of criminal law through judicial interpretation is a necessary part of legal tradition, provided that the results of such interpretative development are consistent with the «essence of the offence and can be reasonably foreseeable»[163]. The

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[158] VIGANÒ, *Il principio di prevedibilità*, cit., 229.

[159] See FORNARI, *Prima e dopo Contrada: precedenti giurisprudenziali ed "essenza" della fattispecie nella valutazione di prevedibilità ex art. 7 CEDU*, in *Diritto penale dell'Unione Europea e nell'Unione Europea – Studi in onore di Giovanni Grasso*, Pisa, 2023, 563, 565. See VALENTINI, *La ricombinazione genica*, cit., 17.

[160] See ECtHR, 8 July 1999, No 23536194 – 24408194, in 31 *E.H.R.R.* 2001, 292; 21 January 2003, *Veeber v. Estonia*, No 45771/99, § 31; *Coëme and others*, *cit.*, § 145; 25 May 1993, *Kokkinakis v. Greece*, No 14307/88, § 52; 24 February 1998, *Larissis and others v. Greece*, § 39 ff.; 22 March 2001, *Streletz and others*, cit., § 50; *K.-H. W. v. Germany*, *cit.*, § 45; *Baskaya and Okçuoglu v. Turkey*, *cit.*, § 36; BERNARDI, *Il principio di legalità*, cit., 681 ff.; MAZZACUVA, *Nulla poena sine lege*, in *Corte di Strasburgo e Giustizia penale*, edited by Ubertis-Viganò, Torino, 2016, 37 ff.; MANES, *Decisioni in primo piano – nessuna interpretazione conforme al diritto comunitario con effetti* in malam partem *– nota a Cass., Sez. un., 25 Giugno 2009 (depositata 6 Ottobre 2009), No 38691*, Caruso, in *Cass. pen.*, 2010, 1, 105 ff.

[161] ECtHR, Section II, 3 March 2020, *Parmak and Bakir v. Turkey*, nos. 22429/07 and 25195/07, § 58.

[162] ECtHR, *Sacharuk v. Lithuania*, cit., 145, the Court continues: «(see *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 65, 3 December 2019); *Jorgic v. Germany*, No 74613/01, § 114, ECHR 2007 III; *Custers and Others v. Denmark, nos. 11843/03 and others* 2, 3 May 2007; *Huhtamäki v. Finland*, No 54468/09, § 51, 6 March 2012)».

[163] ECtHR, 22 March 2001, *Streletz and others*, cit., § 50; *K.-H. W. v. Germany*, *cit.*, § 45; ECtHR, *Sacharuk v. Lithuania*, cit., 144; *S.W. v. United Kingdom*, 22 November 1995, § 36, Series A No 335-B; *Vasiliauskas v. Lithuania [GC]*, No 35343/05, § 155, ECHR 2015; *Kafkaris*, cit., § 141; Section II, 3

concept of the essence of the offence refers, on the one hand, to the "legal type of offence"[164] and, on the other hand, to the text[165], as stated, for example, in the case *of Navalny v. Russia*[166], which also emphasises the role of the text[167]. Knowability and predictability do not only concern the prescriptive part of criminal law – as in the *Pessino* case[168] – but also the consequences of sanctions («an individual must 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 will make him criminally liable and what penalty will be imposed for the act committed and/or omission (see, among other authorities, *Cantoni*, cited above, § 29)»)[169], as reiterated in the *Alimuçaj* case[170], including, as mentioned above, the rules on enforcement[171].

In considering objective parameters, importance is also attached to *socio-cultural* developments[172], which are not bound by formal legal references. In this regard, the historic judgments on *marital rape*[173], in which the socio-cultural developments referred to by the Strasbourg judges attribute decisive importance to a model of objective recognisability[174]. Despite criticism of the victim-centred approach in the case of *marital rape*[175], it is correctly pointed out that it was difficult to imagine a different conclusion by a human rights court that must guarantee respect for fundamental human rights and that, therefore, could not accept a concept of marital relations unworthy of a "civilised society". The Court «did no more than continue a perceptible line of

March 2020, *Parmak and Bakir v. Turkey*, cit., § 59; see BERNARDI, *Il principio di legalità*, cit., 689.

[164] See BARTOLI, *Le garanzie della "nuova" legalità*, in *Sistema Penale* 2020, 180; FORNARI, cit., 14.

[165] See BARTOLI, *Le garanzie*, cit., 159

[166] **ECtHR, Section III, 17 October 2017 (15 November 2018), *Navalnyye v. Russia*, No** 29580/12, § 54.

[167] Idem, § 61 ff. See SANTANGELO, *Precedente e prevedibilità. Profili di deontologia ermeneutica nell'era del diritto penale giurisprudenziale*, Torino, 2022, 352.

[168] ECtHR, *Pessino v. France*, No 40403/02, § 33, 10 October 2006.

[169] ECtHR Grand Chamber, 12 February 2018, *Kafkaris v. Cyprus*, application No 21906/04, § 140.

[170] ECtHR, 7 February 2012, *Alimuçaj v. Albania*; GRASSO-GIUFFRIDA, cit., 42.

[171] ECtHR, Grand Chamber, *Del Rio Prada*, cit., §§ 56 – 118; *Kafkaris v. Cyprus*, cit., §§ 125 – 152; 17 December 2009, Section V, *M. v. Germany*, §§ 106 – 137.

[172] See ECtHR, Section II, 19 February 2008, *Kuolesis and Others v. Lithuania*, § 115 ff. See MAZZACUVA, *Nulla poena,* cit., 238 ff.; BERNARDI, *Riserva di legge e fonti europee in materia penale,* in *Annali Ferrara,* 2006, 45 ff.

[173] ECtHR, 22 November 1995, *S.W. v. United Kingdom*, No 0166/92, §§ 43 ff.

[174] On the criteria for assessing predictability, see DE BLASIS, *Oggettivo, soggettivo ed evolutivo nella prevedibilità dell'esito giudiziario tra giurisprudenza sovranazionale e ricadute interne*, in *Dir. pen. cont.*, 2017, 4, 128 ff.

[175] See VALENTINI, *Diritto penale intertemporale*, cit., 239 ff. See ADDANTE, cit., 13.

case-law development dismantling the immunity of a husband from prosecution for rape upon his wife», imposing increasingly marked limits on marital immunity, such that «judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law»[176].

EU case law also affirms the principle of legality and legal certainty as a fundamental principle of EU law[177], and with particular reference to criminal matters, emphasises that «this principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable»[178].

This interpretation in terms of foreseeability linked to legality, non-retroactivity and specificity is also reiterated in the interpretation of Article 2(2) of Regulation No 2988/1995, which recognises the principle of legality for EU sanctions, stipulating that a sanction cannot be applied unless it has been introduced by an EU act (reservation of law) prior to the irregularity (principle of non-retroactivity)[179]. EU case law emphasises the principle of legality, reiterating that «a penalty, even an administrative one, cannot be imposed unless it rests on a clear and unequivocal legal basis»[180]. The Court of Justice specifies that this rule applies only to administrative penalties (Article 5) and does not apply to the remedial measures referred to in Article 4 of the

[176] ECtHR, *S.W. v. United Kingdom*, cit., § 43, with reference to §§ 11 and 23-27; FORNARI, *op. cit.*, 7; VOGLIOTTI, *Nuovi problemi*, cit., 20, see 22.

[177] ECJ, *Emsland-Stärke GmbH*, cit., § 43; Court of First Instance, 6 October 2005, *Sumitomo Chemical Co. Ltd – Sumika Fine Chemicals Co. Ltd*, joined cases T-22/02 and T-23/02, § 80; ECJ, 23 November 1999, *Arblade and Leloup*, Joined Cases C-369 and 376/96, in *ECR* 8453 ff. with explicit reference to criminal law; ECJ, 15 February 1996, *Duff and* others, C-63/93, in *ECR* I – 569, § 20; Court of First Instance, 31 January 2002, *Hult v Commission*, T-206/00, *ECR* I-A-19 and II-81, § 38.

[178] ECJ, *Advocaten voor de Wereld VZW*, cit., § 50 (see 49 on the principle of precision), with reference to the judgment of the ECtHR, 22 June 2000, *Coëme et al.*; Advocate *Colomer*, *Advocaten voor de Wereld VZW*, cit., § 102; Advocate *Kokott*, 20 November 2007, *The International Association of Independent Tanker Owners e altri*, C-308/0, § 143; see MANACORDA, *La deroga alla doppia punibilità nel mandato di arresto europeo e il principio di legalità (note a margine di Corte di Giustizia, Advocaten Voor De Wereld, 3 maggio 2007)*, in *Cass. Pen.*, 2007, 4346; DI MARTINO, *La frontiera e il diritto penale e contesto delle norme di diritto penale transnazionale*, Torino, 2006, 48.

[179] For a comprehensive discussion of this principle in Community law, see SCHWARZE, *European Administrative Law*, cit., 867 ff.

[180] Court of First Instance, 26 September 2002, *Sgaravatti Mediterranea Srl*, T-199/99, § 126; Case 117/83 Könecke [1984] ECR 3291, § 11; Case C-172/89 Vandemoortele v Commission [1990] ECR 1-4677, § 9.

Regulation[181].
The principle of non-retroactivity enshrined in Article 7 of the ECHR has been interpreted by the ECtHR as also encompassing the principle of retroactivity of the more favourable rule[182], even though this is not expressly provided for in the rule in question[183]. This is particularly the case in *Scoppola*[184], where the Court adheres to the criterion of the so-called maximum standard, adopting the most protective form of fundamental rights protection proposed in national systems[185]. The European Court refers to Article 9 of the American Convention on Human Rights, which guarantees the retroactivity of the most favourable rule, as well as Article 49 of the Charter of Nice and the case law of the Court of Justice in this regard, and, finally, the Statute of the International Criminal Court and the case law of the International Tribunal for the former Yugoslavia (ICTY)[186]. The Grand Chamber, changing its previous and established position (cases *X v Germany*, *Le Petit v United Kingdom*[187], *Zaprianov v Bulgaria*[188]), admits that Article 7 § 1 of the Convention not only enshrines the principle of non-retroactivity of more severe criminal laws, but also, implicitly, the principle of retroactivity of less severe criminal laws.
The ECtHR reached this conclusion taking into account the «evolution of the

[181] ECJ, 4 May 2006, *Reinhold Haug and Land Baden-Württemberg*, C-286/05, § 18 ff.; see Opinion of Advocate General *Philippe Léger*, 11 December 2003, *Gisela Gerken and Amt für Agrarstruktur Verden*, C-295/02, § 23 ff.
[182] ECtHR, 17 September 2009, *Scoppola v. Italy (Application No 10249103)*, in *Riv. it. dir. proc. pen.*, 2010, 356 ff., with note by BUZZELLI-PECORELLA, *The Scoppola case before the Strasbourg Court*; see MAZZACUVA, *La Convenzione Europea dei diritti dell'uomo e il principio di legalità nella materia penale*, in *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, edited by Manes-Zagrebelsky, Milano, 2011, 411 ff.; MANACORDA, *Carta dei diritti fondamentali dell'Unione Europea e CEDU: una nuova topografia delle garanzie penali in Europa?*, *ibid.*, 168 ff. For an initial opening in relation to retroactivity, see ECtHR, *Baskaya and Okçuoglu v. Turkey*, cit., §; see ESPOSITO, *Il diritto penale «flessibile» (Flexible Criminal Law)*, Torino, 2008, 235; BERNARDI, *Art. 7 ('No punishment without law')*, cit., 252 ff.
[183] See BERNARDI, *Il principio di legalità*, cit., 683.
[184] See ARMONE, *European Human Rights Court and the principle of 'Lex mitior': evidence of multilevel protection*, in *Foro it.*, 2010, 231.
[185] ARMONE, *op. cit.*, 229. On the criteria of the maximum standard or adequate protection developed by the Constitutional Court, see MAUGERI, *Il ruolo della CEDU nella tutela interna dei diritti fondamentali: la tutela del sentimento e della libertà di religione nella giurisprudenza della Corte europea,* currently being published in *Trattato di Diritto Penale,* Vol. V*, Delitti contro il sentimento religioso e contro la pietà dei defunti,* Edizioni Scientifiche Italiane; PULITANÒ, *Tempi del processo e diritto penale sostanziale,* in *Riv. it. dir. e proc. pen.,* 2005, 520; TESAURO, *Costituzione e regole esterne,* in *Dir. Unione europea,* 2009, 210.
[186] ECtHR, *Scoppola v. Italy*, cit., § 105.
[187] *Ibid.*, § 107; ECtHR, 5 December 2000, No 35574/97.
[188] ECtHR, 6 March 2003, No 41171/98.

situation in the respondent State and in the Contracting States in general», and acknowledging the need to adopt a dynamic and evolving approach in interpreting the Convention, which makes the guarantees concrete and effective, rather than theoretical and illusory: it thus noted a consensus at European and international level to consider as a fundamental principle of criminal law the application of the criminal law providing for a less severe penalty even after the offence has been committed.

The ECtHR considers that the principle of retroactivity of the more favourable rule is also based on the "principle of the primacy of law", of which Article 7 is an essential element, a principle which requires the court to apply to each punishable act the penalty that the legislature considers proportionate. The application of the most severe penalty solely on the grounds that it was the penalty provided for at the time the offence was committed, would constitute «*une application au détriment de l'accusé des règles régissant la succession des lois pénales dans le temps*» (an application to the detriment of the accused of the rules governing the succession of criminal laws over time) – it would mean ignoring the legislative change favourable to the accused, which occurred before the judgment, and continuing to impose a penalty that the State and the community now consider excessive[189].

However, the ECtHR considers that the principle of retroactivity under Article 7 applies only to rules defining the offence and penalties, and not to procedural rules[190], for which the application of the *tempus regit actum* principle is considered reasonable[191].

Even before the entry into force of the Treaty of Lisbon, the Court of Justice had considered that the principle of *lex mitior*[192], as enshrined in Article 15 of the International Covenant on Civil and Political Rights, was part of the common constitutional traditions of the Member States and, as such, should be considered an integral part of the general principles of European law, compliance with which is guaranteed by the Court of Justice itself and which national courts must observe when applying national law adopted to imple-

[189] § 108.
[190] § 110.
[191] ECtHR, 12 February 2004, *Mione v. Italy*, No 7856/02, and *Rasnik v. Italy*, 10 July 2007, No 45989/06; *Martelli v. Italy*, 12 April 2007, No 20402/03; 22 June 2000, *Coëme et al.*, cit., §§ 147-149.
[192] ECJ, *Kirk*, 10 July 1984, *Kirk*, C-63/ 83, *ivi* 1984, 2718; ECJ, 13 November 1990, C-331/88, *Fedesa et al.*, in *ECR*, p. 4023; ECJ, 3 May 2005, *Silvio Berlusconi – Sergio Adelchi – Marcello Dell'Utri and others*, C-387/02, C-391/02 and C-403/02, § 68 – 69; Advocate General *Yves Bot*, 27 November 2007, *Rüdiger Jager v Amt für Landwirtschaft Bützow*, C-420/06, § 48. See VAGLIASINDI, *La definizione di rifiuto tra diritto penale ambientale e diritto comunitario*, in *Riv. trim. dir. pen. econ.* 2005, 959; GRASSO, *"La Costituzione" per l'Europa*, in *Lezioni*, cit., 666–667.

ment EU law[193]. However, this approach by the Court does not correspond to the legal traditions of the Member States[194]; in the Italian legal system itself, there were doubts as to the constitutional nature of the principle of "favouring the accused"[195].

Article 2(2) of EU Regulation No 2988/95, in establishing the principle of legality, expressly provides that in the event of subsequent amendment of the provisions relating to administrative penalties contained in EU legislation, the less stringent provisions shall apply retroactively, thus accepting the principle of *favor rei* (i.e., favouring the defendant)[196]. The Court of Justice specifies that this rule applies only to administrative penalties (Article 5) and does not apply to the remedial measures referred to in Article 4 of the Regulation[197]; although the Court has recently nuanced this position, stating that «it is true that that provision provides for the retroactive application of provisions of EU law re-

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[193] See ECJ, 28 April 2011, *Hassen El Dridi*, C-61/11 PPU, point 61; ECJ, 3 May 2005, *Berlusconi*, cit., I-3565 ff.; ECJ, 10 July 1984, *Kirk*, cit., 2718; ECJ, 13 November 1990, C-331/88, *Fedesa et al.*, cit., 4023; this principle was subsequently reaffirmed by the judgments of 11 March 2008, *Jager*, C-420/06. See DE VERO, *Limiti di vincolatività in ambito penale degli obblighi comunitari di tutela*, in *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, edited by Grasso-Sicurella, Milan 2008, 299 ff.; SICURELLA, *La protezione "mediata" degli interessi dell'integrazione europea: l'armonizzazione dei sistemi penali nazionali tra il diritto comunitario e il diritto dell'Unione europea*, in *Lezioni di Diritto Penale Europeo*, cit., pp. 342 ff. – 350; see also MAUGERI, *I principi fondamentali della "materia penale" nella giurisprudenza della Corte di Giustizia e della Corte europea dei diritti dell'uomo*, in *Per un rilancio del progetto europeo*, cit., 125 and doctrine cited therein.

[194] See BERNARDI, *Il principio di legalità*, cit., 683. See ECJ, 8 March 2007, *Campina GmbH & Co., formerly TUFFI Campina emzett Gmbh/Hauptzollamt Frankfurt (oder)*, C-45/06.

[195] See Constitutional Court No 394/06; FIANDACA-MUSCO, *op. cit.*, 85-86; MANTOVANI, *Diritto Penale*, Padua, 2007, 87 ff.; PADOVANI, *Diritto penale*, Milan 2004, 38, which refers to the indirect constitutional relevance of the principle; SICURELLA, *La tutela "mediata" degli interessi della costruzione europea,* cit., 349 ff. and doctrine cited therein regarding the case law of the Italian Constitutional Court (Constitutional Court 28 December 2006, order No 458; 1 June 2004, order No 165; 24 February 2006, No 70; judgment No 394/06).

[196] ECJ, 17 July 1997, *The Queen v Minister for Agriculture, Fisheries and Food, ex parte: National Farmers' Union and others*, C-354/95, ECR 4559, paragraph 41, with commentary by HOFFMANN, *Cour de Justice: 'Première application du règlement relatif à la protection des intérêts financiers des Communautés européennes?'*, in *Agon* 1997, No 16, 10; ID., *La protection des intérêts financiers des Communautés européennes dans la jurisprudence de lla Cour e de Justice*, in *Riv. it. dir. pubbl. com.*, 1998, 674; ECJ, *Gisela Gerken, cit.,* § 40 et seq.; *Campina GmbH & Co., cit.*, § 33; 11 March 2008, *Rüdiger Jager v Amt für Landwirtschaft Bützow*, C-420/06, 41 ff. – in particular 59 ff.; Opinion of Advocate General *Philippe Léger*, 13 July 2006, *Maatschap Schonewille-Prins and others*, C-45/05, § 67; Advocate General *Yves Bot*, 27 November 2007, *Rüdiger Jager v Amt für Landwirtschaft Bützow*, C-420/06, § 48.

[197] ECJ, 4 May 2006*, Reinhold Haug and Land Baden-Württemberg*, C-286/05, § 18 ff.; see Opinion of Advocate General *Philippe Léger*, 11 December 2003, C-295/02, *Gisela Gerken and Amt für Agrarstruktur Verden*, § 23 ff.

ducing the severity of the system of administrative penalties, without its scope being limited to penalties of a criminal nature alone»[198].
Article 49 of the Charter of Fundamental Rights of the European Union finally, provides for explicit recognition of the principle of *favor rei*, thus elevating to a fundamental right the application of a law subsequent to the commission of the offence if more favourable, in accordance with the position developed by the Court of Justice (legal doctrine previously held that this provision recognised more extensive protection than Article 7 of the ECHR, a possibility provided for in Article 52(3) of the Charter)[199].
In this regard, the *Taricco* case is significant because it represents a model of "virtuous cooperation between domestic and supranational jurisdictions". The Constitutional Court could have invoked the "*controlimiti*" (counter-limits), but preferred a dialogue-based approach, referring the matter to the Court of Justice of the EU for a preliminary ruling (concerning the alleged non-application of criminal law provisions on the extension of the statute of limitations "*in malam partem*")[200]. The Court of Luxembourg thus performs an «advisory function aimed at building a more advanced *nomofilachia* (legal uniformity) at European level». This broadens the range of procedural instruments which, created to establish horizontal links between national courts and supranational courts, effectively implement a more general *principium cooperationis* aimed at the harmonious formation of a common European case law, primarily intended to guarantee the effective protection of individual rights and freedoms[201].

8. *The principle of guilt.* Despite the recognition of fundamental rights, par-

[198] ECJ, Grand Chamber, 1 August 2025, Case C-544/23, T.T., *BAJI Trans s.r.o. v Národný inšpektorát práce* , § 78 and § 79: «That being said, as was emphasised by the Advocate General in point 70 of his Opinion, the fact that the EU legislature considered it necessary, in Article 2(2) of Regulation No 2988/95, to extend the general EU-law principle of the retroactive application of the lighter penalty to all administrative penalties concerning irregularities likely to prejudice the financial interests of the Union within the meaning of Article 1 of that regulation, whether or not they are of a criminal nature, specifically indicates that that principle is not intended to be applied, as such, to penalties which are not of such a nature».
[199] BERNARDI, *Il principio di legalità*, cit., 699.
[200] Court of Justice, 8 September 2015, in Case C-105/14, and by the preliminary ruling of the Constitutional Court, to which the European Court responded with its judgment of 5 December 2017, in the case of M.A.S. and M.B. ("*Taricco 2*" or "*Taricco-bis*"), which was finally followed by the judgment of the Constitutional Court.
[201] CANZIO, *Legalità penale, processi decisionali e nomofilachia*, in *Sistema penale*, 29 June 2022, 14 ff.

ticularly in criminal matters, within the framework of European Union law, it should be noted that the European Convention on Human Rights and the European Charter of Fundamental Rights unfortunately have a very serious shortcoming: the principle of guilt has not been enshrined[202].

This shortcoming is unacceptable in criminal matters, as it compromises respect for citizens' freedoms, who risk being punished for the uncontrollable consequences of their conduct. In the legal traditions of modern constitutional states, this principle constitutes a fundamental right (even if there are obvious exceptions) that not only represents a bulwark for the protection of citizens' freedom, but also for the protection of human dignity. The time is now ripe to identify guilt «as a fundamental right in the European Union anchored in the idea of human dignity and the model of a democratic state governed by the rule of law»[203].

Even in the punitive administrative sector – as emerges from the quoted study by a group of European scholars dedicated to the analysis of the administrative sanctioning systems of the EU Member States[204] – it tends to assert itself in order to guarantee the same preventive purpose as the threat of sanction; mere objective liability could lead to a lack of responsibility on the part of operators, who would perceive the sanction as a sort of unpredictable and inevitable fate, to be amortised through an increase in the prices of products or services.

Such disregard for this fundamental principle is consistent, moreover, with an attitude of limited sensitivity – especially in the past – revealed in this regard in the case law of the European Court of Human Rights and the Court of Justice, including in relation to the criminal sector, as examined extensively elsewhere[205].

The compromise-inspired approach of the European Court of Human Rights on the issue of guilt was radically changed in *Sud Fondi v Italy*[206], in which the

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[202] See GRASSO, *La Costituzione per l'Europa,* cit., 662.

[203] See DEMETRIO CRESPO, *El principio de culpabilidad: ¿un derecho fundamental en la Unión Europea?* in *Los derechos fundamentales en el derecho penal europeo*, edited by Diez-Picazo-Nieto Martìn, Civitas, 2010, 384; PULITANÒ, *Diritti umani e diritto penale*, in *Riv. it. dir. proc. pen.*, 2013, 1625, points out that «the right to protection, which constitutes the substance of the principle of culpability, has acquired the status of a human right».

[204] *Étude sur les systèmes de sanctions administratives et pénales dans les États membres des Communautés Européennes*, vol. I, *Rapports nationaux*; *Rapport de synthèse sur les systèmes de sanctions administratives des États membres des Communautés européennes, ibid.*, vol. II, cit.

[205] See MAUGERI, *Verso la piena affermazione del principio di colpevolezza come diritto fondamentale nel diritto penale europeo, pur con qualche tentennamento*, in *Arch. pen.* 2022, 1 ss.

[206] ECtHR, Section II, 20 January 2009, *Sud Fondi s.r.l. and others v. Italy*, No 75909/01, in *Cass. Pen.*,

Court recognised the fundamental nature of the principle of guilt in criminal matters, basing it, however, not on Article 6, which expressly establishes the presumption of innocence that should constitute the procedural aspect of the principle of guilt, but rather on the principle of legality under Article 7 of the ECHR[207].

The European Court, taking up an argument made in the historic judgment of the Italian Constitutional Court, No 364/1988[208], emphasises that compliance with the principle of legality and non-retroactivity[209], which entails the predictability of criminal intervention and therefore the accessibility and knowability of the precept and the criminal sanction, necessarily requires compliance with the principle of guilt, because predictability cannot be guaranteed with regard to conduct carried out without guilt and which, therefore, did not fall within the sphere of control of the agent. The Court points out that the subjective element, the moral link between the material element of the offence and the person who is considered to be the perpetrator, is not expressly mentioned in Article 7 of the ECHR, but the logic of punishment and retribution requires an interpretation of the concept of "guilty" in Article 7 (and the corresponding notion of *"personne coupable"* in the French version), which requires, in order to punish, a link of an intellectual nature allowing an element of responsibility to be identified in the conduct of the material perpetrator of the offence. Otherwise, the punishment would no longer be justified, as it would be inconsistent, on the one hand, to require an accessible and predictable legal basis and, on the other hand, to consider a person guilty and punish them when they were not in a position to know the criminal law, in view of an unavoidable error that cannot be attributed to the person who was the victim of it[210].

7-8, 3185. See ANDRIJAUSKAITĖ, *The Principles of Administrative Punishment under the ECHR*, Vilnius, 2022, 265 ss.

[207] See, on this point, GRASSO, *Il Trattato di Lisbona*, cit., 2320-2326.

[208] Constitutional Court, 12 October 2012, No 230; in this regard, Constitutional Court, 21 March 2019, n. 63, § 6.1., according to which the immediate *rationale* of Article 25, paragraph 2, of the Constitution is «to protect individual freedom of self-determination, guaranteeing that individuals will not be surprised by the imposition of a criminal penalty that was not foreseeable at the time the act was committed». See GRASSO, *Politiche penali e ruolo della giurisprudenza*, cit., 60.

[209] On this principle, see ECtHR, Section III, 12 July 2022, *Kotlyar v. Russia*, No 38825/16; ECtHR, 17 May 2010 (GC), *Kononov v. Latvia*, No 36376/04, § 185; ECtHR, 24 January 2012, *Mihai Toma v. Romania*, No 1051/06, § 26.

[210] On this subject, see ABBADESSA-GAMBARDELLA-MANES-VIGANÒ, *Il "Controcanto" della Corte europea dei diritti dell'uomo: l'europeizzazione delle garanzie in materia penale*, in *Ius 17*, 2010, 87; MAZZACUVA, *Nulla poena sine lege*, in *Corte di Strasburgo e Giustizia penale*, edited by Ubertis-Viganò, Torino, 2016, 247 ff.; Id., *Le pene nascoste. Topografia delle sanzioni punitive e modulazione dello*

With the *Varvara* judgment, the ECtHR seems to reaffirm not only the prohibition of liability for the acts of others, but also the principle of guilt, whether based on Article 6, § 2 and, therefore, on the presumption of innocence, or on the principle of legality under Article 7, even though the Court then returns to admitting, in a rather superficial manner, the legitimacy of forms of strict liability.

§ 70 states that «the Contracting States remain free, in principle, to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected by the Convention and therefore to define the constituent elements of such offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or negligence. Examples of such offences may be found in the laws of the Contracting States»[211]. The Grand Chamber intervened authoritatively in the *G.I.E.M.* case, providing an interesting interpretation of the apparent contrast between the two judgments in *Sud Fondi* and *Varvara*, in the sense that the interpretation of the principle of guilt provided in the *Sud Fondi* judgment represents the rule, while that provided by *Varvara* represents the exception[212]. Forms of strict liability based on presumptions of guilt are accepted as exceptions[213]. Although not prohibited by the Convention, such presumptions must, in criminal matters, remain within certain limits, which are exceeded «where a presumption has the effect of making it impossible for an individual to exon-

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statuto garantistico, Torino, 2017, 219; PULITANÒ, *Personalità della responsabilità: problemi e prospettive*, in *Riv. it. dir. proc. pen.*, 2012, 1231 ff.; COTTU, *Ambigua fenomenologia e incerto statuto del principio di colpevolezza nel dialogo tra le Corti*, in *Ind. Pen.* 2017, 380; SCOLETTA, *La legalità penale nel sistema europeo dei diritti fondamentali,* in *Europa e diritto penale*, edited by Paliero-Viganò, Milan, 2013, 247; BALSAMO, *La Corte europea e la confisca contro la lottizzazione abusiva: nuovi scenari e problemi aperti* – note to ECtHR, Sec. II, 20 January 2009, n. 75909/01, *Sud Fondi s.r.l. and others v. Italy*, in *Cass. Pen.* 2009, v. 49, n. 7-8, 3185; MANES, *Il giudice nel labirinto. Profili delle intersezioni tra diritto penale e fonti sovranazionali*, Rome, 2012, 142; cfr. ID., *Nessuna interpretazione conforme al diritto comunitario con effetti in malam partem*, in *Cass. Pen.* 2010, 101 ss.; MAIELLO, *Confisca, CEDU e diritto dell'Unione tra questioni risolte ed ancora aperte*, in *Dir. Pen. Cont. 2*012, 43 ff. See, on this subject, judgment No 49/2015 of the Italian Constitutional Court.

[211] The ECtHR cites *Salabiaku v. France*, 7 October 1988, Series A No 141, § 27. The same principle was affirmed in *Janosevic v. Sweden* (No 34619/97, 23 July 2002, § 68), in which the Court added that «the absence of subjective elements does not necessarily deprive an offence of its criminal nature; in fact, the laws of the Contracting States offer examples of offences based solely on objective elements». Highly critical is BALSAMO, *La Corte Europea e la "confisca senza condanna" per la lottizzazione abusiva* – note to ECtHR, 29 October 2013, No 17475/09, *Varvara v. Italy*, in *Cass. pen.*, 2014, v. 54, n. 4, 1405.

[212] See §§ 242-247.

[213] § 243.

erate himself from the accusations against him, thus depriving him of the benefit of Article 6 § 2 of the Convention»[214]. Presumptions of guilt – which, in procedural terms, resolve cases of strict liability, exceptionally permitted by the Convention – must, in essence, be rebuttable, allowing for evidence to the contrary and, therefore, enabling the perpetrator to exercise their right of defence[215].

The Court of Justice of the EU, in turn, prior to the *Sud Fondi* judgment of the ECtHR, allows restrictions on the principle of guilt under Article 6, provided that they comply with the principle of proportionality, in that they are within "reasonable limits"[216], as stated by Advocate General Van Gerven in the *Hansen* case; or the Court does not exclude the configuration of criminal offences based on strict liability, but simply limits their scope by invoking respect for the rights of the defence[217], as highlighted by Advocate General Stix-Hackl in the *Käserei Champignon* case[218] (the effective protection of the Community's financial interests may require the burden of proof to be eased and even the waiving of the presumption of guilt[219]). It follows that «in the field of administrative penalties, it is not possible to infer from Article 6(2) of the EU Treaty, read in conjunction with the European Convention on Human Rights, the recognition of the principle of guilt as a general principle of Community law»[220].

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[214] The Court refers to *Salabiaku v. France*, 7 October 1988, §§ 27-28, Series A No 141-A, *Janosevic v. Sweden*, No 34619/97, § 68, ECHR 2002 – VII and *Klouvi v. France* 30754/03, § 48, 30 June 2011.

[215] § 41; GALLUCCIO, C*onfisca senza condanna, principio di colpevolezza, partecipazione dell'ente al processo: l'attesa sentenza della Corte EDU, Grande Camera, in materia urbanistica*„ in *www.penalecontemporaneo.it*, 3 July 2018.

[216] ECtHR, *Salabiaku v. France*, *cit.*, 15 and 387; 23 July 2002, *Västberga Taxi Aktiebolag and Vulic v. Sweden*, No 36985/97, § 113; European Commission, 15 April 1991, *Marandino*, No 12386/86, in *Decisions et Rapports (DR)* 70, 78; 22 February 1994, *Raimondo v. Italy*, Série A vol. 281, 7 and in *European Human Rights Reports* 1994, vol. 18, III, 237; 15 June 1999, *Prisco v. Italy*, decision on the admissibility of application No 38662/97; 25 March 2003, *Madonia v. Italy*, No 55927/00, in www.coe.it, 4; 20 June 2002, *Andersson v. Italy*, No 55504/00, *ibid.* 4; 5 July 2001, *Arcuri and three others v. Italy*, No 52024/99, *ibid.* 4; 4 September 2001, *Riela v. Italy*, No 52439/99, *ibid.* 5–6; *Bocellari and Rizza v. Italy*, No 399/02, *ibid.* 8; *Phillips v. the United Kingdom,* 12 December 2001, No 41087/98, § 32–34; *Van Offeren v. the Netherlands*, No 19581/04, 5 July 2005; 19 October 2004, Application No 66273/01, *Joost Falk v. the Netherlands*, *ibid.* 6 ff.

[217] Advocate General *Stix-Hackl*, 27 November 2001, *Käserei Champignon*, *cit.,* § 52.

[218] Conclusions of Advocate *Stix-Hackl*, *Käserei Champignon*, *cit.,* § 49.

[219] Advocate *Stix-Hackl*, *Käserei Champignon*, *cit.*, § 79 ff.

[220] *Ibid.*, § 53; ECJ 17 October 1995, *Leifer,* C-83/94, in *ECR*, 3249 ff.; 4 October 1991, *Richardt and 'Les Accessoires Scientifiques' SNC*, C-367/89, in *ECR*, 4627; 16 November 1983, *Commission v Thyssen AG*, C-188/82, *ECR*, 3736–3737; see Opinion of Advocate General *Van Themaat*, *ibid.*, 3741; ECJ 27 February 1997, *Ebony Maritime v. prefetto di Brindisi*, C-177/95, in *ECR*, 809. See PULITANÒ, *Personalità della responsabilità, cit.,* 1231 ff.; SICURELLA, *Nulla pœna sine culpa*, cit., 15 ff.

The Court of Justice, therefore, in a first phase – precisely in light of the influence of the ECHR – accepted the principle of personal criminal responsibility in its minimum sense, given by the "attributability" of the conduct constituting the offence to the person held responsible, i.e. as a prohibition of liability for the acts of others; however, the principle of personal criminal liability, "*nulla poena sine culpa*", as a principle of guilt, is not incorporated into EU law.

Despite this tolerance of EU case law towards national and European provisions allowing forms of strict liability, the often-severe financial penalties under EU law can only be imposed when there is "culpability", in accordance with the latest developments in case law in many European countries[221].

The Court of Justice has, in fact, required the establishment of guilt in the field of competition law, not least because Article 15(1) and (2) of EEC Regulation No 17/62 expressly required intent and negligence for the purposes of punishment[222], and Article 23 of Regulation No 1/2003 is worded in the same

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For similar conclusions with reference to punitive administrative sanctions (formerly Community sanctions), see ECJ, 11 July 2002, *Kaeserei Champignon Hofmeister GmbH & Co. KG v Hauptzollamt Hamburg-Jonas*, C-210/00, in *Dir. pen. proc.*, 2002, 1433, and for a critical commentary, see RIONDATO, *Un negativo "giro di vite" in tema di responsabilità "personale"*, in *Dir. pen. proc.*, 2002, 1557; MANACORDA, *Le droit pénal et l'Union européenne: esquisse d'un systeme,* in *Rev. science crim. droit pen. comp.*, 2000, 120.

[221] See DANNECKER, *Sanktionen und Grundsätze des Allgemeinen Teils im Wettbewerbsrecht der Europäischen Gemeinschaften*, in *Bausteine des europäischen Wirtschaftsstrafrechts*, edited by Schünemann-Suárez González, Cologne-Berlin-Bonn-Munich, 1994, 331; BÖSE, cit., 152, who argues that this principle applies in the context of fines.

[222] See ECJ, *Estel*, 17 May 1984, *Estel*, C-83/83, in *Racc.*, 2214; on the principle of fault as "a prerequisite for the penalty", ECJ, 2 October 2003, *Thyssen Stahl AG P,* C-194/99, §§ 108 – 113; Advocate General *Tizzano*, *Dansk Rørindustri A/S*, et al., *cit.*, § 121; Advocate General *Stix-Hackl*, 26 September 2002, C-196/99 P, *Siderúrgica Aristrain Madrid SL,* § 123 ff.; ID., 26 September 2002, C-195/99 P, *Krupp Hoesch*, § 74; Advocate *Colomer*, 17 October 2002, *Volkswagen AG*, C-338/00 P, § 62 ff.; Advocate General *Van Themaat* in ECJ 16 November 1983, *Commission v Thyssen AG*, *cit.*, 3740; Advocate General *Colomer*, 13 February 2003, *Ihw Rehmann GmbH v Hauptzollamt Weiden*, C-56/02, 51. On compliance with the principle of culpability in "determining the amount of the fine" ECJ 2 October 2003, *Krupp Hoesch Stahl AG,* C-195/99 P, 103 (98 ff.); 18 September 2003, *Volkswagen AG*, C-338/00 P, § 173; Advocate *Colomer*, 11 February 2003, *Irish Cement Limited,* C-205/00 P, 105 ff.; ID., 11 February 2003, *Aalborg Portland A/S*, 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*,* § 98. See TIEDEMANN, *Community law and criminal law*, in *Riv. trim. dir. pen. econ.*, 1993, 225, who observes that the Court of Justice is often content to apply Article 15(1) and (2) of EEC Regulation No 17 to the assessment of fault, while placing emphasis on the determination of intent when setting the penalty: according to the author, this equation of intent and fault can be explained by the particularities of the legal field in question, which primarily concerns breaches of obligations; in similar terms, see HARTMUT HAMANN, *Das Unternehmen als Täter im europäischen Wettbewerbsrecht*, Pfaffenweiler, 1992, 176-177; for further details on this point, see GRASSO, *Comunità europee,* cit., 107 ff.

terms (some concerns regarding compliance with the principle of guilt are raised by the provisions of Article 23(4) on the principle of solidarity between associated undertakings)[223]. The Directive (EU) 2019/1 on the extended competencies of the competition authorities (the ECN+ Directive) in Article 13(1) establishes that «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». Recital 42 of the Directive states that the notions of intent and negligence should be interpreted in line with the case law of the Court of Justice of the European Union on the application of Articles 101 and 102 TFEU and «not in line with the notions of intent and negligence in proceedings conducted by criminal authorities relating to criminal matters»[224].
In the *ThyssenKrupp Nirosta GmbH* case, Advocate General Yves Bot pointed out that «the Court accepted the applicability of the principle of personal liability to competition law in *Commission v Anic Partecipazioni*»[225]; it is considered that «Pursuant to the principle of personal liability, no person can be liable other than for his own acts. Under the principle of the personal nature of penalties, no punishment may be imposed other than on the guilty party. Those principles therefore preclude a legal or natural person who is neither the author of nor the accomplice to an offence from being held responsible for it, and therefore constitute limits to the exercise by public authorities of the *jus puniendi*»[226]. This ruling is therefore interpreted as a long-standing recognition of the principle of culpability in this area[227].
«In addition, certain regulations expressly require a specific subjective element, such as intent; the Court of Justice has clarified the concept of "intentional non-compliance" found in certain regulations in the field of the common agricultural policy, specifying that, in order to be in breach of the rules, the person must either pursue a situation of non-compliance with the rules or

[223] RINALDI, *Council Regulation No 1/2003: an initial examination of the main innovations and open questions of the reform on the application of Community competition rules*, in *Dir. comm. internaz.*, 2003, 159 ff.; See Court of Justice, 8 July 2008, *AC-Treuhand AG,* cit., 134 – 135.
[224] KORKKA-KNUTS-MELANDER, *op. cit.*, 48 ff.
[225] ECJ, 8 July 1999, Commission v Anic Partecipazioni, C-49/92 P, EU:C:1999:356, § 78.
[226] Advocate General *Yves Bot*, 26 October 2010, C-352/09 P, *ThyssenKrupp Nirosta GmbH, formerly ThyssenKrupp Nirosta AG, formerly ThyssenKrupp Stainless AG v European Commission*, § 162; ECJ, 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, § 87 (see 83 et seq.).
[227] See DE VERO-PANEBIANCO, *Delitti e pene nella giurisprudenza delle Corti europee*, Torino, 2007, 114.

accept that such non-compliance may occur, even without pursuing it»[228].
The Court of Justice has also developed criteria for assessing gross negligence as a form of fault: account must be taken of the complexity of the regulatory provisions whose non-implementation gave rise to the obligation; the professional experience of the operator (who was required to be aware of the regulations and commercial risks of their activity); and the diligence of the operator (who was required to take all necessary measures to guard against commercial risk). It should be noted that the three elements mentioned above are only assessment criteria, on the basis of which the Commission must assess in concrete terms whether or not the economic operator's conduct was manifestly negligent[229]. In specifying these criteria, Advocate General Kokot observes that «knowledge that damage will probably result, however, is not essential for there to be serious negligence»[230] (in short, gross negligence is not identified with conscious fault).
It is also considered that the principle of culpability at European level is confirmed by the recognition of the category of inevitability of error on the prohibition, which excludes culpability and, therefore, the penalty[231]; in his conclusions in the *Hoffman-La Roche* case, Advocate General Reishl highlights the need to recognise the general principle of EU law in the theory of the doctrine of "unavoidable error on the precept"[232]. All economic operators in whom an institution has raised well-founded hopes may invoke the principle of the protection of legitimate expectations[233]; those who have committed a

[228] ECJ, 27 February 2014, *van der Ham and van der Ham-Reijersen van Buuren*, C-396/12. See Advocate General Bot, 16 November 2011, C-72/11, *Afrasiabi and others*, in ECR, I-14288; ECJ, 21 December 2011, *Afrasiabi and* others, cit., in ECR, I-14308; Court of First Instance, 6 September 2013, *Europaisch-Iranische Handelsbank AG v Council*, T-434/11

[229] ECJ, *Käserei Champignon, cit.*, § 75 ff. – 82; 11 January 2007, *Von Dairy Products BV v Productschap Zuivel*, C-279/05, § 33; 21 July 2005, *Eichsfelder Schlachtbetrieb*, ECR I-7355, § 39.

[230] See, on the concept of serious negligence in Community case law, Advocate General *Kokott*, *The International Association of Independent Tanker Owners and Others*, cit., § 104.

[231] See ECJ, 25 November 1998, *Manfredi v Regione Puglia*, C-308/97, *ECR*, 7685; Comm., 23 December 1977, *Pergamentpapier*, (78/252/EEC), in *Official Journal of the European Communities,* 13 March 1978, L 70, 54–64; see TIEDEMANN, *Europäisches Gemeinschaftsrecht und Strafrecht*, in *Neue Jur. Wochen.*, 1993, 29.

[232] Conclusions of Advocate General *Reischl*, *Hoffmann La Roche,* C-85/76, in *Racc.*, §§ 596 ff.; ECJ, *Hoffmann La Roche,* 13 febbraio 1979, *Hoffmann La Roche,* C-85/76, in *Racc.*, §§ 461 ff.; 16 December 1975, *Coöperative Vereniging _suiker Unie" U.A. and others* (*Pfeifer and Langen*), C 40 to 48/50, 54 to 56, 111, 113 and 114-73, in *ECR*, 1663-2012; 12 November 1987, *Ferriere San Carlo*, C-344/85, in *ECR*, 4435-4450; cf. TIEDEMANN, *Europäisches Gemeinschaftsrecht*, cit., 29.

[233] Court of First Instance, 9 July 2008, *Paul Reber GmbH & Co. KG v Office for Harmonisation in the Internal Market*, T-304/06, § 64; 27 June 2007, *Nuova Gela Sviluppo Soc. cons. pa,* T-65/04, § 61; 7 June 2006, T-213/01 and T-214/01, *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft*

manifest breach of the legislation in force cannot invoke legitimate expectations[234].

The principle of culpability is particularly important in Regulation No 2988/1995, Article 5 of which reserves the application of EU administrative penalties for intentional or negligent conduct; while for non-reprehensible conduct compensatory measures are sufficient, which are not considered penalties as they are intended "merely to restore the *status quo*" (and therefore not repressive in nature, Article 4), as recently and repeatedly confirmed by the Court of Justice[235]. In several judgments, however, European case law disregards the fundamental value of the principle of guilt, by virtue of the provisions of Article 5(2), which, in requiring guilt, is without prejudice to any "sectoral penalty provision", thus allowing the application of punitive sanctions for irregularities not caused culpably, if they fall within the scope of sectoral penalty provisions. It is stated that «the suggestion that Article 5 of Regulation No 2988/95 is an acknowledgement of the general applicability of the fault principle therefore seems questionable, to say the least»[236]. The Court of Justice goes so far as to argue that irregularity is defined by Article 1(1) of Regulation No 2988/1995 as being «defined by their results and not by the existence of intention or serious negligence. Therefore, the absence of such an element is no justification for refraining from imposing the penalty provided for by the Community legislation for an irregularity the existence of which

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v Commission, ECR II-1601, § 210 and case law cited therein; *Sgaravatti Mediterranea Srl*, *cit.*, § 111; 6 July 1999, T-203/97, *Forvass v Commission*, ECR I-A-129 and II-705, § 70 and the case law cited *therein*, and 26 September 2002, T-319/00, *Borremans and Others v Commission*, ECR I-A-171 and II-905, § 63. See Opinion of Advocate General *Yves Bot*, 6 May 2008, *Heemskerk BV Firma Schaap v Productschap Vee en Vlees*, C-455/06, 137; ECJ, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and* others, cit., § 52 and case law cited *therein*, 55 and 59).

[234] See Court of First Instance, *Vela Srl – Tecnagrind SL*, *cit.*, § 388 et seq.; *Sgaravatti Mediterranea Srl*, *cit.*, § 111. See JESCHEK, *Die Strafgewalt übernationaler* Gemeinschaften, in *Zeitschrift für die gesamte Staatswissenschaft,* 1953, 497.

[235] ECJ, IV Chamber, 7 April 2022, C-447/20 and C-448/20, *Instituto de Financiamento da Agricultura e Pescas IP (IFAP) v LM* (C-447/20), *BD, Autoridade Tributária e Aduaneira* (C-448/20), § 74; ECJ, *Christosoulou and Others*, C-116/12, EU:C:2013:825, § 67 and case law cited; ECJ, IV Chamber, 21 July 2011, C-150/10, *Bureau d'intervention et de restitution belge v Beneo-Orafti SA*, § 70 et seq.; Advocate General Sharpston, 5 February 2015, C-607/13, *Ministero dell'Economia e delle Finanze Agenzia delle Dogane Commissione europea v Cimmino and Others*, § 112. SEE TIEDEMANN, *Der Strafschutz der Finanzinteressen der Europäischen Gemeinschaft*, in *Neue Jur. Wochen.*, 1990, 2233; VERVAELE, *La fraude*, cit., 27.

[236] Opinion of Advocate General *Stix-Hackl*, *Käserei Champignon*, *cit.*, § 57; in accordance with ECJ 11 July 2002, *Käserei Champignon Hofmeister GmbH & Co. KG v Hauptzollamt Hamburg – Jonas*, C-210/00, § 50, 44 ff.

has been established»[237].
Where culpability is emphasised, it is considered a mere defence, with a reversal of the burden of proof, in the sense that it is accepted that the entrepreneur can escape the penalty if he can prove his lack of fault[238].
Even in the interpretation of the concept of force majeure, after the entry into force of Regulation No 2988/1995, an interpretation continues to emerge that is not only absolutely objectivist, corresponding to the interpretation of force majeure as a cause for exclusion of *suitas* (i.e., controllability of conduct as a prerequisite for legality, and particularly the principle *nullum crimen sine lege stricta* – usually referred to as "*tipicità*" in Italian, hereinafter "typicality"[239]) or culpable typicality, but even ends up admitting forms of liability for the acts of others[240].
Finally, however, the Court of Justice seems to be re-evaluating and promoting compliance with the principle of culpability where, as already mentioned, it has emphasised the different subjective attribution regime between the penalties provided for in Article 5 of Regulation No 2988/1995 and the measures contemplated in Article 4, highlighting how «it is clear from Article 5 of that regulation that the penalties referred to therein concern intentional irregularities or irregularities caused by negligence which, in principle, constitute particularly serious irregularities»; while the administrative measures referred to in Article 4 of the same Regulation «are also applicable to cases of less serious irregularities»[241].
Not only that, but the influence of the most recent judgments of the European Court of Human Rights, which have recognised the principle of guilt, is also evident. The Court of Justice points out that, as is clear from the case law of the European Court of Human Rights, on the one hand, the term "conviction" within the meaning of the ECtHR implies both "a finding of guilt", following the establishment, in accordance with the procedures laid down by law, of the commission of an offence, and the imposition of a penalty or other

[237] ECJ, 13 September 2001, *Kingdom of Spain v Commission of the European Communities*, C-374/99, § 34 and the related Opinion of Advocate General *Geelhoed*, § 28-68.
[238] ECJ, 19 November 2002, *Strawson e Gag & Sons*, C-304/00, in *Racc.*, I – 10737, § 62; Advocate *Léger*, 13 July 2006, *Maatschap Schonewille –Prins c.*, C-45/05.
[239] ROMANO, *Art. 42*, in *Commentario sistematico del Codice penale*, vol. I, Milano, 2005, 418.
[240] *Ibid.*, 1510.
[241] ECJ, IV Chamber, 7 April 2022, C-447/20 and C-448/20, *Instituto de Financiamento da Agricultura e Pescas IP (IFAP) v LM* (C-447/20), *BD, Autoridade Tributária e Aduaneira* (C-448/20), § 74; ECJ, 1 October 2020, *Elme Messer Metalurgs*, C-743/18, § 60; ECJ, 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, § 122 and the case law cited therein.

measure involving deprivation of liberty[242]; Article 2 of Framework Decision 2008/675 – on the taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings[243], as highlighted by Advocate General Yves Bot – also provides that "conviction" means any final decision of a criminal court establishing the guilt of a person for a criminal offence, clarifying that a conviction in European Union law presupposes a finding of guilt[244] and a final judgment.

In this regard, all judgments of the Court of First Instance and the Court of Justice concerning European arrest warrants require a ruling on guilt, based on the implicit recognition that the imposition of a penalty requires a finding of guilt in accordance with the guarantees of criminal proceedings. As Advocate General Bot pointed out in the *Dawid Piotrowski* case, the principle of mutual recognition «obliges the executing Member State to accept the analysis of the issuing Member State as regards guilt, either potential in the case of a prosecution or established in the case of a conviction in the issuing Member State»[245].

Advocate General Pitruzzella in the *Sumal, S.L. v Mercedes Benz Trucks España, S.L.* case[246] states that «in the public enforcement of competition law, given the almost criminal nature of the penalties imposed, several fundamental principles come into play: first, the principle of personal responsibility, and its corollary according to which the imposition of a penalty and the identification of liability presuppose guilt (*nulla poena sine culpa*)»[247].

Advocate General Pitruzzella refers to the conclusions of Advocate General Mengozzi in the case of *Siemens Österreich and others and Siemens Transmission & Distribution*, which recognises that «the principle that penalties

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[242] ECJ, 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628; see, to that effect, ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 123 and the case law cited therein.

[243] OJ 2008 L 220, 32.

[244] Advocate General *Yves Bot*, 17 May 2017, *Trayan Beshkov, in the presence of Sofiyska rayonna prokuratura*, C-171/16; ECJ, 21 September 2017, *Trayan Beshkov*, C-171/16, § 29.

[245] Advocate General *Yves Bot*, 6 September 2017, C-367/16, *Criminal proceedings v Dawid Piotrowski*, § 56; ECJ, 12 December 2019, ZB (Public Prosecutor of Brussels, Belgium) (C-627/19 PPU, EU:C:2019:1079, paragraph 36); Opinion of Advocate General Kokott, 17 September 2020, C-488/19, *Minister for Justice and Equality v JR*, § 51; ECJ, I Chamber, 14 January 2021, C-393/19 ruled – in relation to a case concerning the unlawful export of cultural goods – that «the means used to commit an offence cannot be confiscated if the owner claiming them is acting in good faith and demonstrates that he or she was unaware of the unlawful use made of them by the perpetrator of the offence».

[246] Advocate General *Pitruzzella*, 15 April 2021, C-882/19, *Sumal S.L. v Mercedes Benz Trucks España*, S.L., 3.

[247] ECJ, Grand Chamber, 6 October 2021, C-882/19, *Sumal SL v Mercedes Benz Trucks España*.

must be specific to the offender and the offence, [...] is a corollary to the principle of personal responsibility and, together with that principle, constitutes a fundamental guarantee deriving from criminal law that limits the public authority's right to impose punishment. Those principles apply in relation to competition law, including in regard to legal persons, because the penalties which may be imposed by the Commission to punish anti-competitive behaviour have 'a character similar to criminal law'»[248].

However, the principle of personal responsibility is interpreted not as a mere prohibition of liability for the actions of others, but as a genuine principle of culpability (liability for one's own culpable actions): with reference to competition law, it is emphasised that «the principle of personal liability applies *primarily* to the undertaking, which, as the addressee of the EU competition rules, must, as a single economic entity, even if it does not necessarily have its own legal personality, be held personally liable if it commits, intentionally or negligently, an infringement of those rules»[249]. This is indirectly confirmed by the text of Article 23(2) of Regulation No 1/2003 which, as mentioned above, provides that the fine shall be imposed on the undertaking which, *intentionally* or *negligently*, commits the infringement of the competition rules. In this regard, the Court has recognised that, where an infringement has been committed by several undertakings, the Commission is required to determine the relative gravity of the participation of each of them[250] and to individualise the penalty «according to the conduct and characteristics of the undertakings con-

[248] See Advocate General *Mengozzi*, 19 September 2013, Joined Cases C-231/11 P, C-232/11 P and C-233/11 P, *European Commission v Siemens Österreich and Others* (C-231/11 P*), Siemens Transmission & Distribution Ltd* (C-232/11 P), *Siemens Transmission & Distribution SA and Nuova Magrini Galileo SpA* (C-233/11 P) *v European Commission*, § 74. See Advocate General *Ruiz-Jarabo Colomer*, *Aalborg Portland and Others v Commission*, cit., § 63; Opinion of Advocate General *Bot*, 26 October 2010, in *ArcelorMittal Luxembourg v Commission* and *Commission v ArcelorMittal Luxembourg and Others,* cit. (judgment of 29 March 2011, C-201/09 P and 216/09 P, ECR p. I-2239, paragraph 181), and *ThyssenKrupp Nirosta and Others v Commission*, cit.. As regards the "quasi-criminal" nature of the penalties, see, most recently, § 40 of the Opinion of Advocate General Kokott, 28 February 2013, *Schenker und Co AG and Others* (judgment of 18 June 2013, C-681/11), with further extensive references to the Court's consistent application of criminal law principles in the field of European competition law. It should also be noted that the ECtHR, in its judgment of 27 September 2011, *Menarini Diagnostics* v. *Italy* (application no.No 43509/08, §§ 38 to 45), recognised the criminal nature, within the meaning of Article 6(1) of the ECHR, of a fine imposed under Italian competition law by the Competition and Market Authority.

[249] § 77. In this regard, see ECJ, 18 July 2013, *Schindler Holding and Others v Commission*, C-501/11 P, § 101 et seq., as well as § 129.

[250] ECJ, *Commission v Anic Partecipazioni*, cit., § 150; ECJ, 8 July 1999, *Hercules Chemicals v Commission*, C-51/92 P, ECR, -4235, §110.

cerned»[251]; thus, the principle of culpability is also invoked as a criterion for determining the penalty.

In the recent *Delta Stroy* case[252], Advocate General Priit Pikamäe, referring to the conclusions of Advocate Bot in the previous *ThyssenKrupp* case[253], stated that «the Court has thus accepted, [...] the applicability of the principle of personal responsibility and its corollary, namely the principle that punishment and penalties are applicable to the person responsible»[254], specifying that «The ECtHR did indeed recall, by reference to Articles 6(2) and Article 7 of the ECHR, which have in common that they protect the right of everyone not to be penalised without his or her personal liability having been duly established, the prohibition on punishing a person in respect of an offence committed by another»[255].

Finally, the principle of guilt is expressly recognised by the Court of Luxembourg, which acknowledges that criminal proceedings are «proceedings that may result in a decision of guilt or innocence», while admitting that such proceedings may take place in the absence of the defendant within the limits provided for in Articles 8 and 9 of Directive (EU) 2016/343[256] on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[257].

8.1. *The culpability of legal persons.* Clearly, many of the decisions examined in which the Court of Justice recognises the principle of guilt in the applica-

[251] ECJ, 10 April 2014, *European Commission v Siemens Österreich and Others* (C-231/11 P), *Siemens Transmission & Distribution Ltd* (C-232/11 P), *Siemens Transmission & Distribution SA and Nuova Magrini Galileo SpA* (C-233/11 P) *v European Commission*, joined cases C-231/11 P to C-233/11 P, § 37.

[252] Advocate General Priit Pikamäe, 9 June 2022, C-203/21, *Criminal proceedings against Delta Story*, 2003, § 34.

[253] Advocate *Bot* in the case *ThyssenKrupp Nirosta v Commission*, C-352/09 P, EU:C:2010:635, §§ 51 and 161.

[254] See ECJ, *Commission v Anic Partecipazioni*, cit., § 78; 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, §§ 56 and 77.

[255] Advocate *Priit Pikamäe*, *Delta Stroy*, 2003, cit., § 43.

[256] Of particular importance in this regard is the introduction of Directive 2016/343 on the presumption of innocence, which is giving rise to extensive case law aimed at guaranteeing this principle, ECJ 28/11/2019, C-653/19 PPU, DK – Spetsializirana prokuratura; ECJ 19/9/2019, C-467/18, EP 2016/343; 5/9/2019, C-377/18, AH, PB, CX, KM – MH; 19/9/2018, C-310/18 PPU; 26/2/, C-202/18 and C-238/18, Ilmārs Rimšēvičs, European Central Bank (ECB); Court, Grand Chamber, 25/7/2018, C-216/18 PPU, LM. It remains understood that the European legislator continues to regard rebuttable presumptions of fact and law as being compatible with the presumption of innocence, as is apparent from recital 22 of the Directive.

[257] ECJ, IV Chamber, 19 May 2022, *IR with the intervention of Spetsializirana prokuratura*, C-569/20.

tion of EU law relate to legal persons, particularly in the field of competition or in relation to Regulation No 2988/1995, but it should be emphasised that, in the EU legal system, the Court of Justice places particular importance on the recognition of the principle of culpability in the application of punitive sanctions against entities.

As emphasised by Advocate General Priit Pikamäe in the *Delta Stroy 2003* case,[258] «the principle of the recognition of fundamental rights for legal persons is now established[259] to the benefit of a judicial interpretation which, initially, found fertile ground for expression in the economic sphere, and more particularly in the sphere of competition, since the effects of the relevant legislation were mainly of interest to commercial companies. In disputes relating to the suppression of infringements of competition law, which strictly speaking do not come within criminal matters, the Court applied the essential principles of criminal law and the fundamental principles laid down in Article 6 of the ECHR[260] for the advantage of the applicant legal persons. The Court has thus accepted, as Advocate General Bot has emphasised, the applicability of the principle of personal responsibility and its corollary, namely the principle that punishment and penalties are applicable to the person responsible, on which the concept of the attributability of illicit agreements is based»[261].

Within the European Union legal system, moreover, the culpability of legal persons is expressly recognised as a prerequisite for the application of punitive sanctions.

Article 7 of Regulation No 2988[262] in particular, provides for the applicability of administrative penalties directly against legal persons and, since, pursuant to Article 5, the application of administrative penalties presupposes the guilt of the recipient, it follows that the applicability to legal persons, pursuant to Article 7, of the penalties provided for in Article 5 presupposes the guilt of the legal person.

With regard to legal persons, the Commission seems to accept, first and foremost, a form of *autonomous* liability, which takes the form of liability for

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[258] Advocate Priit Pikamäe, *Delta Stroy* 2003, cit., § 34.

[259] See judgement of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84) and the protection of personal data; judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832), § 79 and case law cited.

[260] See ECJ, 21 September 1989, *Hoechst v Commission*, 46/87 and 227/88, EU:C:1989:337, § 13.

[261] Opinion of Advocate General *Priit Pikamäe*, cit., § 34; Court of Justice, 8 July 1999, *Commission v Anic Partecipazioni* (C-49/92 P, EU:C:1999:356, § 78), and 10 September 2009, *Akzo Nobel and Others v Commission* (C-97/08 P, EU:C:2009:536, §§ 56 and 77).

[262] ECJ, III Chamber, 4 October 2024, C-721/22 P, European Commission, PB, Council of the European Union, § 59.

the organisation guilty of failing to prevent or stop the commission of offences[263]; in this regard, Community case law on centralised penalties refers to a notion of fault on the part of the undertaking that is independent of the objectively unlawful conduct committed by certain employees[264]. As stated by Advocate General Colomer in the *Volkswagen AG* case, if, in order to establish the infringement, it were necessary to identify, within an undertaking, the individual or individuals who can be blamed for both the unlawful conduct and the intention or fault, the legal person would not be treated in the same way as a natural person, but would be granted almost total impunity, since, in order to have all charges dropped, it would be sufficient for the executive orders to have been given by persons without any particular legal knowledge[265]. Such a claim, according to which an undertaking could be held liable for the acts of an employee only if the latter embodied all the objective and subjective elements of an infringement, specifies the Commission in the case in question, would be contrary to the nature of competition law as the law of undertakings and to the division of labour within the organisation of undertakings; all acts of persons authorised to act on behalf of undertakings must be attributed to the latter[266]. «In the case of an undertaking, the principle would require, at least, that it could be charged with inadequate organisation or a breach of its duty of supervision»[267].

A similar autonomous concept of guilt seems to be accepted in Regulation No 2988, which does not specify, as was the case in the draft regulation, that groups or associations of natural or legal persons are liable for irregularities when an irregularity has been committed by a natural person acting on their behalf and exercising legal, delegated or de facto decision-making power. The absence of this clarification emphasises the *autonomous* nature of the legal person's liability (as provided for in the most advanced systems in this area)[268].

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[263] See OTTO, *Die Strafbarkeit von Unternehmen und Verbänden*, Berlin, 1993, 28; DANNECKER, *Sanktionen und Grundsätze*, cit., 10.

[264] ECJ, *Volkswagen AG*, cit., 67; Commission, 27 November 1981, C 82/203/EEC, relating to a proceeding under Article 85 of the EEC Treaty (IV/30.188 – *Moët et Chandon*, London, Ltd, in OJEC 1982, L-94, 7, 10); Commission, 6 January 1982, 82/267/EEC, (IV/28.748 – *AEG –Telefunken*, in OJ L-177, 15, 27).

[265] Advocate *Colomer*, *Volkswagen AG*, cit., § 64.

[266] ECJ, *Volkswagen AG*, cit., § 67; Court of First Instance, 6 July 2000, T-62/98, *Volkswagen*, in ECR II-2707, § 2234. See RIONDATO, *The "principle of corporate fault" does not require the identification of the guilty natural person*, in *Dir. pen. proc.*, 2003, 1440.

[267] ECJ, *Volkswagen AG*, cit., § 67; Court of First Instance, 6 July 2000, T-62/98, *Volkswagen*, in ECR II-2707, § 2234. See RIONDATO, *The "principle of corporate fault" cit.,* 1440.

[268] DE MAGLIE, *Ethics and the market: the criminal liability of companies*, Milan, 2002.

In particular, the doctrine developed in German law for *Ordnungswidrigkeiten* is applied in European law where the Commission and the Court attribute to companies and associations the conduct and responsibilities of all natural persons who have acted on their behalf, whether they are employees, delegates or external agents, provided that the breach of their obligations by the managers of the legal person has made the offences possible or facilitated them[269]; therefore, the organicist theory is accepted, according to which it is possible to attribute to the legal person the actions of natural persons acting on its behalf, even if the criteria for attribution are not clearly established in EU case law. Notwithstanding that it is irrelevant who actually acted, or whether that person is guilty, the breach of the "obligations of organisation, diligence, prevention and control" that the company or association committed through its bodies or representatives constitutes the core of the regulatory reproach[270]; therefore, the Court accepts a notion of guilt according to which the legal person, within the framework of a teleologically oriented conception of punitive law (aimed at the protection of legal interests), is liable for failing to meet the requirements of the legal system, by failing to implement internal management and control mechanisms aimed at preventing the commission of offences (in each case, it will be necessary to ascertain the extent of the control *deficit* «over the entire company that the legal person allowed to occur in the specific situation»[271]).

The Commission applies very strict standards of culpability to legal persons[272]; it is clear from the Court's rulings that, in order to attribute liability, it is sufficient that the natural persons managing the company knew or should have known about the offence, even if they did not directly commit it[273]. There is concern in legal theory that, in practice, the paradigm of liability of the structurally guilty entity will give way to an *objective* paradigm[274], a «drift towards

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[269] See ECJ, 7 June 1983, *Musique Diffusion française*, C-100-103/80, in ECR, 1903.

[270] See OTTO, *Die Strafbarkeit von Unternehmen und Verbänden*, Berlin, 1993, 30 ff.; DANNECKER, *Sanktionen und Grundsätze,* cit., 10; HARTMUT HAMANN, *op. cit.*, 174-175. Commission, 5 December 1983, No 83/667/EEC, relating to a procedure under Article 85 of the EEC Treaty (Case No IV/30.671 – *iPTC Belgium*, in OJEC, L-376, 7), § 17; Commission Decision 85/79/EEC of 14 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.809 – *John Deere*, in OJ 1985, L-35, 58).

[271] See PALIERO, *La responsabilità penale delle persone giuridiche e la tutela degli interessi finanziari della Comunità europea*, in *La lotta contro la frode agli interessi finanziari della Comunità Europea tra prevenzione e repressione. L'esempio dei fondi strutturali*, edited by Grasso, Milano, 2000, 77.

[273] See DANNECKER, *Sanktionen und Grundsätze,* cit., 11.

[272] *IPTC – Belgium*, 31 December 1983, L 376; *British Leyland*, 2 August 1984, L 207; *Sperry New Holland*, 31 December 1985, L 376; *Tipp-Ex*, 10 August 1987, L 222; see HEITZER, op. cit., 24.

[274] PALIERO, *Le "sanzioni comunitarie": un modello di disciplina per la responsabilita` delle persone*

schemes of objective attribution of the offence, a liability based on the position oriented towards the causation of the harmful event, in any case attributable, on the basis of a para-presumptive judgement (*culpa in re ipsa*), to a defect in company organisation»[275].

The Commission and the Court of Justice then take a particularly rigorous stance on the issue of error on the precept when the perpetrator of the offence is a company (in particular in relation to violations of Articles 85(1) and 86 of the Treaty), requiring knowledge not only of the specific case but also of its meaning (*Bedeutungskenntnis*) with reference to regulatory elements (e.g. the concept of abuse of a dominant position[276]) and considering the behaviour negligent where such knowledge is lacking[277]. This approach applies not only to large international companies, but also to small businesses, which are also expected to be aware of the decisions of the Court and the Commission and the situation in their markets[278].

The Advocate General in the *Schenker* case also refers to Article 6(1) of the ECHR and the constitutional traditions of the Member States, as well as Article 23(2) of Regulation No 1/2003, which, as already mentioned, provides that the Commission may impose fines only for intentional or negligent infringements. The Advocate General then considered that not all errors of law are capable of precluding antitrust liability, but only *unavoidable* errors («sometimes also called an *excusable* error or an *unobjectionable* error») – that is, where «has the undertaking acted without fault and it cannot be held liable for the cartel offence in question». This means that the undertaking «took all possible and reasonable steps to avoid its alleged infringement of EU antitrust law», a situation that «would appear to occur only very rarely»[279]. In

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giuridiche nell'area europea?, in *Per un rilancio del progetto europeo*, cit., 184. For an examination of the case law on this subject, see MAUGERI, *I principi fondamentali*, cit., 145 ff. – 148.

[275] PALIERO, *Le "sanzioni comunitarie"*, cit., 185. Part of German doctrine, in light of the Constitutional Court's ruling on the Treaty of Lisbon (*die Lissabon-Entscheidung* – BVERFG, 2BVE 2/08, 30 June 2009), which emphasises the mandatory nature of compliance with the principle of guilt in criminal matters, considers that the introduction of criminal sanctions for legal persons would be inadmissible on constitutional grounds, MEYER, *op. cit.*, 660; see BÖSE, *La sentenza della Corte Costituzionale tedesca sul trattato di Lisbona e il suo significato per la europeizzazione del diritto penale,* in *Criminalia*, 2009, 278.

[276] See ECJ, 23 September 1986, *Akzo Chemie v Commission*, C-5/85, in *ECR*, 2585.

[277] See ECJ 1-2-1978, *Miller International Schallplatten GmbH*, C-19/77, in *ECR*, I, 151, see Advocate *Warner*, 160; ECJ, 8 November 1983*, NV Jaz International Belgium and others*, C 96/102, 104, 105, 108, 110/82, in *ECR*, IV, 3369.

[278] See Advocate *Warner*, *Miller International Schallplatten GmbH, cit.,* 160, who considers the Commission's claim to be excessive.

[279] Advocate General Kokott, 28 February 2013, C-681/11, *Schenker & Co AG and Others*, § 46.

this light, it is considered that reliance on legal advice may constitute an "unavoidable" error of law, and the Court's ruling in the 1978 *Miller* judgment – according to which legal advice cannot excuse a violation of Article 85 EEC Treaty – is no longer justified after the entry into force of Regulation No 1/2003[280].

9. *Recognition of the principle of guilt through recognition of the presumption of innocence in the case law of the Court of Justice*. The European Court of Human Rights, as examined in more detail elsewhere, has operated «along a dual guideline of "substantialisation" of the conventional parameters used, relating to the procedural area, and "proceduralisation" of the substantive criminal categories involved in the regulatory situations it examines»[281]. Similarly, beyond the ambiguities that remain regarding the recognition of the principle of guilt as a fundamental right in the European Union legal system, the case law of the Court of Justice expressly recognises that the procedural guarantee of the principle of guilt, i.e. the presumption of innocence, as set out in particular in Article 6(2) of the ECHR, is one of the fundamental rights which, according to the settled case law of the Court, reaffirmed in the preamble to the Single European Act and in Article 6(2) of the Treaty on European Union, are protected in the EU legal system. It should be noted that the presumption of innocence is recognised in EU law in the context of the right to a fair trial and equality of arms, recognised by Article 6(1) and (3) of the ECHR as general principles of EU law[282].
Furthermore, unlike the principle of guilt, the presumption of innocence has been recognised by Article 48 («Presumption of innocence and right of defence») of the Charter of Fundamental Rights of the European Union[283]. In the *Volkswagen* case, Advocate General Colomer grounded the presumption of innocence as a fundamental right not only on Article 6(2) of the European

[280] Conclusions, 28 February 2013, *Schenker and others*, C-681/11, in Reports, §§ 40 and 41. On the relevance of *Verbotsirrtum* in European competition law, see FRENZ, *Handbuch Europarecht*, 2, *Europäisches Kartellrecht*, Heidelberg-New York-Dordrecht-London, 2014, 945.
[281] See COTTU, *op. cit.*, 356.
[282] *Stix-Hackl*, *Corus Uk Ltd*, *cit.*, § 147 et seq.; ECJ, 15 May 1986, *Johnston*, C-222/84, in *ECR*, 1651; Court of First Instance, 6 October 2005, *Sumitomo Chemical Co. Ltd – Sumika Fine Chemicals Co. Ltd*, joined cases T-22/02 and T-23/02, § 103 ff.; Opinion of Advocate General *Verica Trstenjak*, 3 May 2007, C-62/06, *Fazenda Pública-Director Geral das Alfândegas v ZF Zefeser – Importação e Exportação de Produtos Alimentares L*, §§ 56–57. See KORKKA-KNUTS-MELANDER, cit., 47 ff.
[283] See HETZER, *Fight against Fraud and Protection of Fundamental Rights in the European Union*, in *Eur. journ. of crime, crim. law and crim. just.* 2006, 25.

Convention, but also on Article 48(1) of the Charter of Fundamental Rights[284]. The Court of First Instance also referred to Article 48(1) of the Charter, invoked by the applicants in the *Sumitomo Chemical Co. Ltd – Sumika Fine Chemicals Co. Ltd* case[285].

The principle of guilt is therefore expressly based on Article 48. In the *Schenker* case, Advocate General Juliane Kokott identifies the basis of the principle of guilt in the express recognition of the presumption of innocence in Article 48 of the Charter: «Although this principle is not expressly mentioned in the Charter of Fundamental Rights of the European Union or in the ECHR, it is the necessary precondition for the presumption of innocence. The principle of *nulla poena sine culpa* may therefore be considered to be contained implicitly in both Article 48(1) of the Charter and Article 6(2) ECHR, which, as has been recognised, must be taken into account in cartel proceedings. Ultimately, these two provisions of the Charter and the ECHR can be regarded as the expression in procedural law of the principle of *nulla poena sine culpa*»[286].

In the same vein, Advocate General Kokott, in her conclusions in the *Schindler* holding case[287] and in the *Túrkevei Tejtermelő Kft.* case, discussed the "polluter pays" principle[288]. It is expressly recognised that the presumption

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[284] Advocate *Colomer*, *Volkswagen AG*, *cit.*, § 94.

[285] Tribunal, 6 October 2005, Joined Cases T-22/02 and T-23/02, *Sumitomo Chemical Co. Ltd and Sumika Fine Chemicals Co. Ltd*, § 103.

[286] Conclusions, *Schenker et al.*, cit., in Collection, §§ 40 and 41; *contra* ECJ, 18 June 2013, *Schenker und Co AG et al.*, C-681/11; also *contra* ECtHR, 30 August 2011, *G. v United Kingdom*; see Constitutional Court, 24 July 2007, No 322. See BOTTA-HARSDORFAND-FREWEIN, Poena sine Culpa.? *Comment on Schenker*, in *Eur. LR*, 553 ff.; VÖLCKER, Ignorantia legis non excusat *and the demise of national procedural autonomy in the application of the EU competition rules*, in *Comm. Mark. LR*, 2014, 1497-1519; WEITBRECHT, *Unbeachtlicher Verbotsirrtum im Kartellrecht*, in *Neue Jur. Wochen.*, 2013, 3085 ff.

[287] Advocate General *Kokott*, 18 April 2013, *Schindler Holding Ltd v European Commission and* Others, C-501/11 P, § 114 et seq.

[288] Advocate General *Kokott*, 16 February 2017, C-129/16, *Túrkevei Tejtermelő Kft. v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség*, § 44, referring to judgments of 18 November 1987, *Maizena and Others* (137/85, EU:C:1987:493, paragraph 15), and of 11 July 2002, *Käserei Champignon Hofmeister* (C-210/00, EU:C:2002:440, paragraphs 35 and 44). See also my Opinion in *Schenker and Others* (C-681/11, EU:C:2013:126, paragraphs 40 and 41); § 68: «Article 36(2) of the Waste Directive, the 'polluter pays' principle referred to in Article 191(2) TFEU, the principle of proportionality of penalties within the meaning of Article 49(3) of the Charter of Fundamental Rights and the presumption of innocence within the meaning of Article 48, paragraph 1, of the Charter do not preclude the owner of leased land from being subject to an appropriate penalty based on the legal presumption that he is jointly and severally liable with the actual user of the land for the infringement of waste legislation that has occurred there, provided that, in principle, it is possible to rebut that presumption by providing reasonable evidence».

of innocence entails recognition of the principle of guilt.
More recently, the Grand Chamber of the Court in the *IS* (*Illégalité de l'ordonnance de renvoi*) case[289] recognised, first of all, that under Article 48(1) of the Charter, every defendant is presumed innocent until proven guilty according to law, and that Article 52(3) of the Charter specifies that, where the latter contains rights corresponding to those guaranteed by the ECHR, the meaning and scope of those rights are the same as those conferred by that Convention.[290] Article 48 corresponds to Article 6(2) and (3) of the ECHR, with the consequence that the Court must therefore ensure that its interpretation of Article 48 of the Charter guarantees a level of protection that does not violate that guaranteed by Article 6 of the ECHR, as interpreted by the European Court of Human Rights.[291]
This principle «implies that every person accused is presumed to be innocent until his guilt has been established according to law;»[292] it follows that reversals of the burden of proof are inadmissible, as it is for the Commission to prove the facts alleged.[293]
As stated in several cases by Advocate Colomer, the principle prohibiting the reversal of the burden of proof «is of a procedural nature, is in the service of the fundamental right to the presumption of innocence, which is of a substantive nature, but they must not be confused.»[294] «The presumption of innocence means that there can be no punishment if guilt is not shown. Consequently, anyone making an accusation must show that the person accused has carried out the acts constituting the offence and also that the additional elements of fact and of law which make it possible to find him responsible are present. It is at that point that the presumption of innocence and the burden

[289] ECJ, Grand Chamber, 23 November 2021, C-564/19, IS (*Illégalité de l'ordonnance de renvoi*).
[290] «However, as is apparent from the explanations relating to Article 48 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, must be taken into account for the purposes of interpreting the latter.»
[291] ECJ, IS (*Illégalité de l'ordonnance de renvoi*), cit., §§ 101 and 104, in which it states that according to the Court's settled case law, for the purposes of interpreting a provision of EU law, account must be taken not only of its wording but also of its context and the objectives pursued by the legislation of which it forms part [judgments of 2 September 2015, Surmačs, C-127/14, EU:C:2015:522, § 28, and of 16 November 2016, DHL Express (Austria), C-2/15, EU:C:2016:880, § 19]; see ECJ, 29 July 2019, *Gambino and Hyka*, C-38/18, EU:C:2019:628, paragraph 39 and the case law cited therein.
[292] General Court, *Sumitomo Chemical Co. Ltd v Sumika Fine Chemicals Co. Ltd*, *cit.*, paragraph 106; Court of First Instance, 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse GmbH,* T-474/04, 75.
[293] ECJ, 8 July 1999, *Hüls AG v DSM NV,* C-199/92 P, *ECR* I-4287, §§ 155-167.
[294] Advocate Ruiz-Jarabo *Colomer*, 11 February 2003, C-217/00 P, Buzzi Unicem SpA v Commission of the European Communities, § 41.

of proof meet.»[295]
In the *Fazenda Pública* case, Advocate Trstenjak specifies, with particular reference to criminal matters, that guilt must be proven by the public prosecutor "beyond reasonable doubt;" the principle of in *dubio pro reo* «is a particular expression of the principle of the presumption of innocence.»[296]
Furthermore, as repeatedly confirmed by the Court of Justice, «the principle of the presumption of innocence is part of the Community legal order and applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments»[297] this was also the conclusion reached by Advocate General Nicholas Emiliou in the recent case of HSBC Holdings plc. and others.[298] Within the EU legal system, it is established, first and foremost, that procedural principles should also be applied in proceedings relating to legal persons (particularly frequent, for example, in the field of competition), as the Court of Justice – as examined above – has expressly recognised that fundamental rights, which are part of the general legal principles whose observance is guaranteed by the Court, are recognised for undertakings[299] (except in the case of rights that cannot be enjoyed by a legal person[300]).
In this regard, Article 2 of Regulation No 1/2003 on competition provides that «in all national or Community proceedings relating to the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of

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[295] Advocate *Colomer*, *Buzzi Unicem SpA v.,* cit., § 42; ID., 11 February 2003, C-219/00 P, *Cementir, Cementerie del Tirreno SpA v Commission of the European Communities,* § 39-40; ID., 11 February 2003, *Italcementi Spa v Commission,* C-213/00, § 38; ECJ 23 September 2004, *Italian Republic*, cit., 78.
[296] Advocate General Verica Trstenjak, *Fazenda Pública*, cit., § 60.
[297] ECJ, 21 September 2006, *JCB Service v Commission*, C-167/04 P, 90 ff. (50 – 53); *Hüls AG – DSM NV,* cit., § 149 ff.; 8 July 1999, *Montecatini*, C-235/92 P, in ECR I-4539, § 175 – 176; *Volkswagen*, *cit.*, in ECR II-2707, § 269; *Sumitomo Chemicali, cit.,* § 104 – 105; *Degussa AG*, *cit.*, § 411; 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse*, T-474/04; Advocate *Colomer*, *Buzzi Unicem SpA c., cit.*, § 41 ff.; Lawyer *Vestendorf*, in Court, 24 October 1991, T-1/89, *Rhône Poulenc*, in *Rec.* III – 867, II – 869, II – 954 and II – 956; Advocate *F.G.Jacobs*, 15 December 2005, C-167/04 P, *JCB Service*, § 61 ff. See GRASSO, *Recenti sviluppi*, cit., 758; OTTO, *op. cit.*, 28; for a comprehensive overview of procedural principles in EU law, see SCHWARZE, *Europäisches Verwaltungsrecht*, 2005, 1173 ff.; OPPERMANN, *op. cit.*, 46 ff.
[298] Opinion of Advocate General Nicholas Emiliou, 12 May 2022, C-883/19 P, *HSBC Holdings plc, HSBC Bank plc, HSBC Continental Europe,* formerly *HSBC France v European Commission*, § 121.
[299] ECJ, 26 June 1980, *National Panasonic*, C-136/79, in ECR 1980, 2034-2056 ff.; see Opinion of Advocate General Darmon, 18 May 1989, in *ECR*, 3324 – 3340; *contra* FROMMEL, *The European Court of Human Rights and the right of the accused to remain silent: can it be invoked by taxpayers?*, in *Dir. prat. trib.*, 1993, 1, 2167-2195.
[300] See DE SALVIA, *European Convention on Human Rights*, Naples, 2001, 97 ff.

Article 81(1) or Article 82 of the Treaty shall rest on the party or authority alleging the infringement».[301] Not only that, but even if the procedural rules for the application of *sui generis* sanctions are not covered by Regulation No 2988, in referring the application of sanctions to the national administrative authorities and, therefore, to the relevant local procedures, Article 2(4) of the Regulation specifies «without prejudice to applicable Community law»[302] and, therefore, the primacy of European Union law and the recognition of fundamental rights, starting with the presumption of innocence recognised by Article 48 of the Charter, is also recognised in procedural matters.

The ECtHR itself accepts a broad concept of "criminal proceedings," including proceedings aimed at the application of administrative penalties, which falls within the concept of "criminal matters" referred to in Article 6 of the Convention;[303] and, as clarified by Advocate General Colomer in the *Cementir* case, the Charter of Fundamental Rights of the European Union also follows this line.[304]

Also interesting are the aforementioned conclusions of Advocate Emiliou in the recent case of *HSBC Holdings plc. and others*,[305] when he states that «according to a consistent line of case-law of the ECtHR, the principle of the presumption of innocence also precludes the premature expression, by public authorities, of the opinion that the person charged with an offence is guilty before he or she has been so proved according to law. Those expressions

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[301] Articles 27 and 28 guarantee the rights of defence of the undertakings concerned. However, legal scholars have complained that, as with Regulation No 1/2003, it continues to provide for a reversal of the burden of proof; see RINALDI, *op. cit.*, 165-167.

[302] See MASSERA, *I principi generali*, in *Trattato di diritto amministrativo europeo,* cit., 441 ff. and 460 ff.

[303] See Advocate General Colomer, *Cementir, Cementerie del Tirreno SpA, cit.*, § 52; ECJ 16 July 1988, C-252/97 P, *N v Commission of the European Communities*, § 52; *Lymburgse Vinyl Maatschappij NV (LVM) and others,* 15 October 2002, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P and C-252/99 P and C-254/99 P, § 169. See TIEDEMANN, *Generalbericht*, in *Grunderfordernisse des Allgemeinen Teils für ein europäisches Sanktionenrecht*, in *ZStW* 1998, 513; PALIERO, *Problemi e prospettive della responsabilità penale dell'ente nell'ordinamento italiano*, in *Riv. trim. dir. pen. econ.,* 1996, 4, 29.

[304] Advocate Colomer, *Cementir, Cementerie del Tirreno SpA, cit.*, § 26. See LEMONDE, *De La Convention européenne des droits de l'Homee au Traité sur L'Union Européenne: Pluralitè des logiques*, in *Quelle Politique*, cit., 20-21; STELLA, *I diritti fondamentali nei periodi di crisi, di guerra e di terrorismo: il modello Barak*, in *Riv. it. dir. proc. pen.*, 2005, 938; DELMAS MARTY-TRUCHE, *Uniformité ou compatibilité des systèmes juridiques nationaux: des règles identiques aux principes directeurs,* in *Quelle Politique*, cit., 324 ff.; CHIAVARIO, *"Cultura italiana" del processo penale e Convenzione europea dei diritti dell'uomo: frammenti di appunti e spunti per una "microstoria"*, in *Studi in onore di Giuliano Vassalli. Evoluzione e riforma del diritto e della procedura penale 1945-1990,* vol. II, edited by Bassouni-Latagliata-Stile, Milan, 1991, 525 ff.; LABAYLE, *The application of Title VI of the Treaty on European Union and criminal matters*, in *Rev. science crim. droit pen. comp.*, 1995, 51.

[305] Opinion of Advocate General Emiliou, C-883/19 P, *HSBC Holdings plc, cit.*, § 121.

may, in fact, encourage the public to believe in the guilt of the person concerned, thereby affecting his or her reputation and dignity, and prejudice a serene and impartial assessment of the matter by the competent authorities.»[306] In this regard, the Court of Justice has further clarified that «The presumption of innocence is intended to ensure that no-one is declared guilty, or treated as being guilty, of an offence before his guilt has been established by a court of law»[307] and that this principle also applies in relation to «the imposition of administrative penalties of a criminal nature»[308] «and the principle that penalties should be imposed only on the offender, of which the Court ensures observance when the infringement of the competition rules committed by a subsidiary is imputed to the parent company, on the basis of the concept of an "economic unit" and on the presumption that the parent company in fact exercises decisive influence over the commercial policy of the subsidiary owing to the capital links between them.» The presumption of innocence emerges not only as a rule of judgement (*in dubio pro reo*), but also as a rule of treatment that requires that a "defendant" has the right to be treated "as if" they were innocent until a final conviction has proven otherwise.[309]

Finally, Advocate General Priit Pikamäe, in the aforementioned recent *Delta Stroy* case,[310] reiterates once again that the ECHR admits the «possible use of presumptions, including in matters covered by Article 7 of the ECHR, and therefore of presumptions of liability», but that «in the context of *inter partes* judicial proceedings, the legal person has the opportunity to rebut that presumption that the offence is imputed to it, thus revealing that it has the rebuttable nature required by the Court.»[311] In fact, there have been rulings by the Court of Justice which, in line with the ECHR, have recognised that presumptions of fact or law in criminal matters may be admissible, provided that they are kept within reasonable limits[312] , «which take into account the im-

[306] § 146.

[307] ECJ, 16 July 2009, *Rubach*, C-344/08, EU:C:2009:482, § 31 and case law cited; Advocate Priit Pikamäe, *Delta Stroy 2003*, cit., § 36.

[308] Advocate Priit Pikamäe, *Delta Stroy 2003*, cit., § 36; ECJ, *Hüls AG – DSM NV*, cit., § 149 et seq.

[309] See ILLUMINATI, *La presunzione d'innocenza dell'imputato*, Bologna 1979, 77–78; see MAUGERI, *Le moderne sanzioni patrimoniali*, cit., 790 ff.

[310] Advocate Priit Pikamäe, *Delta Stroy 2003*, cit., § 34; ECJ, 23 December 2009*, Spector Photo Group and Van Raemdonck*, C-45/08, EU:C:2009:806, § 43; 9 September 2021, *Adler Real Estate and* others, C-546/18, EU:C:2021:711, § 47.

[311] Advocate Priit Pikamäe, *Delta Stroy 2003*, cit., §§ 43 – 48.

[312] Court of First Instance, Third Chamber, 8 July 2008, T-48/05, *Franchet and Byk v Commission*, § 211; see MITSILEGAS, *The Aims and Limits of EU Anti-Corruption Law*, in *Modern Bribery Law. Comparative Perspectives*, edited by Horder-Alldridge, Cambridge, 2013, 188; ECJ, *Hüls AG – DSM NV*, cit., 4336 ff., §§ 150.

portance of what is at stake and maintain the rights of the defence»[313] as also highlighted by Advocate Bot in the *ThyssenKrupp Nirosta* case.[314] For example, it is considered that a presumption that does not exceed these limits is one in which the intention of the perpetrator of insider trading is implicitly inferred from the tangible elements characterising such a violation: this presumption is rebuttable and the rights of the defence are guaranteed.[315]
European case law also often refers to Article 47 of the Charter of Fundamental Rights to establish the right to defence, to a fair trial and to effective protection.[316]
As highlighted by the Court of Justice and Advocate Wathelet in the *Milev* case,[317] the importance of the presumption of innocence at European level as a guarantee of the principle of guilt also emerges from Directive 2016/343, Article 3 of which, entitled «Presumption of innocence» provides that «Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law». The Directive, reiterating what has been established in case law regarding the presumption of innocence, stipulates in Article 2 that «it applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.»[318]

10. *The principle of proportionality in the strict sense*. The principle of proportionality must also guide the European legislator in choosing the penalty to

[313] Advocate Priit Pikamäe, *Delta Stroy 2003*, cit., § 37.
[314] Advocate Bot, *ThyssenKrupp Nirosta v Commission*, cit., §§ 51 and 161.
[315] ECJ, 23 December 2009, C-45/08, *Spector Photo Group NV and Chris Van Raemdonck v. Commissie voor het Bank, Financie en Assurantiewezen—CBFA*, §§ 44; CRAIG-DE BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, 2015, 412.
[316] On the presumption of innocence, see MAUGERI, *Le moderne sanzioni patrimoniali*, cit., 775 ff. With regard to procedural guarantees (the right to silence, the right to defence, etc.) in the case law of the European Court of Human Rights and the Court of Justice, which refers to Article 47 of the Charter of Fundamental Rights of the European Union, see MAUGERI, *Il sistema sanzionatorio*, cit., 217 ff. See ECtHR, 19 April 2007, *Vilho Eskelinen and others v. Finland*, No 63235/00; POLLICINO-SCIARABBA, *La Corte europea dei diritti dell'uomo e la Corte di giustizia nella prospettiva della giustizia costituzionale*, in *Sistemi e modelli di giustizia costituzionale*, II, edited by Mezzetti, Padova, 2011, 108-109; *Lawyer Priit Pikamäe*, 27 October 2020, C-481/19, *DB v Consob*, on the right to silence.
[317] Advocate General Melchior Wathelet, 7 August 2018, *Spetsializirana prokuratura v Emil Milev*, C-310/18 PPU.
[318] In particular, in the present case, Article 4 of Directive 2016/343, entitled 'Public references to guilt', is relevant (§ 5).

be imposed for infringements of EU law. This principle, which relates not to *the nature* but to the *type* and *quantum* of the penalty, is recognised by the European Court of Human Rights, which uses it to assess whether the penalty, as a restriction of a fundamental right, is proportionate to the aim pursued.[319]

Article 49(3) of the Charter of Fundamental Rights states that «The severity of penalties must not be disproportionate to the criminal offence» reaffirming the principle of proportionality in the strict sense,[320] already recognised by EU case law both in the criminal sector in the strict sense and in the punitive administrative sector, thus allowing for extensive control by the Court of Justice over the levels of penalties imposed by national criminal laws introduced in implementation of EU acts or affecting regulatory areas falling within the competence of the Union.[321] The principle of proportionality of punishment has taken on particular importance since the Union, in light of the powers provided for in the new Article 83 of the Treaty of Lisbon, can formulate hypotheses of criminal offences.[322]

As stated by the Court of Justice, the principle of proportionality of penalties in the strict sense is affirmed by Article 2 of Regulation No 2988/1995.[323]

In particular, the Court of Justice has expressly ruled that penalties must not be disproportionate to the nature or seriousness of the infringement: a disproportionate penalty would in fact constitute excessive interference with the freedom recognised by the Treaty and therefore an unlawful obstacle to the exercise of that freedom;[324] EU institutions must tailor the penalty to the seriousness of the infringement.[325]

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[319] See TRECHSEL, *The European Convention on Human Rights and the criminal justice system*, in *Riv. int. dir. uomo* 1997, No 2, 234; see ECtHR, 24 May 1988, MÜLLER, in Série A vol. 133, 6.

[320] MAUGERI, *Le moderne sanzioni patrimoniali*, *cit.*, 630 ff.

[321] SICURELLA, *Diritto penale*, *cit.*, 427.

[322] See PAGANO, *I diritti fondamentali nella Comunità europea dopo Maastricht*, in *Riv. dir. com.* 1998, 163 ss.

[323] «Articles 2 and 4 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests, Articles 2 and 4 of Council Regulation (EEC) No 2080/92 of 30 June 1992 instituting a Community aid scheme for forestry measures in agriculture, and the principle of proportionality» ECJ (Third Chamber) 16 November 2023, C-196/22, Regione Lombardia and Provincia di Pavia (Reforestation measures); ECJ (Third Chamber), 16 November 2023, C-196/22, *IB v Regione Lombardia, Provincia di Pavia*, § 50.

[324] See ECJ, *Criminal proceedings against Sofia Skanavi and others*, *cit.*, 929; 7 October 2010, *Stils Met SIA v Valsts ieņēmumu dienests*, C-382/09; 2 October 2003, *Marco Grilli*, C-12/02, 20 ff. – 48 – 49; 25 February 1988, *Drexl*, C-299/86, in *Boll. trib.*, 1988, 1577 ff. and in *Cass. pen.* 1989, 1618; 3 July 1980, *Regina v. Pieck*, C-157/79, in *Racc.*, 2186-2187; 7 July 1976, *Lynne Watson and Alessandro Belmann*, *ibid.* 1976, II, 1185.

[325] ECJ, 20 February 1979, *Buitoni v Forma*, *cit.*, 677; in this vein ECJ 18 May 2006, *Archer Daniels*

With regard to domestic law, as mentioned above, the Court of Justice, interpreting the negative corollary of the principle of loyal cooperation referred to in Article 10(2) EC (now Article 4(3) TEU) in the light of the principle of proportionality, not only intervened in cases where it considered that the nature or extent of the penalties imposed gave rise to manifest unfairness, but also «assessed the proportionality of the protection afforded to a certain national interest as part of an overall assessment of the interests protected by domestic law in the light of the impact on that scale of values of the recognition of the fundamental freedoms of the Community legal order.»[326] In a series of preliminary rulings, the Court held that the penalties imposed by the State were excessive in relation to the nature of the offence, the conduct of the perpetrator, or other possible indicators of the seriousness of the offence, with the consequent obligation on the national court to disapply the punitive provision, pending the reform of the penalty system by the national legislator in accordance with the principles of loyal cooperation and proportionality;[327] for example, it disapplied a domestic provision because the national penalty was contrary to the principle of proportionality, as it was considered excessive and restrictive of freedom of movement.[328] In this way, European case law has promoted compliance with the principle of *extrema ratio* and proportionality of penalties at national level: «In essence, therefore, by invoking Article 10.2

Midland Co. v Archer Daniels Midland Ingredients Ltd, C-397/03 P, § 100 ff.; *Käserei Champignon*, *cit.*, § 59 ff.; *Südzucker*, 29 January 1998, *Racc.*, I, 281; 22 September 1988, *Jensen*, C-199/87, *ibid.* 1988, 5064 – 5072; *Drexl*, *cit.*, 1618; *Atalanta*, 21 June 1979, *C-240-*78, in *ECR*, 2137-2151; Court of First Instance, 27 September 2006, *Archer Daniels Midland Co.,* cit., § 129 ff.; 13 January 2004, *JCB Service*, T-67/01, § 174 ff.; 9 July 2003, *Cheil Jedang Corp v Commission of the European Communities*, T-220/00, § 76 et seq.; Opinion of Advocate General Tizzano, 7 June 2005, C-397/03 P, *Archer Daniels Midland Company and Archer Daniels Midland Ingredients v Commission*, § 127 et seq.; Advocate Léger, 28 October 2004, C-57/02 P, *Compañia Española para la Fabricación de Aceros Inoxidables, Sa and others*, 52 ff.; Advocate Tizzano, *Dansk Rørindustri A/S*, *cit.*, § 91 ff. – 102; in doctrine BERNARDI, *"Europeizzazione"*, *cit.*, 181; PISANESCHI, *op. cit.*, 75 ff.

[326] See GRASSO, *Comunità europee,* cit., 331 – 332; TRECHSEL, *op. cit.*, 235.

[327] BERNARDI, *L'armonizzazione delle sanzioni in Europa: linee ricostruttive*, in *Riv. it. dir. proc. pen.* 2008, 111 ff.; RIZZA, *La sanzione delle violazioni da parte dei singoli di norme comunitarie dirette alla protezione degli interessi finanziari della Comunità nella giurisprudenza della Corte di giustizia,* in *La lotta contro la frode agli interessi finanziari,* cit., 138 ff.; see ECJ, 26 February 1975, C 67/74, *Bonsignore*, in *Racc.* 1975, 306 – 307; 8 April 1976, C 48/75, *Royer*, in *Racc.* 1976, 517; 7 July 1976, C 118/75, *Watson and Belmann*, in *Racc.* 1976, 1189; 15 December1976, C 41/76, *Donckerwolcke*, in ECR 1976, 1936.

[328] See BERNARDI, *Profili di incidenza del diritto comunitario sul diritto penale agroalimentare*, in *Ann. Univ. Ferr.* 1997, 58 — 159; SCACCIA, *Proporzionalità e bilanciamento tra diritti nella giurisprudenza delle corti europee*, in *Riv. AIC*, 2017, 3, 1 ss. See Advocate General Cruz Villalón, 18 November 2010, C-346/09, *Staat der Nederlanden v Denkavit Nederland BV, Cehave Landbouwbelang Voeders BV.*

EC, the Luxembourg judges have triggered a process of harmonisation of penalties which, unlike that achieved under the third pillar, appears to be aimed not at strengthening repression but, on the contrary, at enhancing the principle of *extrema ratio* of criminal penalties and thus promoting decriminalisation.»[329]

Finally, as examined elsewhere, the actual determination of penalties must also be based on the principle of proportionality in the strict sense, and, to this end, the European legislator has regulated both traditional and *sui generis* EU penalties (if the amount of the penalty is not determined on the basis of automatic criteria)[330].

In this regard, it should be noted that, despite what has been defined as «the tendency of general prevention to colonise the commensurability of sanctions implementing EU law, i.e. those punitive measures that embody the principle of loyal cooperation and where the requirements of effectiveness, proportionality and dissuasiveness are also binding on the national court called upon to choose and quantify the sanction,» other teleological horizons emerge when reflecting on the importance of the request for individualisation of sanctions within the EU.[331] In this regard, it is important to note the growing impatience shown by the EU Court of Justice with regard to fixed or lump-sum penalties and sanctions and with regard to automatic sanctions in the area of ancillary penalties. These are developments which, although they have matured in the context of case law in which EU judges use case-by-case assessment schemes based on balance, seem to open up encouraging opportunities to orientate the purpose of sanctions towards positive special prevention.[332] In this direction, EU legislation on circumstances itself contemplates the possibility of moderating the sanctioning response as a result of the interaction between the threatened penalty and mechanisms of proportionality in the broad sense, even imposing the introduction of mitigating circumstances and allowing the judge to give weight to special preventive purposes in determining the actual penalty. The national legislator, who must comply with EU protection obligations, while ensuring that the legal penalty is dissuasive, must provide for indispen-

[329] ECJ, 15 December 1976, C 41/76, *Donckerwolcke*, in *Racc.* 1976, § 1936. See KASPAR, *Verhältnismäßigkeit und Grundrechtsschutz im Präventionsstrafrecht*, Baden-Baden, 2014, 571 ss.

[330] See MAUGERI, *Le sanzioni comunitarie*, cit., 154 ff.; EAD., *Il Regolamento No 2988*, II, *cit.*, 952 ff.; LENAERTS, *Proportionality as a Matrix Principle Promoting the Effectiveness of EU law and the Legitimacy of EU Action*, ECB Legal Conference 2021 Continuity and change – how the challenges of today prepare the ground for tomorrow 25 November 2021, in https://www.ecb.europa.eu/, 27 ss.

[331] MARTUFI, *op. cit.*, 415.

[332] Idem.

sable "pressure relief valves" at the application stage. This tempering of deterrence objectives, in the view of the Court of Justice and the EU legislator itself, seems to be ensured by the strengthening of judicial discretion, which, even if it does not necessarily lead to a mitigation of the punitive consequences of the offence, must nevertheless tend towards a subjectivisation of the punitive response.

Not only that, but the Court of Justice has recently taken a further step forward, recognising a subjective right not to be subjected to disproportionate penalties, rooted in Article 49(3) of the Charter of Fundamental Rights of the European Union and based on the axiological primacy of human dignity over the purposes of punishment.[333] In particular, the Court has stated that «the administrative measures or the measures imposing penalties permitted under the national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation, and furthermore, they must not be disproportionate to those objectives (judgment of 4 March 2020, *Schenker*, C-655/18, EU:C:2020:157, paragraph 43 and the case-law cited).»[334]

In this regard, the fundamental decision of the Court of Justice recognising the right not to suffer disproportionate penalties is found in the well-known NE case, where European judges for the first time expressly linked the requirements of the *Greek Maize* judgment 68/88, or rather the criterion of proportionality of penalties implementing EU law, to Article 49(3) of the Charter. In the previous *Link Logistik* case,[335] the Court denied the direct effect of Article 49, while recognising that it is a general principle of EU law based on the constitutional traditions common to the Member States and that it is specifically applied to criminal penalties by Article 49(3) of the Charter; it denied direct effect, despite the favourable opinion of Advocate General

[333] MARTUFI, *op. cit.*, 416.

[334] ECJ (Eighth Chamber), 5 December 2024, C-506/23, Network One Distribution SRL v Agenţia Naţională de Administrare Fiscală, § 35; MARTUFI, op. cit., 416 – 417; see ECJ, 26 September 2013, case 418/11 (Texdata Software GmbH), margin no 51–52: «measures provided for under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question: where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued». On the concept of penal parsimony as an expression of the principle of equality and the value of human dignity, see most recently TONRY, *Fairness, Equality, Proportionality and Parsimony,* in *Penal Censure: Engagements Within and Beyond Desert Theory*, edited by du Bois-Pedain-Bottoms, Oxford, 2019, 277 ff. and in particular 294; see also FRASE, *Sentencing Principles in Theory and Practice*, in *Cr. & Just.*, 1997, 363 ff.

[335] ECJ, Fifth Chamber, 4 October 2018, *Link Logistic,* C-384/17.

Bobek, who referred to the Court's case law on the proportionality of penalties, established in relation to various acts of secondary legislation in which the Union requires Member States to adopt penalties that are «effective, proportionate and dissuasive.»

In the *NE* case, however, as mentioned above, the Grand Chamber of the Court of Justice[336] affirmed the principle that the criterion of proportionality of the penalty – established by individual directives, or based on Article 49(3) of the Charter – has *direct effect* in the legal systems of the Member States. This has the crucial consequence that, within the scope of EU law, criminal courts will be required to *disapply* conflicting national legislation, albeit «only to the extent necessary to enable proportionate penalties to be imposed.» In particular, the Court of Justice states in this decision that the obligation to provide for proportionate, effective and dissuasive penalties (referred to in Article 20 of Directive 2014/67/EU on posted workers) constitutes a reference to the principle set out in Article 49(3) of the Charter; bases on the latter provision the strict prohibition of disproportionate penalties (and other sanctions), regardless of any objective pursued by secondary legislation; in an innovative overruling of the Link Logistik case[337], the Court explicitly attributes direct effect to the principle set out in Article 49(3) of the Charter.

It follows that the fundamental right not to be subjected to disproportionate penalties, based on respect for human dignity, constitutes a *constraint external* to the power to punish and is, in the Court's view, capable of being invoked by individuals before national courts.[888] In this way, the direct effect of the principle of proportionality makes it possible to obtain, already from the judicial or administrative authority responsible for imposing the penalty, the removal of those elements of discipline (such as, for example, the provision of an excessively high minimum penalty) on which the imposition of a penalty contrary to Article 49 § 3 of the Charter actually depends.[889]

The same arguments were, in fact, adopted by the Court in the Maksimovic

[886] ECJ, *NE*, 8 March 2022, C-205/20.

[337] ECJ, 4 October 2018, Link Logistik, C-384/17, in particular § 59 ff. On this point, see the Opinion of Advocate General Bobek, 23 September 2021 in C-205/20, NE, § 27 ff.; see ANRÒ-ALBERTI, *Riflessioni sull'effetto diretto, sul primato e sulla disapplicazione del diritto nazionale*, in SSM, *Il Diritto Europeo e il Giudice Nazionale. I Il diritto dell'Unione europea e il ruolo del giudice nazionale*, Milano 2023, 79

[888] ECJ, 8 March 2022, NE, C-205/20, § 39; see MARTUFI, op. cit., 376.

[889] MARTUFI, op. cit., 407.; see TSOLKA, *Direct Effect of the Proportionality Requirement of (Criminal) Sanctions: Considerations on the European Court of Justice Overruling in the Case "NE II"*, in *Eur. Crim. L. Rev.* 2022, 140: 'the ECJ [...] seems to accept that, in this case, the principle of proportionality constitutes a source of the right to non-disproportionate "penalty."

judgment, but in application of Article 56 TFEU: the objectives pursued by the penalties are certainly legitimate, but their severity (also in relation to the seriousness of the consequences envisaged in the event of non-compliance) exceeds what is necessary to achieve those objectives and does not appear to be proportionate to the seriousness of the infringements penalised, which concern documentary non-compliance and not the substantive conditions of the services inherent in the employment relationship.[340]

The NE judgment shows that the principle of proportionality prohibits Member States from imposing and applying penalties that are disproportionate to the seriousness of the infringement, taking into account all relevant factual circumstances. The rules laying down that requirement are therefore directly applicable, since they can be relied on by individuals before national courts, which will be required to *disapply* national law in so far as it imposes disproportionate penalties; that obligation to disapply must, however, be limited to the minimum necessary to ensure compliance with the prohibition on imposing disproportionate penalties and does not extend, in particular, to the *entire* provision laying down the infringement, for which EU law normally requires that penalties be *effective* and *dissuasive* as well as proportionate; proportionality can be achieved simply by bringing the penalties provided for by national law within the limits of proportionality.[341]

It follows from this case law that the national criminal court may refer the matter directly to the Court of Justice by means of a preliminary ruling specifically concerning the compatibility of a given penalty provision with the requirement of proportionality of the penalty, based either on a single directive or on Article 49(3) of the Charter. The other solution is to raise the question of constitutional legitimacy, alleging violation of the principle of proportionality of punishment – based on various internal parameters, including, in particular, Articles 3 and 27, paragraph 3, of the Italian Constitution, but also directly on Article 49(3) of the Charter, whenever the matter falls within the scope of EU law – and the Constitutional Court may declare the entire provision establishing the offence to be unconstitutional, but also correct only the

[340] Both rulings result in a substantially identical operative part, according to which EU law (more specifically, Article 56 TFEU in the first case and Article 20 of Directive 2014/67 in the second) «precludes national legislation, such as that at issue in the main proceedings,» which provides for the imposition of financial penalties that cannot be lower than a predefined amount for each worker, that do not provide for any upper limit in the event of their accumulation, to which is added a contribution of 20 % to the costs of the proceedings in the event that the appeal against their imposition is rejected, and which may be converted into custodial sentences in the event of non-payment.

[341] VIGANÒ, *Il diritto giurisprudenziale,* cit., 16.

part of the provision that leads to disproportionate penalties, provided that the application of a more moderate but *effective* and *dissuasive* penalty is guaranteed. The advantage of the Constitutional Court's intervention will be that it will "clean up" the part of the provision that determines the application of disproportionate penalties, with *erga omnes* effects; and, additionally it will make it possible *to integrate* the provision itself in order to provide clear guidance to judges (and, even before that, to the public administration itself, when administrative penalties are at stake) so as to enable them to apply, in a predictable and uniform manner, penalties that are proportionate to the seriousness of the offence. All this will be done in accordance with the principle of equality, avoiding the risk of individual judges arriving at divergent interpretations. The Constitutional Court may also intervene with the Court of Justice through a preliminary ruling.[342]

11. *The principle of ne bis in idem.* The principle of *ne bis in idem* in criminal matters, enshrined in Article 4 of Protocol No 7 to the ECHR, is a fundamental principle of EU law, compliance with which is guaranteed by the Courts.[343] Within the European Union's area of freedom, security and justice, the main legal sources of the principle are Articles 54 to 58 of the CISA and Article 50 of the Charter. The principle is also included as grounds for refusal in a large number of EU instruments on judicial cooperation in criminal matters, including mutual recognition instruments such as Council Framework

[342] Idem.

[343] ECJ 5 May 1966, joined cases 18/65 and 35/65, *Gutmann v EAEC Commission*, in *ECR*, 149 – 172; 14 December 1972, *Boehringer* v *Commission*, C 7/72, *ibid.* 1281, § 3; 15 ottobre 2002, *Limburgse Vinyl Maatschappij e a./Commissione*, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P-C-252/99 P e C-254/99 P, in *ECR* I-8375, § 59; *SGL Carbon AG, cit.,* § 26; 29 giugno 2006, *Showa Denko KK*, C-289/04 P, § 50, which bases this principle on Article 7 of the ECHR; Court of First Instance, 20 April 1999, *Limburgse Vinyl Maatschappij and Others v Commission,* Joined Cases T-305/94 to 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, known as 'PVC II', *ibid.* II-931, § 96; Court of First Instance, 27 September 2006, *Roquette Frères SA c. Commissione delle Comunità europee*, T-322/01, § 277; Opinion of Advocate General Geelhoed, *SGL Carbon AG, cit.,* § 31; Advocate General *Colomer, Buzzi Unicem SpA v, cit.,* § 178 and note 118, and C-213/00 *Italcementi Spa v Commission,* § 96 and note 68; ID., 19 September 2002, C-187/01, *Gözütok,* and C-385/01, *Brügge,* note 22, states that under the articles cited, the principle of *ne bis in idem* is an absolute right that does not allow for exceptions; Advocate *Mazák, SGL Carbon AG, cit.,* § 24. See MANACORDA, Judicial activism *dans le cadre de l'Espace de liberté, de justice et de sécurité de l'Union européenne,* in *Rev. sc. crim.*, 2005, 942 ff.; GALATINI, *Evoluzione del principio del* ne bis in idem *europeo tra norme convenzionali e norme interne di attuazione,* in *Dir. pen. e proc.* 2005, 1567; AUDENAERT, *Unity of Intent Effect on Sentencing: An EU Dimension to ne bis in idem and Proportionality*, in *Eur. Crim. L. Rev.* 2018, 39 ss.; BASILE, *Il "doppio binario" sanzionatorio degli abusi di mercato in Italia e la trasfigurazione del ne bis in idem europeo*, in *Giur. comm.*, 2019, 129 ss.

Decision 2002/584/JHA on the European arrest warrant (EAW FD) and Directive 2014/41/EU on the European investigation order in criminal matters.
This limitation is called into question in the event of cumulative EU penalties and third-country penalties (e.g. those imposed by American and Canadian authorities).[344]
It is even stated that Article 4 of Protocol No 7 to the ECHR[345] has the sole effect, according to its literal wording, of prohibiting a national court from trying or punishing an offence for which the person concerned has already been acquitted or convicted in the same State; it does not prohibit a person from being prosecuted or convicted more than once for the same offence in two or more States.[346] Advocate General Tizzano also pointed out that Article 14(7) of the 1966 International Covenant on Civil and Political Rights[347] has been interpreted by the United Nations Human Rights Committee as prohibiting «double jeopardy *only with regard to an offence adjudicated in a given State*»[348] and that the International Criminal Tribunal for the former Yugoslavia did not hesitate to recognise that «the principle of non bis in idem...is generally applied so as to cover only a double prosecution within the same State.»[349]

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[344] Court of First Instance, 29 April 2004, *Tokai Carbon Co. Ltd and others*, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, § 141; *Roquette Frères SA, cit.,* 281; ECJ, *Showa Denko, cit.,* § 51 et seq.; 10 May 2007, SGL Carbon AG v Commission of the European Communities, C-328/05 P, § 24 ff.; Opinion of Advocate General Tizzano, *Archer Daniels Midland Company and Archer Daniels Midland Ingredients v Commission, cit.,* § 100; Advocate *Geelhoed, SGL Carbon AG, cit.,* 27 – 34 ff. – 74; Advocate *Mazák,* 18 January 2007, *SGL Carbon AG,* C-328/05 P, § 25 ff.; Court, 27 September 2006, *Archer Daniels Midland Company, cit.,* § 63 ff.

[345] Article 4 of Protocol No 7 «Right not to be tried or punished twice»: «1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention.»

[346] Court of First Instance, Tokai *Carbon and Others, cit.,* 135; Court, 9 July 2003, *Archer Daniels Midland Company and Others,* cit., 91; Opinion of Advocate General Tizzano, *Archer Daniels Midland Company and Others,* cit., § 96.

[347] 'No one may be tried or punished for an offence for which he has already been acquitted or convicted by a final judgment in accordance with the law and criminal procedure of each country'.

[348] Decision of 2 November 1987, *Ap/Italy*, Communication No 204/1986. Thus, Conclusions of Advocate Tizzano, *Archer Daniels Midland* et al., *cit.*, § 95.

[349] Conclusions of Advocate Tizzano, *Archer Daniels Midland* et al., *cit.*, § 97; TPY, 14 November 1995, *Prosecutor v. Tadic*, Trial Chamber II, Decision on the Defence Motion on the Principle of NON-bis-in-idem, Case No IT-94-1.

It is considered that there is no rule of international law prohibiting *ne bis in idem*; it should be noted that even Article 54 of the Convention implementing the Schengen Agreement (14 June 1985) and Article 50 of the Charter of Fundamental Rights (II-110 Tcost), regardless of their legal value, establish the principle in question only within the territory of the Union.[350]
Against this approach, it should be noted that part of the doctrine tends to interpret the principle of *ne bis in idem*, solemnly recognised in Article 14(7) of the International Covenant on Civil and Political Rights, as applicable to "criminal matters" in the interpretation provided by the European Court of Human Rights, examined above,[351] and as a principle of international law.
In the European Union legal system, this principle «precludes an undertaking from being sanctioned by the Commission or made the defendant to proceedings brought by the Commission a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision of the Commission that is no longer amenable to challenge.»[352] This minimum interpretation of the principle in question is universally recognised.
With particular reference to EU law in relation to centralised sanctions (in the field of competition), case law has, however, allowed for the possibility of combining EU sanctions with national sanctions in relation to the same conduct, where there are two parallel proceedings pursuing different objectives, the admissibility of which derives from the particular system of division of powers between the EU and the Member States in the field of cartels.[353]
The only limitation is the principle of proportionality, as it is stated that a general requirement of fairness implies that, when determining the amount of the fine, the European Commission must take into account the penalties that

[350] Court of First Instance (Fourth Chamber), 9 July 2003, T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission,* 92–93; Opinion of Advocate General Tizzano, *Archer Daniels Midland* and others, *cit.*, §; Court of First Instance, *Tokai Carbon Co.*, cit., §137.
[351] See DE NAUW-DERUYCK, Belgique – *Étude comparative des systèmes de sanctions administratives*, in *Étude sur les systèmes,* vol. I, *Rapports nationaux*, *cit.*, 38; MAUGERI, *Le moderne sanzioni patrimoniali*, cit., 766–767.
[352] Court of First Instance, *Tokai Carbon Co. Ltd and others*, cit., § 131; Court of First Instance, 25 October 2005, *Danone Group v Commission,* T-38/02, § 185; ECJ, 7 January 2004, *Aalborg Portland and others v Commission of the European Communities*, 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, § 338.
[353] Court of First Instance, 27 September 2006, *Archer Daniels Midland Co. v Commission of the European Communities*, *cit.*, § 62, which specifies 'and there is no identity between the rules infringed'; *Roquette Frères SA, cit.,* § 279; 6 April 1995, *Tréfileurope v Commission,* T-141/89, in *ECR* II-791, § 191; 6 April 1995, *Sotralentz v Commission,* T-149/89, in *ECR* II-1127, § 29; *Tokai Carbon and Others*, *cit.,* 132 et seq.; 9 July 2003, *Archer Daniels Midland Company and Others, cit.*, § 89.

have already been imposed on the undertaking for the same offence, where those penalties were imposed for infringement of the competition law of a Member State and, consequently, for offences committed within the EU (principle of compensation).[354] The Court of Justice originally ruled in this regard in case C-14/68, *Walt Wilhem.*[355]

Thereafter, however, again in relation to centralised sanctions, a more protective approach seems to be emerging, according to which the principle of *ne bis in idem* does not allow for exceptions, as it represents a fundamental right. The conclusions of Advocate General *Colomer* in the *Buzzi* case are interesting, in which it is specified that the principle of *ne bis in idem* prevents a person from being punished more than once for the same offence in order to protect the same legal interests (as such duplication of penalties entails an inadmissible repetition of the exercise of the *ius puniendi)*, and prevents conduct, once prosecuted and sanctioned by the Commission, from being punished by the national authority responsible for competition protection,[356] or vice versa, as Advocate General *Geelhoed* points out, it prohibits an undertaking from being convicted or prosecuted again by the Commission for anti-competitive conduct for which it has already been sanctioned.[357]

A reduction in the penalty is not sufficient, as it is noted that the *ne bis in idem* principle «is not a procedural rule which operates as a palliative for proportionality when an individual is tried and punished twice for the same conduct, but a fundamental guarantee for citizens.»[358] The decision in the *Wilhelm* case is contested on the grounds that it does not comply with the *ne bis in idem* principle, and it is noted that the case in question involved parallel proceedings to protect different assets.[359]

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[354] Court of First Instance, 9 July 2003, *Archer Daniels Midland Company and others*, cit., § 89; *Sgaravatti Mediterranea Srl*, *cit.*, § 138; *Roquette Frères SA*, *cit.*, 279.

[355] See ECJ 13 February 1969, *Wilhem v. Bundeskartellamtt*, C-14/68, in *Rec.*, 1; see GRASSO, *Nuove prospettive, cit.,* 872; ID., *Recenti sviluppi, cit.,* 762-763; BIANCARELLI, *L'ordre juridique communautaire a-t-il compétence pour instituer des sanctions?*, in *Quelle Politique, cit.,* 270-271; BERNARDI, *Politiche di armonizzazione, cit.,* 9 highlights the need for harmonisation of penalties between different European countries as a prerequisite for the application of the principle in question.

[356] Opinion of Advocate General *Colomer*, *Buzzi Unicem SpA v., cit.*, § 170 ff.

[357] Opinion of Advocate *Geelhoed*, *SGL Carbon AG*, *cit.*, § 31.

[358] Opinion of Advocate *Colomer*, *Italcementi SpA*, *cit.*, § 96 – 97.

[359] See RINALDI, *Il regolamento del consiglio n. 1/2003: un primo esame delle principali novità e dei punti aperti della riforma sull'applicazione delle regole comunitarie in tema di concorrenza*, in *Dir. del commercio intern.* 2003, 165 – 167, who notes that Regulation No 1/2003, with regard to centralised sanctions, has provided sufficient instruments to resolve conflicts between the European Commission and national authorities acting as guarantors of competition, but has not adequately developed rules governing relations between national administrative authorities themselves and between those authori-

Within this approach, with particular reference to *criminal matters*, it is stated that the principle of *ne bis in idem* is enshrined in the European Union by Article 54 of the Convention implementing the Schengen Agreement[360] and, as highlighted by the Court of Justice itself, in the Miraglia case, Article 50 of the Charter of Fundamental Rights also prohibits subsequent examination if the person concerned has been "acquitted or convicted" by a final judgment, clarifying that it is the exercise *of ius puniendi* that is relevant, while the scope of the verdict is not relevant.[361] Article 50 of the Charter unequivocally states that the *ne bis in idem* principle applies not only within the same State, but also with reference to the European Union as a whole.[362] This principle was proclaimed in Article 6(2) of the ECHR, becoming a general principle of "Community law" under Article 6(2) TEU.[363]

The *ne bis in idem* principle prevents a person from being prosecuted more than once for the same unlawful conduct and, where applicable, punished repeatedly, since such duplication involves an inadmissible repeated exercise of the *ius puniendi*;[364] this principle therefore precludes the repetition of both the penalty and the "criminal prosecution" and the "charge": Article 54 of the Convention uses the first noun, while Article 50 of the Charter of Fundamental Rights of the European Union uses the second.[365]

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ties and the courts; FAVRET, *Le renforcement du rôle des autorités nationales dans la mise en œuvre du droit communautaire de la concurrence. Le règlement du Conseil n° 1/2003 du 16 décembre 2002*, in *AJDA* 2004, 178 – 182 – 183.

[360] Article 54 provides that «A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.» Opinion of Advocate General Dámaso Ruiz-Jarabo Colomer, 20 October 2005, *Leopold Henri Van Esbroeck* v *Openbaar Ministerie,* C-436/04, § 18.

[361] ECJ, *Miraglia*, 10 March 2005, C-469/03, § 30; Opinion of Advocate General Dámaso Ruiz-Jarabo Colomer, 8 June 2006, C-150/05, *Jean Leon van Straaten v Staat der Nederlanden and Italian Republic*, § 53 – 52; Id., *Italcementi, cit.,* note 68; Opinion of Advocate General Geelhoed, *SGL Carbon AG, cit.,* § 34; Court of First Instance, *Tokai Carbon* and others, cit., § 137; Court of First Instance, T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission, cit.,* and T-223/00, *Kyowa Hakko Kogyo and Kyowa Hakko Europe v Commission,* in which the principle in question is used as a basis, but only within the territory of the Union; Conclusions of Advocate General *Colomer, Buzzi Unicem SpA v., cit.,* § 178 and note 118, and *Italcementi Spa v. Commission, cit.,* § 96 and note 68.

[362] BERNARDI, *"Europeizzazione", cit.*, 10. See GRASSO, *La Costituzione per l'Europa e la formazione di un diritto penale dell'Unione europea*, in *Studi in onore di Giorgio Marinucci*, Milano 2006, 372 ff.

[363] Opinion of Advocate General Colomer, *Van Straaten v., cit.*, § 71.

[364] Opinion of Advocate General Colomer, *Leopold Henri Van Esbroeck* v *Openbaar Ministerie*, *cit.*, § 18.

[365] Opinion of Advocate General Colomer, *Van Straaten v., cit.*, § 68; see ECJ, Miraglia, *cit.*, § 32;

It should be noted that the principle in question represents a fundamental right of citizens, linked to due process and legitimate judgement; it is inspired by other principles such as legal certainty and fairness.[366] This principle is an expression of the judicial protection of citizens against *ius puniendi*, but also an expression of a structural requirement of the legal system, whose legitimacy is substantiated in the authority of *res judicata*;[367] it is functional to legal stability so that the decisions of the public authorities, once final, are not discussed *sine die.* Once criminal proceedings have been exhausted in one Member State, the others cannot ignore this circumstance; however, integration requires assistance, which is unlikely without mutual trust in each other's judicial systems and without the homologation of decisions adopted in a true "common home" of fundamental rights.[368] In the *Schengen acquis*, which aims to strengthen integration between peoples, *ne bis in idem* is also linked to the right to move freely,[369] with the aim of maintaining and developing an area of freedom, security and justice;[370] the perpetrator of the offence must know that, once convicted and having served their sentence, or definitively acquitted, in one Member State, they can move around that territory without fear of being prosecuted in another State whose legal system considers their behaviour to constitute a separate offence[371] (the principle applies only to persons who have been finally judged by a Contracting State[372]). It applies not only in the case of acquittal (including on the grounds of insufficient evidence[373]), but also in the

Gözütock and Brügge, cit., § 38 (in this case, the principle in question also applies in plea bargaining proceedings before a public prosecutor without the intervention of a judge); see SALAZAR, *Il principio del* ne bis in idem *all'attenzione della Corte di Lussemburgo,* in *Dir. pen. e proc.* 2003, 906.

[366] Opinion of Advocate Colomer, *Van Straaten v., cit.*, § 56; Id., *Leopold Henri Van Esbroeck* v. *Openbaar Ministerie*, *cit.*, § 20.

[367] Opinion of Advocate Colomer, *Leopold Henri Van Esbroeck* v. *Openbaar Ministerie*, *cit.*, § 22.

[368] Opinion of Advocate General Colomer, *Van Straaten v., cit.*, § 61.

[369] Opinion of Advocate General Colomer, *Van Straaten v., cit.*, § 58 – 59.

[370] ECJ, *Gözütok* and *Brügge*, *cit.*, 79.

[371] Conclusions of Advocate Colomer, *Leopold Henri Van Esbroeck* v. *Openbaar Ministerie*, *cit.*, § 45-19; Id., 8 June 2006, C-150/05, *Van Straaten v Staat der Nederlanden and Republiek Italië*, § 56 – 57; ECJ, 28 September 2006, *Giuseppe Francesco Gasparini and others,* C–467/04, § 27–28 specifies that the principle also applies in the case of an acquittal, because otherwise the rationale behind the principle would be compromised, even where the acquittal is pronounced on the ground of the statute of limitations (which is not precluded by Framework Decision 2002/584/JHA on the European arrest warrant, which allows the execution of the warrant to be refused where the criminal proceedings are time-barred under the law of the executing State); ECJ, 28 September 2006, *Jean Van Straaten and Staat der Nederlanden, Italian Republic,* C-150/05, *ECR*, I-0000, § 57.

[372] ECJ, *Gasparini and Others*, *cit.*, § 34 et seq.;

[373] ECJ*, Van Straaten, cit.,* § 54.

case of a custodial sentence whose enforcement has been suspended,[374] and in relation to procedures for the termination of criminal proceedings whereby the public prosecutor closes criminal proceedings without the intervention of a judge, or when criminal proceedings are terminated by a decision issued by an authority responsible for administering criminal justice, not necessarily a judge and not necessarily in the form of a judgment;[375] it does not apply to a decision declaring proceedings closed after the public prosecutor has decided not to proceed because proceedings have been initiated in another State against the same defendant and for the same facts, without any assessment of the merits having been made.[376]

Finally, it should be noted that the principle in question preserves dignity in the face of inhuman and degrading treatment, given that the practice of repeatedly punishing the same offence deserves to be classified as such.[377]

According to a first approach, the application of the principle presupposes the identity of the facts, the identity of the perpetrator and the identity of the protected legal interest.[378] According to a second approach dating back to the *Van Esbroeck* judgment, only the identity of the facts is required, understood as a set of events inextricably linked to each other, regardless of the legal classification or the legal interest protected;[379] with the clarification, in the opinion of Advocate General *Sharpston,* that the facts must be linked in time and space, as well as by subject matter.[380] In support of this second approach, ref-

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[374] Opinion of Advocate General Sharpston, 5 December 2006, *Staatsanwaltschaft Augsburg v Jürgen Kretzinger*, C-288/05, § 41 et seq.; the principle does not apply to periods spent in arrest or pre-trial detention, unless those periods are at least equal in length to the prison sentence imposed by a final judgment in respect of the acts for which the defendant was detained (§ 75).

[375] ECJ, *Gözütok* and *Brügge*, cit.

[376] ECJ, *Miraglia*, cit., § 35. See Cass. 2 February 2005, No 10426, *Boheim,* in *Cass. pen.* 2006, 986, which states that the principle in question, enshrined in Article 54 of Law No 388/1993, ratifying Italy's accession to the Schengen Agreement, applies only in the presence of a final judgment or criminal decree, and not a decree of dismissal. See DE ANGELIS, *Osservazioni, in tema di* ne bis in idem *europeo*, in *Cass. Pen.* 2006, 989 who points out that the principle does not apply in the case of a conviction that has not been enforced but is nevertheless enforceable; BARBERINI, *Il principio del* ne bis in idem *internazionale,* in *Doc. giust.* 2000, c. 1298; SALAZAR, *Il principio del ne bis in idem all'attenzione della Corte di. Lussemburgo,* in *Dir. pen. e proc.* 2003, 1043.

[377] See Opinion of Advocate General Colomer, *Van Straaten v., cit.*, § 68.

[378] ECJ, *Aalborg* Portland, *cit.*, 338; Court of First Instance, *Roquette Frères SA*, *cit.*, 278; Opinion of Advocate General *Colomer*, *Buzzi Unicem SpA v., cit.*, § 170 et seq.; Advocate Geelhoed, *SGL Carbon AG, cit.,* § 32; Advocate Mazák, *SGL Carbon AG, cit.,* § 24. See WEYEMBERGH – JONCHERAY, *op. cit.,* 205 ff.

[379] ECJ, *Leopold Henri Van Esbroeck*, *cit.*, § 36 – 42; *Van Straaten and Staat der Nederlanden, Italian Republic*, cit., § 48 and related Opinion of Advocate General *Colomer*, *cit.*, § 74.

[380] Opinion of Advocate General Sharpston, 5 December 2006, *Norma Kraaijenbrink*, C-367/05, § 27; Id., *Staatsanwaltschaft Augsburg v Jürgen Kretzinger*, *cit.*, § 36 – 40; ECJ, *Van Esbroeck, cit.,* § 38;

erence is made to the wording of Article 54 of the Convention implementing the Schengen Agreement, in its various language versions. It is noted that any reference to the same legal interest or the same legal classification would make the application of the principle in question at international level completely uncertain («it would never be operational»), since these elements may vary in relation to the same facts in view of different national criminal policy options,[381] also considering the lack of harmonisation of national criminal laws;[382] the mutual trust of the contracting States in their respective criminal justice systems implies, on the contrary, that each accepts the application of the criminal law in force in the other States, even when recourse to its own law would lead to different solutions[383]. This would explain, it is argued, why, while Article 14(7) of the International Covenant on Civil and Political Rights and Protocol No 7 to the European Convention refer to the same offence, concerning the domestic dimension, «other agreements, relating to its international dimension, consider the facts strictly.»[384]

In recent years, however, the principle in question has been subject to interpretative uncertainties on the part of the European courts, which have led to a gradual reduction in protections.

In particular, European case law, primarily that of the ECtHR, has required four elements to be verified in order to apply protection against double persecution: *bis*, the existence of two criminal proceedings (Engel criterion); *idem*, the identity of the material facts (idem factum, non idem crimen); *eadem persona*, the subjective identity of the perpetrator; *res judicata*, the existence of a final decision in the first proceedings. In the case of A and B v. Norway (15 November 2016), the Grand Chamber introduced the criterion of «sufficiently close connection in substance and in time» transforming two separate proceedings into a "single proceeding" when: they pursue complementary aims, are foreseeable for the person concerned, avoid duplication of

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WAHL, *Ne bis in idem, Eucrim* 2006, 3-4, pp. 64 –65; See WEYEMBERGH – N. JONCHERAY, *op. cit.*, 205.

[381] Opinion of Advocate General *Colomer, Van Esbroeck, cit.*, § 43 ff.; ID., *Van Straaten c., cit.*, § 62.

[382] ECJ, *Van Esbroeck*, cit., § 35; *Jean Van Straaten*, cit., ECR, I-0000, § 47.

[383] ECJ, *Van Esbroeck*, cit., § 30; *Jean Van Straaten*, cit., ECR, I-0000, § 43.

[384] Opinion of Advocate General *Colomer*, *Leopold Henri Van Esbroeck* v *Openbaar Ministerie, cit.*, 48, which refers to the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda (Articles 10(1) and 9(1) respectively); the 1995 Convention on the Protection of the European Communities' Financial Interests, and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union. However, the Charter of Fundamental Rights of the European Union adopts the criterion of *idem crimen,* reaffirmed in the Treaty establishing a Constitution for Europe.

investigations, and provide for mechanisms to compensate for penalties. This is a vague and manipulable test, which legal scholars have criticised as a *"fiction juridique"* with no real regulatory basis.

Judge Pinto de Albuquerque, the sole dissenting judge, denounced a «betrayal of the historical foundations of ne bis in idem» (dissent, §2) and pointed out that Article 4 of Protocol 7 does not allow any balancing with public interests.[385]

As highlighted by legal doctrine, the application of the test varies greatly depending on the area of application: in tax and market abuse cases, the Court always finds violations; in cases involving the protection of life or physical integrity, the Court never finds violations, even with longer time intervals. The application of the principle is subject to the assessment of the aims protected by the State.[386]

The Court of Justice (*Menci* C-524/15, *Garlsson* C-537/16, Di *Puma* C-596/16 and C-597/16, 20 March 2018) does not adopt the fiction of the "single procedure," but recognises duplication and adds a justification test pursuant to Article 52(1) of the Charter, with similar results;[387] it must not represent «an excessive burden on the person concerned» (with reference to the principle and test of proportionality); second, there must be «clear and precise rules enabling it to be predicted which acts and omissions may be subject to accumulation;» third, the proceedings must have been «conducted in a sufficiently coordinated and closely spaced manner in time.»[388] Duplication is permitted when it pursues important interests (VAT, market integrity), is proportionate and coordinated.

In recent years, the Court of Justice has begun to contradict itself internally. In the *Bpost* case,[389] it adopts the language of Strasbourg and requires "evidentiary coordination" and "temporal proximity;" in the *BV* case[390] , it completely

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[385] §§49-61

[386] CANESTRINI, *European ne bis in idem: three standards, two courts and a crisis of legal certainty, 9 December 2025*, in *European ne bis in idem: three standards, two courts and a crisis of legal certainty.*

[387] *Contra* CONSULICH-GENONI, *L'insostenibile leggerezza del ne bis in idem. Le sorti del divieto di doppio giudizio e doppia punizione, tra diritto eurounitario e convenzionale,* in *Giur. Pen.* 2018, 1 – 18. See ECJ, 22 March 2022, C-151/20, Nordzucker and others, EU:C:2022:203; ECJ, 19 July 2023, C-27/22, Volkswagen Group Italia, EU:C:2023:663; DE PASQUALE, *Uno, nessuno, centomila. The criteria for the application of ne bis in idem*, in *Eurojus*, issue 2/2022, p. 248 ff.; GALANTINI, *Anatomy of a fall: ne bis in idem vs 'possible sanctions' proceedings in the Dieselgate case*, in *Sistema penale*, issue 6/2024, 85 ff.

[388] NASCIMBENE, *Ne bis in idem: current issues in light of the interpretation of the Court of Justice and the European Court of Human Rights*, in *Sistema penale*, 3 March 2025, 9.

[389] ECJ, GC, 22 March 2022, C-117/20, Bpost, EU:C:2022:202.

[390] ECJ, 5 May 2022, BV, C-570/20.

ignores *Bpost* and returns to *Menci*; in the *MV-98* case,[391] it introduces a third formula ("coordination of the procedures"); in the *Engie* case,[392] it mixes the various standards and refers the assessment entirely to the national court. This creates a situation that undermines the primary requirement of European criminal law, namely legal certainty.

Where the ECtHR and the ECJ maintain harmony is in the definition of the identity of the fact: on the basis of the aforementioned *Van Esbroeck* case,[393] they only take into account material circumstances that are concretely linked in time and space, identical or substantially identical facts (ECtHR, *Zolotukhin*[394]), the same historical conduct.[395] This standard prevents states from circumventing the prohibition by varying the legal classification.

With regard to this latest development in case law, legal scholars argue that the convergence of the case law of the ECtHR and the ECJ is often regressive, tending to harmonise towards less protective standards; predictability is compromised, as there is no longer a stable test, especially from the ECJ.[396]

Regulation No 1/2003, while not preventing Member States from adopting and applying stricter national competition laws in their respective territories that prohibit or penalise unilateral conduct by undertakings (and while specifying that it does not apply to national laws that impose criminal penalties on natural persons[397]), it appears to seek to avoid the accumulation of proceedings and to ensure the uniform and consistent application of European competition law by maintaining the rule that the competition authorities of the Member States are automatically deprived of their competence when the Commission initiates proceedings (Article 11(6)). Furthermore, where a competition authority of a Member State or the Commission has received a complaint against an agreement, a decision by an association or a concerted practice which has been or is being dealt with by another competition authority, the proceedings may be suspended or the complaint rejected (Article 13). In any event, in order to avoid conflicts between decisions in a system of parallel competences and thus ensure compliance with the principles of legal cer-

[391] ECJ, 4 May 2023, **MV-98,** C-97/21.
[392] ECJ, 30 January 2025, Engie, *Engie România SA*, C-205/23.
[393] C-436/04, 2006, §36
[394] ECtHR, 10 February 2009, No 14939/03.
[395] ECJ, 11 July 2025, **MSIG**, C-802/23, confirmation in relation to terrorism that the diversity of the constituent elements of the case is not relevant, citing ECtHR, 19 December 2017, ***Ramda v. France***, No 78477/11.
[396] CANESTRINI, *op. cit.*
[397] Except in cases where such penalties constitute the means through which the competition rules applicable to undertakings are implemented (recital 8).

tainty and the uniform application of Community competition rules, it is provided that when competition authorities or national courts rule on agreements, decisions and practices that are already the subject of a Commission decision, they may not take decisions that conflict with the decision adopted by the Commission. Furthermore, courts must avoid decisions that conflict with a decision taken by the Commission in proceedings initiated by it, and to that end may assess whether it is necessary to suspend proceedings (Article 16).

Regulation No 2988/1995 does not expressly provide in any of its articles for the accumulation of national and EU penalties. On the contrary, in the preamble to the Regulation, the EU legislator expresses the need to avoid such cumulation, in contrast to the position taken by the "group of European scholars" who advocated the principle of the primacy of EU law[398] (on the basis that the EU penalties examined are conceived as minimum penalties, which do not exclude the application of corresponding national penalties).[399]

In fact, the preamble to the regulation states that, «whereas not only under the general principle of equity and the principle of proportionality but also in the light of the principle of *ne bis in idem,* appropriate provisions must be adopted while respecting the *acquis communautaire*[400] and the provisions laid down in specific Community rules existing at the time of entry into force of this Regulation, to prevent any overlap of Community financial penalties and national criminal penalties imposed on the same persons for the same reasons»[401] (a subsequent point in the preamble specifies that «Whereas this Regulation will apply without prejudice to the application of the Member States' criminal law»).

However, while the preamble to the Regulation expresses this need to avoid accumulation, Article 6 of the Regulation does not actually exclude the accumulation of national and EU penalties, but rather regulates it, in that it merely provides, «without prejudice to the Community administrative measures and

[398] See TIEDEMANN, *Das Kautionsrecht, cit.*, 2730 and BARENTS, *The System of Deposits in Community Agricultural Law: Efficiency v. Proportionality*, in *Eur. Law Rew.* 1985, vol. 10, 248.

[399] See HEITZER, *op. cit.*, 169-170; TIEDEMANN, *EUGH: Strafrechtlicher Schutz der Finanzmittel der EG, cit.,* 99; *contra* PISANESCHI, *cit.,* p152. In favour of cumulation, it should be noted that the two types of sanctions protect different legal interests: national provisions protect EU financial resources from a financial perspective, while EU provisions protect the objectives pursued by the granting of subsidies, see TIEDEMANN, *Der Strafschutz der Finanzinteressen, cit.,* p. 2232; BERNARDI, *Profili di incidenza del diritto comunitario, cit.,* 174; HEITZER, *cit.,* 176; BÖSE, *cit.,* 389.

[400] On this concept, see CHITI, *Principio di sussidiarietà, cit.*, 509.

[401] On the need to avoid *ne bis in idem* between Community sanctions and national criminal sanctions, see MEZZETTI, *op. cit.*, 253; HEITZER, *op. cit.*, 26.

penalties adopted on the basis of the sectoral rules existing at the time of entry into force of this Regulation,» the possibility of suspending the imposition of administrative fines if criminal proceedings have been initiated against the person concerned for the same acts (Article 6(1)); the administrative proceedings "shall resume" when the criminal proceedings have been concluded, «provided that this is not contrary to the general principles of law,» (Article 6(3)), and the administrative authority must then ensure that a penalty at least equivalent to that provided for in EU legislation is imposed, taking into account any penalty imposed by the criminal authority for the same acts on the same person (Article 6(4)). Finally, it is specified that these provisions do not apply to financial penalties that form an integral part of financial support schemes and may be applied independently of any criminal penalties if, and to the extent that, they are not comparable to such penalties (Article 6(5)).
However, such accumulation should be limited by the principle of proportionality, which requires a similar approach to that originally developed by the Court of Justice in the field of competition,[402] as examined above.
The tendency is therefore to ensure in all cases the application of an administrative financial penalty of equivalent value to that imposed by the EU, almost as if to safeguard its character as a minimum penalty that cannot be waived, even if, in accordance with the principle of proportionality, any criminal penalty already imposed must be taken into account. This limitation of the principle of proportionality to the accumulation of national penalties and *sui generis* penalties[403] is difficult to apply in relation to the decentralised EU penalties which are "automatic" and therefore not subject to discretion in terms of quantification.[404]
Article 6 of the Regulation, however, does not affect EU financial penalties that form an integral part of financial support schemes, an exception that is likely to be particularly significant, as it should apply to a large number of EU penalties, which are often linked to Community aid schemes and therefore have to coexist with national penalties[405]. For example, in the case of

[402] ECJ *Wilhem v. Bundeskartellamt*, *cited* in *Racc.* 1969, 13 ff.; GRASSO, *Recenti sviluppi*, cit., 762; MANACORDA, *Political-Criminal Profiles, cit.,* 238, who takes the view that such accumulation would violate the principle of proportionality and that the problem of accumulation in relation to the sui generis sanctions at issue stems from the diversity of the types of sanctions, which may be of a financial and non-financial nature; BERNARDI, *"Europeizzazione", cit.,* 176; Id., *Il costo di sistema delle opzioni europee sulle sanzioni punitive*, cit., 573 ff.
[403] *Sgaravatti Mediterranea Srl, cit.*, § 138; *Conserve Italia Soc. Coop. arl ex Massalombarda Colombani SpA, cit.*, 108.
[404] PISANESCHI, *op. cit.*, 153.
[405] BERNARDI, *Profili di incidenza del diritto comunitario, cit.*, 176; BÖSE, *cit.*, 385.

Maatschap Schonewille-Prins v Minister van Landbouw, the Advocate General does not raise the issue of compliance with the principle of *ne bis in idem* or the principle of proportionality in relation to Regulation No 2419/2001 on aid in the livestock sector, which provides in Article 49 for the accumulation of penalties, stating that «without prejudice to Article 6 of Regulation [...] No 2988/95 [...],» «the reductions and exclusions provided for in this Regulation shall apply without prejudice to further penalties under other EU or national legislation;» it even provides for the accumulation of EU penalties, as well as between EU penalties and national penalties.[406]

The suspension of administrative proceedings is, in any case, optional, while the resumption of proceedings is mandatory when it complies with the general principles of law; suspension presupposes that the two proceedings deal with the "same fact," understood in a concrete-historical sense, and not in a normative sense, because the two systems, administrative and criminal, will certainly apply different cases.[407] The suspension of administrative proceedings is provided for when criminal proceedings are initiated; the doctrine specifies that the concept of criminal proceedings must be understood in a specific sense, and not in a "broad" sense that also includes punitive administrative offences, since, on the one hand, the latter are applied within Member States by the same administrative authorities that will have to impose *sui generis* EU sanctions and, on the other hand, it must be considered that the purpose of Article 6 is not to ensure, in general, the primacy of national (punitive) law over EU law, but rather to guarantee, in the interests of procedural economy, the imposition of the most severe national penalties, such as those of criminal law in the strict sense, without prejudice to the possibility of imposing further penalties within the limits permitted by the principle of proportionality[408] .

The resumption of administrative proceedings presupposes the conclusion of criminal proceedings and compliance with the general principles of law. The preamble to the Regulation specifies that «criminal proceedings may be considered concluded» even «where the competent national authority and the person concerned have concluded a settlement.» With regard to the expression «general principles of law» there is some doubt as to whether reference should be made to EU law or national law; the purpose of the provision,

[406] See Opinion of Advocate Léger, *Maatschap Schonewille-Prins v Minister van Landbouw, Natuur en Voedselkwaliteit*, *cit.*, § 19.
[407] HEITZER, *op. cit.*, 171.
[408] *Ibid.,* 171.

which is to ensure the application of EU sanctions, argues in favour of the former option. In particular, in addition to the principle of legitimate expectations, the principle of proportionality must be taken into account.[409]
The most recent case law of the Court of Justice, drawing in particular on the recent *G.ST.T.* case[410], has given the court renewed tasks in determining the penalty; ensuring that, in the event of multiple penalties of a "criminal nature" being imposed, the severity of the penalties as a whole in cases of accumulation «does not exceed the seriousness of the offence found»[411] (prohibition of double jeopardy) (this is within the framework of criteria that should highlight the sufficiently close connection between criminal proceedings and any administrative penalty proceedings). In this way, case law on the merits and legitimacy has deemed it possible to reduce the penalty actually imposed below the minimum statutory penalties or even to waive the penalty itself.[412]

12. *Conclusions.* In recent years, the distinction between centralised and decentralised EU sanctions, which was previously clear-cut, has become blurred. With regard to the former, it should be borne in mind that a process of *decentralisation* is underway in the field of competition, pursued by involving Member States and their administrations more closely in the application of EU legislation and the related sanctions regime. As a result, the original tendency of such sanctions to give rise to processes of punitive unification is gradually diminishing, while at the same time their tendency to pursue mere punitive harmonisation is becoming more pronounced.[413]
As regards *decentralised* sanctions, it should be noted that until a few years

[409] *Ibid.*, 172 ff. See BARON, *Test di proporzionalità e ne bis in idem. La giurisprudenza interna alla prova delle indicazioni euro-convenzionali in materia di market abuse*, in *Arch. pen.*, 2019, 3, 1 ss.
[410] Court of Justice, judgment of 19 October 2023, G. ST. T., C-655/21, § 66: «where national legislation provides for a combination of criminal penalties, such as a combination of financial penalties and custodial sentences, the competent authorities are required to ensure that the severity of the penalties imposed as a whole does not exceed the seriousness of the infringement found, otherwise the principle of proportionality will be infringed.»
[411] Court of Justice, judgment of 19 October 2023, G. ST. T., C-655/21, § 66.
[412] With specific reference to the area of market abuse, the Italian Court of Cassation has specified that, where the administrative penalty under Article 187-bis of Legislative Decree No 58 of 24 February 1998 has already been imposed, the criminal court may disapply the criminal sanction in its entirety, where the former penalty has fully "covered" the negative aspects of the conduct relevant for both criminal and administrative liability: in such cases, in fact, the accumulation of sanctions would be manifestly disproportionate. See Criminal Cassation, Section V, 15 April 2019, No 39999; Criminal Cassation, Section V, Judgment No 49869 of 21 September 2018. See G. ARDIZZONE, *Le frodi a danno dei Fondi Agricoli Europei tra ne bis in idem e proporzionalità*, in *Arch. Pen.* 2024, 1 – 38.
[413] See BERNARDI, *L'armonizzazione delle sanzioni*, cit., 126.

ago, this category included all Community sanctions not based on Article 83 of the EC Treaty, and therefore all sanctions provided for in Community acts not relating to competition. Conversely, this correspondence ceased with the entry into force of Regulation No 2342/2002,[414] which introduced *centralised* EU administrative sanctions in a sector other than competition, directly applicable by the Commission, even though such sanctions have remained largely unenforced.[415]

In any case, the use of this instrument for the protection of EU interests has the advantage not only of being an instrument that could be equally or more effective than the criminal instrument, while being less detrimental to fundamental rights, but also, from a European perspective, of guaranteeing the protection of both the assets of the European Union in the strict sense and the provisions contained in EU legislation, through the unification of the rules on penalties, rather than the mere harmonisation that can be pursued in the criminal sector (albeit in an increasingly decisive manner through the powers recognised by the Treaty of Lisbon); in this way, the general preventive function of *Sanktionrecht* should be guaranteed more effectively at European level through a uniform intimidating and dissuasive effect in relation to illegal acts against European interests, or so-called illegal acts of European significance, characterised by the violation of European Union rules (whether contained in rules directly applicable within Member States or transposed into domestic law, for example in the agri-food sector) and therefore by damage to supranational assets.[416]

With a view to limiting criminal law, it should be noted that, initially, it was considered that, although the EU sanctions system was supposed to be the primary fundamental instrument for protecting interests as a valid alternative to criminal law, on the one hand, the process of completing and clarifying the regulation of such sanctions seemed to have stalled; on the other hand, the driving force seemed to have run out, the force that had led the European Community to introduce (precisely with decentralised sanctions) new types of punitive measures and to call for a significant expansion of the regulatory areas that could be protected through the use of such measures (while respecting

[414] Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

[415] See BERNARDI, *L'armonizzazione delle sanzioni*, cit., 127.

[416] DONINI, *Sussidarietà penale e sussidarietà comunitaria*, in ID., *Alla ricerca di un disegno. Scritti sulle riforme penali in italia*, Cedam, Padova, 2003, 140.

the Community principle of subsidiarity),[417] which remained essentially limited to the agricultural policy sector (and should have been extended from agriculture, hunting and fisheries to other sectors, including transport and the movement of persons, in accordance with the eighth recital of Regulation No 2988/95).[418]

Despite these considerations and although the types of Community sanctions have not been expanded, there has been a proliferation of regulations that use such sanctions[419] and also an expansion of the areas of application of *sui generis* sanctions, albeit to a limited extent compared to initial expectations, highlighting the potential of this instrument as a valid alternative to criminal intervention in the strict sense.[420]

Indeed, it has recently been pointed out in legal doctrine that the feared risk of the obliteration of administrative sanctions as a result of a threatened EU-wide criminalisation following the introduction of Article 83 TFEU has not materialised. Many believed that the implicit reference to the requirement of the effectiveness of criminal sanctions in Article 83 TFEU outlined from the outset a preference of the EU legal system for criminal law to the detriment of any other form of protection; it could be assumed that the Union would make less frequent use of administrative penalties, especially in view of the alleged greater effectiveness of penalties for the purposes of *implementing* secondary law.[421] However, not only have the Union's bodies recently continued to pro-

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[417] See, on this point, the eighth recital of the aforementioned Regulation 2988/95. See JESCHECK, *op. cit.*, 234 ff.; SICURELLA, *Diritto Penale*, cit., 161.

[418] MARTUFI, *op. cit.*, 462 ff. This is due to the decentralisation of supranational punitive power in favour of administrative bodies operating at the domestic level; a decentralisation in favour of the Member States, accompanied by the concentration of regulatory, sanctioning and supervisory powers in independent national administrative authorities, characterised by neutrality and technical expertise, removed from the political influence of national decision-makers, and firmly positioned within the multi-level enforcement system outlined by EU law; one need only think, for example, of the financial sector and market abuse. ALBERTI, *New Actors on the Stage: The Emerging Role of EU Agencies in Exercising Sanctioning Powers*, in *EU Law Enforcement: The Evolution of Sanctioning Powers*, edited by Montaldo-Costamagna-Miglio, Abingdon, 2021, 25 – 47.

[419] Regulation (EC) No 4045/98, Regulation (EC) No 800/1999, Regulation (EC) No 104/2000, Regulation (EC) No 150/2001, Regulation (EC) No 1282/2001, Regulation (EC) No 1/2003, Regulation (EC) No 2010/2003.

[420] For example, Articles 93 et seq. of Regulation No 1605/2002 (the so-called Financial Regulation) provide for penalties affecting categories of subsidies other than those provided for in the agricultural sector; Regulation (EC) No 614/2007 of the European Parliament and of the Council of 23 May 2007 concerning the Financial Instrument for the Environment (LIFE+) 2 (aimed at implementing, updating and developing Community policy and legislation on the environment), adopts the concept of administrative infringement referred to in Article 1 of Regulation No 2988/95.

[421] Following the entry into force of the Treaty, HERLIN-KARNELL, *Is administrative law still relevant? How the battle of sanctions has shaped EU criminal law*, in *Research Handbook on EU Criminal Law,*

vide for administrative penalties to enforce the non-criminal provisions contained in sectoral legislation, but – in the wake of the Treaty of Lisbon – there has been a proliferation of EU regulatory instruments aimed at harmonising/standardising the administrative penalties required to implement EU legislation.[422]

Not only that, but the General Court and the Court of Justice have carried out a considerable amount of interpretative work in relation to the principles, concepts and institutions established in the individual provisions of Regulation No 2988/95, confirming its role as a code regulating the Community's punitive power, not limited to the area of *sui generis* sanctions, but also in relation to centralised sanctions. In particular, this interpretative activity has made it possible, as examined, to clarify the concept of irregularity and abuse of rights and the principles of legality, effectiveness and proportionality/dissuasiveness, culpability and *ne bis in idem* applicable to the sanctions in question;[423] «in relation to the general regulation of Community sanctions, there has therefore been an alternation between legislative dynamism and jurisprudential dynamism that has always characterised the process of European integration.»[424]

And so, despite the delays and disappointed expectations, it remains clear that, in a general context characterised by the development of the European penalty system, accentuated also in the strictly criminal sector by the entry into force of the Treaty of Lisbon and the approximation of the penalty systems of EU countries, EU administrative sanctions will be called upon to play an increasingly important role as a valid alternative to criminal sanctions and, therefore, with a view to decriminalization («There are more than 50 post-Lisbon directives or regulations that prescribe obligations to lay down rules on administrative sanctions»[425]). The administrative sanction can be more efficient in some sector.[426]

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edited by Bergstrom-Mitsilegas-Konstadinides, Cheltenham, 2016, 233 ff.

[422] MARTUFI, op. cit., 477. A recent study, published in 2022, surveyed more than fifty EU legislative acts containing provisions on administrative sanctions adopted after the entry into force of the Treaty of Lisbon, as compared with the far less conspicuous body of acts harmonising substantive criminal law (as of January 2022, only nine directives had been adopted under Article 83 TFEU): see KÄRNER, *Interplay between European Union criminal law and administrative sanctions*, cit., 42 ss.

[423] See MAUGERI, *Il sistema sanzionatorio comunitario,* cit., 130 ff.; BERNARDI, *Politiche di armonizzazione*, cit., 237.

[424] See BERNARDI, *Politiche di armonizzazione*, cit., 238

[425] KÄRNER, *Interplay between European Union criminal law and administrative sanctions*, cit., 47.

[426] *Idem*, 51 ff.: «First, an administrative authority that also acts as a supervisory authority is presumably best placed to find and sanction an infringement. Second, the extra-judicial imposition of penalties can

This is from a twofold perspective: at European level and at national level.
In the first case, there are areas where the use of criminal law could be a barrier to the overall effectiveness of sanctions; that is, in areas where the use of criminal law hinders or slows down the swift investigation of offences, administrative protection should be favoured, with the consequent exclusion of the use of legislative powers under Article 83(2) TFEU; where administrative sanctions are more effective from an efficiency point of view, recourse to criminal law cannot be considered "indispensable," as required by the provision of the Treaty referred to above.[427] In short, following the explicit attribution of criminal jurisdiction to the European Union, albeit within the limits highlighted above, punitive EU administrative sanctions could constitute a powerful incentive to apply the criterion of subsidiarity of criminal sanctions over administrative sanctions in the European context, in order to limit the number of criminal offences imposed at supranational level.[428]
In the second direction, «the gradual establishment of such a system of sanctions at supranational level could encourage the adoption – *mutatis mutandis* – of a comprehensive system of national administrative sanctions within those European legal systems that are still lacking – originally focused on formally criminal punitive measures.»[429] From this perspective, the EU sanctioning model could already have an important indirect decriminalising effect and promote respect for criminal subsidiarity at national level.
Furthermore, EU sanctions, in a logic of *extrema ratio* of criminal law, could, also because of their frequent, high severity, sometimes replace national criminal sanctions applicable to the same violations, thus avoiding the need to resort to the so-called *Anrechnungsprinzip,* which, according to Regulation No 2988/95, is used whenever the same violation involves the application of a national criminal sanction and an EU administrative sanction.[430] The modest use of EU administrative penalties has not encouraged their use in place of criminal penalties to protect EU offences considered crimes in many EU countries, despite their low severity.[431]
Centralised subsidiary intervention, therefore, is not intended to expand crim-

allow for an initial bypass of certain procedural safeguards.»
[427] MARTUFI, *op. cit.*, 556. See KÄRNER, *Punitive Administrative Sanctions*, cit., 172.
[428] BERNARDI, *L'armonizzazione delle sanzioni,* cit., 129.
[429] BERNARDI, *L'armonizzazione delle sanzioni,* cit., 128. About the inefficiency of the punitive system of administrative sanctions in Italy, see BERNARDI, *Il costo di sistema delle opzioni europee sulle sanzioni punitive*, cit., 589 ff.
[430] BERNARDI, *L'armonizzazione delle sanzioni,* cit., 128.
[431] BERNARDI, *Politiche di armonizzazione*, cit., 240.

inal intervention (perhaps to compensate for the lack of protection provided by some States, but in an unjustified manner and in conflict with the principle of *extrema ratio* for other Member States), but to reduce internal criminal intervention; the European Union would favour decriminalisation, in contrast to the current process of inflation of national criminal laws, for which it is often considered responsible.

In this logic, the principle of EU subsidiarity does not conflict with, but harmonises with, that of criminal subsidiarity, in the sense that, within the limits of EU competences, EU sanctions could be considered necessary and more efficient, to the point of superseding national criminal intervention, rendering it unnecessary.

However, this will only be possible if we move beyond the logic of EU sanctions as a minimum intervention that is added to domestic intervention, whether administrative or criminal, and beyond the distinction between national and EU systems, and instead adopt a unified approach, in which European and domestic legislators coordinate to determine whether, in areas of direct EU competence, particularly where EU assets are at stake, it is possible to dispense with dual intervention (European and domestic) and consider the EU sanctions system to be *sufficient* and *effective*. Criminal policy assessments in the light of the principle of criminal subsidiarity must be made from a unified European perspective.