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Administrative Sanctions in EU Law

Adrienne de Moor-van Vugt

Professor of Administrative Law at the University of Amsterdam (The Netherlands)

Abstract

EU law has broadened the scope of administrative sanctioning by adding a variety of sanctions to the palette of sanctions in national law. Since the coming into force of the Charter, EU procedural standards are modelled on the 'criminal charge' case law of the ECrtHR. These standards are discussed below, and the question of whether the ECtHR and the CJ will agree on the qualification of certain EU sanctions as not criminal in nature is raised. The difference in the Court's approach of reparatory and punitive sanctions with regard to procedural guarantees is gradual and in line with the ECrtHR's case law allowing a procedure that is not as strict provided the sanction concerns a 'light' criminal charge. The Charter contains specific guarantees in 'criminal proceedings'. It is argued that, as a consequence, the CJ needs to clear up to which sanctions these guarantees apply.

1 Introduction

The European context has certainly been favourable to the development of administrative sanctions. EU law has stimulated the introduction of several kinds of administrative sanctions, such as the loss of a deposit, the administrative fine, the surcharge, the exclusion from subsidies and blacklisting. Member States, such as the Netherlands, needed to adapt their legal framework in order to make unknown sanctions like the deposit or the exclusion fit into the system.[1] Over time, the EU has established a fully fledged framework for the application of administrative sanctions by the Member States. The EU has taken inspiration from the case law of the European Court of Human Rights (ECrtHR) on the procedural standards of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) for sanctions that entail a criminal charge. Still, EU law over time has developed its own standards on the basis of the principles that are common to the laws of the Member States. The focal point for these standards is whether the interests of the party involved are adversely affected. The more intrusive the sanction becomes, the higher the safeguards need to be. That way, the Court of Justice has been, for a long time, able to avoid the question of whether a sanction

[1] See for an overview of existing administrative sanctions in the early nineties: The system of administrative and penal sanctions in the Member States of the European Communities, Vol. I, National reports, Luxemburg 1994; K. Tiedemann, E. Bacigalupo & G. Grasso, *Étude sur les systèmes de sanctions administratives et pénales dans les États Membres des CE*, Vol. II, Rapports de synthèse, Luxembourg 1995.

constitutes a criminal charge. The Charter of Fundamental Rights establishes fundamental rights for EU citizens with regard to sanctions and procedural rights, which are modelled on the rights in the ECRM.[2] This article will show that the settled case law on administrative sanctions fits in easily with the case law of the ECrtHR. This way the accession of the EU to the ECRM will be smooth with respect to article 6 ECRM, due to the converging case law on procedural standards and guarantees. However, one issue remains to be solved; which administrative EU sanctions will be categorised as of a 'criminal' nature or as a 'charge'? The CJ needs to give an answer to this question in view of the application of Articles 48 (presumption of innocence), 49 (principle of legality) and 50 (*ne bis in idem*) of the Charter, but also in view of the qualification as 'criminal charge' under Article 6 ECRM. A first answer is to be expected in the *Bonda* case, not yet decided by the CJ when this article was finished.[3] Therefore, only the conclusion of AG Kokott will be discussed below. In the following sections, this question together with said procedural standards are described and analysed. But first, we will go back in time and have a look at the roots of the system of administrative sanctions.

2 Enforcement of Union Law by way of Administrative Sanctions

2.1 The Starting Point

Traditionally, criminal law was considered to fall within the ambit of exclusive national sovereignty. The social, economic and cultural aspects related to criminal law were too different for Member States to be prepared to confer powers in that field to the E(E)C. From the outset it was clear that the Member States of the former EEC were not keen on handing over their sanctioning powers. Hence, jurisdiction in criminal matters was explicitly reserved for the Member States. However, the European Commission was given powers in the field of the production of coal and steel and competition law to directly impose administrative fines on companies that had acted in breach of the EEC and ECSC Regulations. Thus, the power to impose sanctions *and* to legislate them was concentrated on either the national level, or the Community level. This situation left more or less a vacuum with respect to the enforcement of E(E)C rules that needed to be implemented and executed by the Member States. The European Commission only had supervisory powers to ensure that Member

2 Charter of Fundamental Rights of the European Union of 7 December 2000 [2000] OJ C 364.
3 Case C-489/10 *Bonda*. This article was finished on May 4, 2012.

States honoured their obligations, but could not deal with infringements of E(E)C law; that needed to be done on the national level.

Over time, this became a serious flaw in the system. The European Commission found itself in a difficult situation, when at the verge of the accomplishment of the internal market in 1992 it had to conclude that the enforcement of Community law should be enhanced in all policy fields.[4] It had virtually no instruments with which to do so. The first policy area in which action was taken was the protection of the financial interests of the then EC, of which the driving force was DG XX (Financial control) of the European Commission.[5] Over time, not only the financial interests of the EC were an issue when it came to enforcement, but also the protection of the environment, the safeguarding of the free movement of goods, the rights of employees and other EC rights and freedoms. Much was done by the Commission in its supervisory capacity by means of the action for failure to fulfil obligations.[6] This was not sufficient though, because at that time the Commission had no means to enforce a judgment of the Court that a Member State needed to fulfil it's obligations under EC law (now Article 260 TFEU).[7] When it comes to the topic of sanctions however, we can learn most in the fields of the protection of the financial interests of the (former) EC (combating fraud concerning the EC budget) and competition law. The developments in the field of criminal law remain unmentioned, since the subject of this contribution pertains to administrative sanctions.

2.2 Filling the Gap

We have just seen that the Commission did not have enough powers to make sure that Member States would respond to infringements of EC law. The Commission started searching for ways to tackle this problem. It was found in the principle of loyal cooperation.

The principle of loyal cooperation, laid down in article 4 § 3 TFEU, is the most important basis for the duties of Member States to put an adequate sanctions system into place. The Court of Justice decided that Member States are perfectly allowed to impose sanctions in response to infringements of Community law, even if the Treaty or secondary legislation does not provide

4 See e.g. '1992' The Environmental Dimension. Task Force Report on the Environment and the Internal Market, http://aei.pitt.edu/6016/.

5 See M.S. Groenhuijsen & M.I. Veldt, *The Dutch Approach in Tackling EC Fraud*, The Hague/London/Boston: Kluwer 1995.

6 See M. Smith, 'Inter-institutional Dialogue and the Establishment of Enforcement Norms: A Decade of Financial Penalties under Artikel 228 EC (now Article 260 TFEU)', *European Public Law* 2010, p. 547-570.

7 References to articles in the EC treaties are adjusted to numbers in the Lisbon Treaty, unless it is functional to use the old numbers.

for an explicit legal basis for them to do so.[8] And, not only that, in fact they have a *duty* to respond to a breach of Community law under the rule of loyal cooperation. In the *Greek Maize* ruling the Court of Justice set this as a standard for future cases.[9]It added that, as a general rule, Member States are free to choose the way in which they wish to react: by means of civil, penal or administrative law. This freedom of choice is not unconditional: the sanctions must be effective, proportional and deterrent,[10]and it may be added that under circumstances this might mean that only criminal penalties are adequate in the eyes of the Court.[11] This stance in the case law was codified for fraud cases in (the now) Article 325 TFEU. In following cases the Court ruled that Member States can be obliged to act upon infringements of Community law and start proceedings to enforce the rules. Not doing so can give rise to an action for failure to fulfill obligations.[12]

Over the years the freedom of choice has been limited by several regulations in which the EC prescribed which sanctions to use when Member State authorities discover an infringement of specific provisions. At first, this was done in regulations on a specific topic, for instance, premiums for sheep or cattle. Later on, the sanctions were clustered in sector regulations, applicable to all regulations in the sector of agriculture or fishery etc. The next step was to put all the sector regulations together and make one general regulation on the protection of the financial interests of the EC.[13] Regulation 2988/95 prescribes several administrative sanctions in cases of irregularities regarding the rules and regulations of the EC Structural Funds. It is clear that these compulsory responses to infringements are meant to fall within the scope of administrative law. The sanctions mentioned in the Regulation must be considered as possible responses to infringements of Community law. The duty of Member States to impose them stems from the more specific Regulations in the various sectors.[14] These

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8 Case 50/76 *Produktschap voor siergewassen* [1977] ECR 137; reiterated in Case C-180/95 *Draehmpahl* [1997] ECR I-2195.

9 Case 68/88 *Commission v. Greece* [1989] ECR 2965.

10 Case C-326/88 *Hansen & Son* [1990] ECR I-2911.

11 Case C-176/03 *Commission v. Council* [2005] ECR I-7879.

12 Case C-265/95 *Commission v. France (Spanish strawberries)* [1997] ECR I-6959; C-494/01 *Commission v. Ireland* [2005] ECR I-3331; C-304/02 *Commission v. France* [2005] ECR I-6263; C-119/04, *Commission v. Italy* [2006] ECR I-6885, Case C-232/08 *Commission v. The Netherlands* [2009] ECR I-166.

13 Council Regulation (EC, Euratom) No. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312, 23.12.1995, p. 1-4.

14 E.g. Commission Regulation (EC) No. 2419/2001 of 11 December 2001 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes established by Council Regulation (EEC) No. 3508/92, OJ L 327, 12.12.2001, p. 11-32, Article 33. In Case C-367/09 (*SGS Belgium e.a.*), the Court has affirmed that as a prerequisite for the application of Regulation2988/95 either the European Union legislature must have 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 European Union 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.

Regulations can also provide for other sanctions, not mentioned in Regulation 2988/95.[15] Moreover, a Member State cannot lay down its own national penalties in case penalties of that type are already set out in detail in a Community Regulation (i.e. reductions and exclusions from the total amount of Community aid which can be claimed by a farmer who has applied for a slaughter premium).[16]

The Regulations and their sanctions were put into place after an extensive discussion within the institutions and with the Member States about the guarantees that should be available to the individual, when confronted with a possible sanction. Questions about the position of the individual in the preparatory stage of a sanction, the right to a fair hearing, the right to remain silent, the period of limitation, the guarantee of *ne bis in idem*, especially in cases when criminal penalties and administrative sanctions can be applied for the same offence, and access to justice played an important role in the discussions.

2.3 A Question of Competence

An important issue was dealt with by the Court of Justice in a case where Germany started an action against one of the predecessors of Regulation 2988/95.[17] Germany was of the opinion that the EC did not have the competence to issue a Regulation in which it prescribed to the Member States that they had to use sanctions of a penal nature. Referring to the Member States' sovereignty in criminal matters, Germany stated that punishment had always been the privilege of the Member States, and that this privilege had now been violated.

The sanctions Germany objected to were the surcharge and the exclusion. A surcharge can be imposed when a farmer is in default of his obligations stemming from an income support programme. Not only must he reimburse the support already paid, but, in addition, he is also required to pay an extra amount of money. Exclusion means that a farmer is excluded from a future subvention programme, because he has violated the rules of the current programme or of an earlier one. Both sanctions are meant to punish. It was Germany's contention that the EC Treaty did not provide a legal basis for such sanctions of a punitive nature.

The Court found the basis in the general rule that the EC has the power to determine what is necessary to attain the objectives of the common agricultural

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15 Article 5 para. 1, sub. g Regulation 2988/95; an example can be found in Council Regulation (EC) No. 820/97 of 21 April 1997 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products, OJ L 117, 7.5.1997, p. 1-8, Article 21.

16 Case C-45/05 *Maatschap Schonewille-Prins* [2007] ECR I-3997.

17 Case C-240/90 *Germany v. Commission* [1992] ECR I-5383.

policy (CAP). Harmonisation of the sanctions system forms a part thereof, according to the Court. In that way, all responses to irregularities, be they of a punitive or a reparatory nature, could be based on the need to achieve the goals of the CAP.

The Court resisted the invitation made by the Germans to take a position on the Community's power in the 'penal sphere'.[18] The Court thus refrained from giving a clear view on the power to prescribe to Member States the imposition of punitive administrative sanctions; its judgment however, is generally considered as allowing the EC to have full power to prescribe them in its legislation.

This view was supported by the case law of the Court in later years, stating that if necessary the Community can oblige Member States to apply criminal penalties in certain cases. In a case concerning the Council Framework Decision on the protection of the environment through criminal law the Court ruled that as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence. However, this does not prevent the Community legislature from taking measures which relate to the criminal law of the Member States, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, and when it considers those measures to be necessary in order to ensure that the rules on environmental protection are fully effective.[19] Nonetheless, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence as the Court ruled in a more recent case. This case pertained to the Framework decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.[20]

In the Lisbon Treaty the views of the CJ have been codified. Article 83 § 2 TFEU states: 'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.'

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18 Cons. 24.
19 See Case 176/03 *Commission v.Council* [2005] ECR I-7879.
20 Case C-440/05 *Commission v. Council* [2007] ECR I-9097.

3 Administrative Sanctions

3.1 Criminal Charge

As we have seen in the last section, the discussion on administrative sanctions within the EC was fanned by the fear that the Community would take over the national power to impose criminal penalties. In order to obtain a clear view of the questions and problems stemming from the application of criminal penalties we must look at the ECHR. In Article 6 of that Convention, citizens are given fundamental rights when they are faced with a *criminal charge*. Article 6 of the Treaty on the European Union (TEU) stipulates that the EU shall respect fundamental rights, as guaranteed by the ECHR as general principles of Community law. Since the entry into force of the Lisbon Treaty, it is stipulated that these fundamental rights, guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union law. Also, the TEU now states that the Union shall accede to the ECHR (Article 6 § 2 TEU).

In view of the guarantees that the Union must respect, we need to establish the scope of the notion of a *criminal charge*. The ECrtHR has repeatedly stated that this notion must be construed autonomously, without taking into account the categories which national systems use. It considers several aspects in order to conclude the applicability of Article 6, known as the *Engel*-criteria.[21]

In the first place, it takes into account the scope of the rules that have been violated. If those provisions cover all citizens, be it in a certain capacity, e.g. as taxpayers, and not a given group with a particular status, this part of the test is satisfied. Second, the Court assesses the purpose of the sanction. If it is not intended as pecuniary compensation for damage but essentially as a punishment to deter others from committing an offence, the second stage is passed as well. Third, the sanctions must be imposed under a general rule, the purpose of which is both deterrent and punitive. The last aspect to look at is the severity of the sanction. If that is very substantial, this factor also contributes to the conclusion that it falls within the ambit of a criminal charge. For instance, the amount of a fine can be an indication of the severity of the sanction.[22] It is also of importance if a financial sanction can be replaced by imprisonment. If, having weighed the various aspects of the case, the Court notes the predominance of those aspects that have a criminal connotation, Article 6 is applicable. None of those factors are decisive on their own, but taken together and cumulatively they make the 'charge' at issue a 'criminal' one within the meaning of

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21 ECrtHR 8 June 1976, *ECHR, Series A* No. 22.

22 ECrtHR 23 March 1994, *ECHR, Series A* No. 283-B Ravnsborg, in which case the imposed fine was considered to be so futile, that the Court refused to define it as a criminal charge.

Article 6.[23] Thus, the ECrtHR has defined an administrative fine and a tax surcharge as a criminal charge. In 2009, the ECJ has adopted this definition of a criminal charge.[24]

3.2 Definition of Sanctions in EU Law

It seems that Union law does not prefer the term 'sanctions' as an umbrella term for labelling the state's response to unlawful behaviour. More often we find the terms 'penalty' and 'measure' in the English versions of EU rules. For that matter, the term 'penalty' as used in Regulation 2988/95 is translated in several language versions by an equivalent of the word sanction,[25] which points to the punitive character of a sanction. I have not found an overall term to cover responses to an offence both of a reparatory and of a punitive nature. This does not seem to justify the use of the term 'sanction' as an umbrella term in this contribution , but in the absence of a better one, it will make do.

The distinction between a penalty and a measure as such is meaningful. A measure is meant to be of a reparatory nature, while the purpose of the penalty is to punish the offender. In Regulation 2988/95 we can find the two types and a list of sanctions, which fall within their scope. These reflect the kinds of sanctions that are common in Union law. The following responses are considered to be measures (article 4 Regulation 2988/1995):

– withdrawal of the wrongly obtained advantage:
– by an obligation to pay or repay the amounts due or wrongly received,
– by the total or partial loss of the security provided in support of the request for an advantage granted or at the time of the receipt of an advance.

To make sure that these responses are received as intended, the Regulation states that these measures shall not be regarded as penalties. They can be imposed at all times, when an irregularity is found, without the need for culpability.

The penalties of article 5 Regulation 2988/1995 are listed here to show the large variation in types of penalties. They are:

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23 ECrtHR 21 February 1984, *Öztürk, ECHR, Series A* No. 73, p. 9, paragraph 50 with reference to the judgment of 8 June 1976 in Engel and Others, *ECHR, Series A* No. 22, pp. 34-35, paragraph 82. ECrtHR 24 February 1994, *Bendenoun, ECHR, Series A* No. 284, paragraph 47.

24 Case C-45/08 *Spector Photo Group* [2009] ECR I-12073.

25 French: Mesures et sanctions administratives, German: Verwaltungsrechtliche Maßnahmen und Sanktionen, Spanish: Medidas y sanciones administrativas; Italian: Misure e sanzioni amministrative; Dutch: Administratieve maatregelen en sancties

a. payment of an administrative fine;
b. payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate; this additional sum shall be 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. total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;
d. exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity;
e. 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 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 sector 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.

These can only be imposed in cases of intent or negligence of the offender.

In 2002, in the *Käserei Champignon Hofmeister* case, the CJ was confronted with a fundamental question concerning the issue of subjective fault or culpability in relation to the character of a reaction to infringements of the rules.[26] The sanction in question was a reduction of an export refund, as a response to irregularities pertaining to the ingredients of the product that had been exported. This type of sanction is the reverse of the surcharge, as defined under sub b) of Article 5 cited above, and amounted to the same result: a financial loss on the part of the applicant. The plaintiff stated that the sanction in question constituted a punishment, and that for such a sanction the principle of subjective liability applies.

In her opinion AG Stix-Hackl paid ample attention to the character of the sanction.[27] She stated that the deterring nature of the sanction does not make it a punishment. To be considered as a criminal penalty, it must also include social or ethical disapproval. She also thought it significant that the sanction at issue could be passed on to a third party, if so agreed, by way of recovery or compensation.

The CJ found that the character of the measure or penalty must be defined on the basis of its purpose and its place in the system, and implicitly referred

26 Case C-210/00 [2002] ECR, I-6453.
27 Opinion of 27 November 2001.

to the Article 6 case law of the ECrtHR. The CJ stressed that in the CAP the objectives of a stable market, the combating of irregularities and the encouragement of compliance form an integral system, which seems to imply that it is not possible to single out the sanctions and assess them on their merits. But it does not seem to be the main reason for the Court not considering them as punishment. The leading consideration seems to be the following:

'41. In explaining the nature of the breaches complained of, the Court has emphasised on several occasions that the rules breached were aimed solely at *traders who had freely chosen* (emphasis added) to take advantage of an agricultural aid scheme (see, to that effect, Maizena, paragraph 13, and Germany v Commission, paragraph 26). In the context of a Community aid scheme, in which the granting of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness, the penalty imposed in the event of non-compliance with those requirements constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound financial management of Community public funds.'

It seems to be the idea of "contract" which defines the nature of the sanction: it cannot be a punishment, if one has agreed to it oneself.[28] This seems to be in line with the ECrtHR approach, where it states that if a rule covers only a given group, the connotation as 'criminal' is less convincing. However, the CJ's approach contradicts the other factors mentioned by the ECrtHR and also the system that was adopted in Regulation 2988/95, which implies that certain sanctions, even if they are used in aid schemes that economic actors need to enter voluntarily, are indeed meant as punishment. In the future, the Court needs to clear this up and explain better how such sanctions fit in with the assessment scheme of the ECrtHR in matters of criminal charge. The *Bonda* case would be a good opportunity to do so.

In this case, Bonda was blacklisted as a consequence of fraudulent behaviour and excluded from an agricultural aid scheme for three years. He was also prosecuted and sentenced to (suspended) imprisonment. Now, Bonda was sanctioned twice for the same offence, which raised the question if the principle of *ne bis in idem* was violated. Article 50 of the Charter, which protects offenders from double jeopardy however, is only applicable to 'criminal proceedings'. AG Kokott adopts the line of reasoning the CJ used in the afore mentioned *Käserei Champignon Hofmeister* case and concludes that blacklisting for three years does not constitute a criminal charge. Her reasoning is based on two criteria. Following the CJ in *Käserei*, she argues that the scope of the regulation concerns a

[28] See also AG Kokott in her conclusion in Case C-489/10 *Bonda*.

clearly defined group of people, who enter the aid scheme voluntarily. Thus, one of the *Engel*-criteria is not met. Second, she argues that the aim of the sanction is not to deter or prevent, but to protect the financial interests of the EU.

If the Court follows the line of reasoning, which is very likely, as it is based on its own case law, the CJ will not consider a major part of the administrative sanctions in the field of CAP as criminal in nature.[29]

4 Principle of Legality

For a long time, the principle of legality did not have a written basis in the EU treaties. Still, the principle has undoubtedly been part of the legal framework of the EU. In numerous cases the Court has stated that that a directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of persons accused.[30] The Court demands a solid legal basis in national law, even if the conduct as such is prohibited by a Community Regulation. In 2011 the Court held that the general principles of EU law and, in particular, the principle of the legality of criminal offences and penalties preclude national authorities from applying, to a customs offence, a penalty for which no express provision is made under the national legislation.[31] The CJ emphasised earlier that the principle of non-retroactivity of penalties, as enshrined in Article 7 ECHR, would prohibit the imposition of criminal penalties for conduct, that is not prohibited by national law, even if the national rule were contrary to Community law.[32]

With the adoption of the Charter the principle of legality is now underpinned with a thorough basis in the EU Treaties. The Charter puts it as follows:

'Article 49: Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was

29 Point 67, conclusion in Case 489/10.
30 See Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi* [2005] ECR I-3565.
31 Case C-546/09 *Aurubis Balgaria*, nyr.
32 Case C-60/02 *Counterfeit and pirated goods* [2004] ECR I-651.

committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

The ECHR recognises the principle of legality in Article 7, stating that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. It also entails the *lex mitior*.

The lack of a thorough basis in the TEU in the past led to the odd consequence that the principle was expressly mentioned in Article 2 of Regulation 2988/1995:

'2. No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions, which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.'

This text might suggest that the principle of legality only applies to the penalties. In the *Könicke* case however, the Court emphasised that 'penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis'.[33] The phrase refers to the forfeiture of a deposit, which might be considered as a 'measure' in terms of Regulation 2988/95, and, as a general rule, is of a reparatory nature. It suggests that a legal basis is necessary for reparatory measures as well. However, the forfeiture of a deposit in combination with the recovery of sums paid, is in reality a penalty, and that was what the case was about. In conclusion, the principle of legality certainly applies to penalties in EU law however, it is uncertain whether it applies to measures as well.

5 Culpability

In the Charter the *presumptio innocentiae* is codified for offences of a criminal nature.

'Article 48: Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'

33 Case 117/83 [1984] ECR 3291.

This principle is not adhered to in EU law in the sense that an offender is always considered to be innocent until proven guilty before a court of law. Union law is for a large part administrative law, in which the standard of strict liability applies. Therefore, it is sufficient to establish that the offence has been committed, and, regardless of culpability, the offender is liable for the offence.[34] Administrative authorities must prove that an offence has taken place and that it was committed by the accused. In the process they may use information that they have gathered from the accused under the duty to cooperate. The accused is not required to answer when in doing so, he might incriminate himself and thus provide the authorities with the proof they needed in order to be able to establish an infringement and to impose a penalty. In case the authorities envisage a measure, this guarantee not to incriminate oneself does not need to be offered, as we will see when in Paragraph 6.2 the right to remain silent is discussed.

In the *Käserei Champignon Hofmeister* case the AG concluded that the fault principle is not a general principle of Community law when it comes to administrative sanctions:[35]

'46. Firstly, a comparison of the legal systems of the Member States, as made by the plaintiff in its written observations, reveals, in particular, that the boundary between criminal and administrative penalties is a fluid one.

47. Thus, in the legal systems of the Member States the principles of criminal law, to which the fault principle undisputedly belongs, are variously applied. The narrower the range of purely administrative penalties – and hence the broader the range of criminal penalties – the clearer the distinction between criminal and administrative sanctions with respect to their legal treatment.

48. The scope of the fault principle also appears to vary. In the case of criminal penalties which give expression to minor social disapproval, the behavioural obligation may be so conceived that individual reprehensibility is induced merely by its not being fulfilled. Moreover, in its written observations the plaintiff itself acknowledges that where a sanction is based on objective criteria the possibilities of exemption could lead to more or less the same results as liability based on fault with reversal of the burden of proof.

49. It therefore appears that the general applicability of the fault principle to penalties of an administrative nature cannot be derived from the legal traditions of the Member States.'

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34 See Green Paper – The Presumption of Innocence, COM/2006/0174 final.

35 Case C-210/00, opinion of Advocate General Stix-Hackl delivered on 27 November 2001.

As regards the case law of the Court, the Court explicitly found that the principle *nulla poena sine culpa* did not apply to measures such as the loss of security.[36] In *Germany v. Commission*, the Court reached the same conclusion for the administrative fine, because administrative authorities had imposed the penalty in order to protect the CAP, and not in order to punish the offender.[37] In the *Käserei Champignon Hofmeister* case the CJ also found it to be of importance if a sanction can be qualified as being of a criminal nature. If this is not the case, as in *Käserei* with the penalty of a reduction of an export refund, the principle of *nulla poena sine culpa* does not apply, according to the Court.[38] In other areas, the Court has accepted that a system of strict criminal liability penalising a breach of a Community Regulation is not in itself incompatible with Community law. These cases concerned national sanctions systems of criminal law set up to enforce EC rules.[39] Thus, the Court stressed that the general principles of Community law do not preclude the application of national provisions under which an offender of Community Regulations may incur strict criminal liability. The Court's opinion however, is without prejudice to the competence of the EU legislator to provide for rules as laid down in Article 5 of Regulation 2988/95, determining that in order to impose a penalty the offender must have shown intent or gross negligence.

6 Protection of the Individual

The protection of the individual does not necessarily depend upon the qualification of the sanction as a penalty or a measure. The CJ has decided, for instance, that the rights of the defence must be respected in every case in which a decision is taken, that is unfavourable for an individual.[40] Moreover, the guarantees that are available to the individual are in most cases compatible with those stemming from the ECHR. The character of EC law as economic law brings about that the protection of the individual extends to legal persons (companies) as well.[41] This is not self-evident, since the ECHR was originally drafted for natural persons, and the CJ has tried to follow that Convention when developing specific guarantees in EU law. Still, the case law of

36 Case 137/85 *Maizena* [1987] ECR 4587, para. 14.
37 Case C-240/90 *Germany v. Commission* [1992] ECR I-5383.
38 Case 210/00 [2002] ECR I-6453.
39 Case C-326/88 *Hansen & Son* [1990] ECR I-2911, paragraph 19; Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111, paragraph 36.
40 Case 17/74 *Transocean Marine Paint* [1974] ECR 1063, Case C- 32/95 P *Lisrestal* [1996] ECR I-5373
41 Case 85/76 *Hofmann-LaRoche* [1979] ECR 461.

both the CJ and the ECrtHR has been moving towards the recognition of guarantees for legal persons/companies, as we shall see from the following.

6.1 The Rights of the Defence

In the Coal and Steel Treaty companies were given the right to be heard before a fine was to be imposed (Article 36). Although the right was laid down in some of the written law, it was considered to have a wider scope as a part of the general principles of Community law. This was due to the limited scope of the provisions in question. The rights of the defence find their basis in the French 'droits de la défense'. This is a body of rules, set up to protect an individual when he finds himself confronted with drastic decisions of public authorities.[42] The rights are acknowledged by the Court and must be respected in every case when a decision implies a sanction, even if the proceedings in question are merely administrative proceedings.[43] It is settled case law, that respect for the rights of the defence is in fact a fundamental principle of Union law, that must be guaranteed even in the absence of any rules governing the proceedings in question. Although the Charter acknowledges the rights of the defence only to someone who has been 'charged', the case law holds that these rights must be respected in all proceedings initiated against a person, which are liable to culminate in a measure adversely affecting that person.[44] In 1991 the Court decided that the right to defend oneself against an accusation, which is guaranteed in Article 6 ECHR, is part of the Community legal order.[45] In later case law the Court acknowledged the same rights in all proceedings, which are initiated against a person and are liable to culminate in a measure adversely affecting that person.[46] In that leading case, *Listrestal*, it became clear that such measures not only include penalties, but also the withdrawal of a favourable decision such as a grant from the European Social Fund. Thus, the distinction between measures and penalties does not affect the protection of the rights of the defence. The rights must be observed, not only by the courts, but also by national public authorities when they impose measures and penalties.[47]

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42 Conseil d'Etat 5 May 1944, *Dame veuve Trompier-Gravier*, Rec. p. 133. This case concerned the withdrawal of a permit as a consequence of the unbecoming behaviour of the permit holder.

43 Case 17/74 *Transocean Marine Paint* [1974] ECR 1063; and Case 121/76 *Moli* [1977] ECR 1980; Case 85/76 *Hofmann-LaRoche* [1979] ECR 461.

44 Itai Rabinovici, 'The Right to Be Heard in the Charter of Fundamental Rights of the European Union', *European Public Law* No. 1 (2012): 149-173, argues that the text of the Charter goes back to an erroneous translation of the case law.

45 Case C-49/88 *SAMAD* [1991] ECR I-3187.

46 Case C-32/95P *Lisretal et al.* [1996] ECR I-5373, cons. 21. See also Joint Cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-06351; Case C-510/06 P *Archer Daniels Midland* [2009] ECR I-1843.

47 See e.g. Case C-28/05 *Dokter* [2006] ECR I-5431.

In the Treaties and in Regulations rules are laid down on the right to a fair hearing and the rights of the defence. The TFEU provides for the right to a fair hearing for Member States before the Commission decides on the admissibility of state aid (Article 108), and before a procedure for a breach of Community law is introduced to the Court (Article 258). Furthermore, the right is provided for in competition law, for companies that are suspected of a breach of Article 101 TFEU. Regulation 1/2003 on competition law[48] states that the rights of defence of the parties concerned shall be fully respected in the proceedings (Article 27, § 2). The Charter, as mentioned before, acknowledges the rights must be respected of anyone who has been charged.

In substance, the rights of the defence were developed in the context of competition law. The former Regulations 17/62 and 99/63 and the case law thereon defined in rather detail the elements of those rights. The new Regulation 1/2003 acknowledges the right to be heard by the Commission, the right of access to the file, and the protection of business secrets. The right to be heard is exercised, before the Commission declares that an infringement has taken place, and before it imposes fines or periodic penalty payments.

The rights of the defence have several aspects; the core is the right to express one's view on the matter, in short, the right to a fair hearing. In the *Lisrestal* case the Court stated that the addressees of a decision should be placed in a position in which they may effectively make their views known. The possibility to do so depends on several conditions. These form the other elements of the rights of the defence.

One must be informed about the investigation, which may lead to a sanction (measure or penalty). This information must be timely, at such a moment that the decision has not yet been taken (cf. Article 27 Regulation 1/2003). This is an essential element, because the rights of the defence can be irreparably harmed in the preparatory phase.

The party involved must be informed about the allegation, the facts and the applicable rules that it has allegedly broken (Article 27, § 1 Regulation 1/2003). He must have access to the files of the authorities in order to prepare a defence (Article 27, § 2).[49] In competition cases the Commission provides a kind of summary, which is added to the letter of allegation.

The addressee can ask for the precise contents of the documents if he thinks that this is essential to his defence. However, there are some restrictions on access to files, especially in competition cases. Some parts of the file can be labelled as confidential, in order to protect a competitor's interests against another competitor (Article 27, § 2). The company that has complained to the Commis-

48 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

49 Cases T-10/92, T-11/92, T-12/92 en T-15/92 *Cimenteries CBR* [1992] ECR II-2667, and T-36/91 *ICI* [1995] ECR II-1847.

sion of unlawful actions by his competitor also has procedural rights. He also has access to files, but not to the files containing delicate information about the company, such as business secrets. The Court is very precise in its examination of the necessity of confidentiality, because as the ECHR shows it is a fundamental aspect of the right to a fair trial that proceedings leading to a penalty should be adversarial and that there should be equality of arms between the authorities and the defence.[50] The right to an adversarial trial means that both sides must be given the opportunity to have knowledge of and to comment on the observations filed and the evidence adduced by the other party. Article 6 § 1 ECHR requires that the authorities disclose to the defence all material evidence in their possession for or against the accused. However, the right of disclosure of relevant evidence is not an absolute right. In competition proceedings it is obvious that there may be competing interests, such as the protection of vital business information, which must be weighed against the rights of the accused. Thus, in some cases, it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or company. However, only such measures restricting the rights of the defence, which are strictly necessary, are permissible under Article 6 § 1 ECHR.[51]

On several occasions the Court has stressed the importance of the right to express one's views on the evidence presented (now in Article 27 § 1 Regulation 1/2003).[52] In the *Almini* case it stated that this right is all the more important when the EU authorities have wide discretionary powers.[53] The right to express a point of view pertains to the facts on which the decision shall be founded. The right has been given to the addressee of the envisaged decision.[54] The person adversely affected by the decision must have sufficient time to prepare his defence. The period needed is related to the complexity of the case, and the volume of the files. A short period of time for preparation can be justified if the decision concerns an undertaking that is a professional in the market.[55]

The parties concerned express their views in a written opinion. In general, there is no public hearing. Only in staff cases can civil servants express their views orally at a hearing. In competition cases sometimes an oral hearing takes place. The parties concerned can be represented by lawyers, who are also admitted to the bar of the Court of Justice, or by other suitable persons.

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50 ECrtHR 16 February 2000, *Rowe and Davis v. the United Kingdom*, Application no. 28901/95.
51 ECrtHR 23 April 1997, *Van Mechelen and Others v. the Netherlands*, Reports 1997-III, p. 712, § 58.
52 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25.
53 Case 19/70 *Almini* [1971] ECR 623.
54 *Lisrestal*: case cited above.
55 Case C-349/07 *Sopropé* [2008] ECR I-10369.

In the *Jussila* case the ECrtHR has acknowledged that even if a sanction qualifies as a criminal charge, it is not necessary to apply the whole set of procedural guarantees without fail.[56] There are criminal charges of differing weight, the Court ruled, and that weight depends on the degree of 'stigma' that is attached to the sanction. Administrative sanctions do not necessarily belong to the hard core of criminal law. In the *Jussila* case as a consequence of the criminal charge being of a 'light' character Jussila was denied the right to be heard.

The CJ should, as a consequence, define in which cases one can speak of light charges that do not warrant a public hearing.[57] The Dutch General Administrative Law Act, for instance, differs between a full and a light procedure, in cases where an administrative fine is threatened. The demarcation line lies at € 340. The light procedure does not require a written specification of the facts that have been established leading to the fine and a previous hearing of the offender is not required.

Respect for the rights of the defence is an essential procedural requirement, which makes a decision susceptible to annulment when it is not adhered to.[58] Regulation 1/2003 even states that the Commission shall base its decisions *only* on objections on which the parties concerned have been able to comment (Article 27, § 1).

6.2 The Right to Remain Silent

In administrative law, it is quite usual that individuals or companies are required to cooperate with inspections and enquiries, answer questions, produce documents etc. This is no different in EU law. In fact, the EU adds rules about cooperation with inspections and enquiries in many Regulations and Directives.[59] Member States do the same in national legislation in order to comply with the demands of the EU regarding the standard of enforcement. In view of the commitment of the EU to guarantee fundamental rights, enshrined in the Charter and the ECHR, the EU needs to set certain safeguards to protect the individual from incriminating himself. This raises the question whether information that was gathered under the duty to cooperate, may be

56 ECrtHR 23 November 2006, Report 2006-XIV.

57 See Eric Barbier de La Serre, 'Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends', *European Public Law* No. 2 (2006): 225-250, who argues that the EU Courts should avoid confining the rights of the defence within over-rigid categories.

58 Cases C-238/99P, C-44/99P, C-45/99P. C-247/99P, C-250-252/99P and C-254/99P *Limburgse Vinyl Maatschappij et al.* [2002] ECR I-8375.

59 E.g. Council Regulation (Euratom, EC) No. 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292, 15.11.1996, p. 2-5, Article 7.

used to underpin a decision to impose a penalty (which is considered to be a criminal charge) at all times. The rights of the defence can, of course, be impaired during preliminary inquiry proceedings, when the duty to cooperate with inspectors/investigators can cause undertakings to produce evidence of the unlawful nature of the conduct, which the Commission will be sanctioning at a later stage.

To fully appreciate this matter we must first turn to the case law of the ECrtHR. The Court has acknowledged that the right to remain silent is part of a fair trial, as guaranteed in Article 6 § 1 ECHR. The question is in what kind of situations this right can be invoked. Article 6 ECHR does not recognise an absolute right not to give evidence against oneself, but only if and when necessary to protect the rights of the defence.[60] This means that, as a general rule, the parties involved are obliged to provide all the information requested, that is to say all factual information. In the *Saunders* case the Court established that it is a violation of the right to a fair trial when oral information obtained from the individual by tax inspectors during a normal inspection is used in a criminal trial. The violation can be found in the circumstance that the information is obtained under the exercise of compulsory powers, that is, under pressure of sanctions like a fine or imprisonment. In a later case the Court reiterated this judgment for the situation in which a public receiver had questioned someone under similar compulsory powers, and this information was used in a criminal trial as well.[61]

In the *Orkem* case the Court of Justice established that the right to remain silent had no foundation in written EC law.[62] This case was a competition case against a company, started by the European Commission. Up to that time national systems only recognised the right to remain silent for natural persons, in criminal proceedings, but the Court was clear in acknowledging the same right for undertakings.

The Court stated that the duty to cooperate in normal inspection procedures cannot be warded off easily. The duty to provide information ends when the authorities ask questions in order to establish whether a breach of EU rules has taken place. In those situations there is no duty to answer questions.[63] As it was put in the *Orkem* case: the Commission may not compel an undertaking to provide it with answers, which might involve an admission of an infringement, which the Commission should prove.[64] This seems to imply that even the an-

60 ECrtHR 17 December 1996, Saunders. ECHR Report 1996-VI, p. 2044, para. 68.
61 ECrtHR 27 April 2004, Application No. 21413/02, *Kansal v. The United Kingdom*.
62 Case 374/87 *Orkem* [1989] ECR 3283, cons. 28. See also case 27/88 *Solvay* [1989] ECR 3355 and T-34/93 *Société Générale* [1995] ECR II-545.
63 Cons. 34 and 5 *Orkem*, see also case T-112/98 *Mannesmannröhren-Werke* [2001] ECR II-729, cons. 67.
64 Cons. 35.

swering of questions is not required in the inspection phase. We can find this in the competition Regulation 1/2003 when it says in the preamble that undertakings cannot be forced to admit that they have committed an infringement. In the next part of the sentence there is a 'but': undertakings are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish the existence of such an infringement. This formula of the right to remain silent is not repeated in the actual text of the Regulation. There, it only mentions the duty to answer questions on facts and to cooperate in the examination of books and other documents (Article 20).

6.3 Protection Against Entering Business Premises or a Home

Article 7 of the EU Charter protects the privacy of the home. The right is a codification of the fundamental right laid down in the ECHR, which has already been recognised in the Community legal order for a considerable length of time. Since the EU has declared that it shall abide by the fundamental rights laid down in the ECHR, this convention and its interpretation have become of importance. This has been problematic for the interpretation of Article 8 ECHR, because the ECrtHR and the CJ took a different approach to the right of legal persons/companies to have their home protected.

In the *Chapell* case the ECrtHR implied that undertakings are protected by article 8 ECHR, when authorities wish to enter their business premises.[65] The CJ however, was of a different opinion at the time and stated that the protection of the home was guaranteed for natural persons only. However, it did recognise a certain degree of protection against arbitrary entrance to business premises.[66] In 2002 the two courts fine-tuned their case law, and both chose the same interpretation as to the rights of companies. Recently, in the *DEB*-case, the CJ has affirmed the right of legal persons to rely on the fundamental rights of the Charter.[67]

In the *Colas Est* case the ECrtHR not only reiterated that article 8 ECHR protects legal persons as well,[68] but also clarified the conditions for interference in the right under article 8 § 2. The leading thought in the case is that investigation powers must be proportionate to the (legitimate) aim that is pursued (and is necessary in a democratic society). Therefore, it is necessary that there is some form of previous judicial control available to prevent possible arbitrary action, in those cases where the investigative powers of the authorities are very

65 ECrtHR 30 March 1989, No. 10461/83.
66 Cases 46/87 and 227/88 [1989] ECR 2859.
67 Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, nyr.
68 See cons. 41 ECrtHR 16 April 2002, No. 37971/97, *Société Colas Est and others*, Report 2002-III.

wide, as was the case in *Colas Est*. In the *Roquettes* case the CJ adopted the same line of reasoning as the Strasbourg Court, and it added guidelines for national courts advising how to perform the task of judicial control. Since the *Roquettes* case dealt with the problem of the scope of the investigative powers of the Commission in competition cases, the Court explained the standard of information that the courts should receive in order to be able to decide on the legality of the search. The Commission should be able to provide 'detailed information showing that the Commission possesses solid factual information and evidence providing grounds for suspecting such infringement on the part of the undertaking concerned.'[69]

This is more than the former Regulation 17/62 demanded; article 14 solely obliged the Commission to state the subject-matter and the purpose of an investigation. Hence, it is clear that increasing the burden of proof can put the Commission in a difficult spot when third parties have an interest in confidentiality or when the investigation could be hampered because of the compulsory disclosure of certain information to the court. In an analysis of the case, Waelbroeck and Leinemeyer state that the Commission needs to provide nearly a full description of the case, including an indication of the affected market and the nature of the suspected infringement, in order to enable the court to assess the use of investigative powers.[70]

The *Roquettes* rules have been incorporated in Regulation 1/2003, where it provides that the Commission is empowered to 'enter any premises, land and means of transport of undertakings and associations of undertakings' (Article 20, § 2), but if, according to national law, judicial authorisation for coercive measures is needed, it shall be applied for (§ 6 and 7). In that case the judicial authority 'shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection'.

It has now become clear that national courts are not competent to question whether there is sufficient cause to start an investigation, when initiated by the Commission. The Commission's decision to go ahead can only be assessed by the CJ. Of course this is different when national authorities conduct an investigation or inspection in EU cases of their own motion. In that case the courts can rule on the legality thereof, provided that the rules on access to business premises or a home of the EU *and* the ECHR are taken into account.

This also means that, for the time being, under EU law different approaches are allowed. Waelbroeck and Leinemeyer indicated that only ten out of (at that time) fifteen Member States require a judicial search warrant.[71] This raises

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69 Roquettes C-94/00 [2002] ECR I-9011, cons. 99.

70 [2003] *CML Rev.*, 1481-1497 (1490).

71 O.c. p. 1494, only Austria, Finland, Ireland, the Netherlands and Sweden do not require a search warrant for business premises. All states require one for the search of a private home.

questions as to the compatibility of the Regulation and the case law with the *Colas Est* rule, which clearly requires prior judicial control for the use of extensive powers to search premises; all Member States are now bound by this case law.[72]

7 Judicial Protection

As a general rule the judicial protection of the individual is a matter governed by national law.

This concept of the procedural autonomy of the Member States is limited by the principles of equivalence and effectiveness, well known from the *Rewe* and *Comet* cases.[73] In those cases the CJ laid down several minimum requirements for the system of judicial protection against the wrongful application of EU law as such. These minimum requirements pertain, among others things, to the right to have access to justice and to the right to have adequate procedures and remedies.[74]

7.1 Access to Justice

The right to have an effective remedy against violations of EU rights is an important part of the legal order of the EU. Both the Strasbourg and the Luxemburg courts stress, that rights awarded by the respective treaties must be protected by an impartial and independent tribunal. The Court of Justice demands effective remedies in those cases when EU rights have been infringed.[75] The Court has set several conditions with which the national legal orders must comply in order to provide the right standard of protection. These include access to a court, effective procedures to undo infringements, the duty to underpin decisions with adequate reasons, rules on standing and time-limits, the burden of proof and full jurisdiction of the courts.[76] As a general rule, Member States enjoy procedural autonomy, provided that equivalent rules are applied to national and Union law cases, and that they are adequate to protect EU rights. The Court has limited this autonomy by setting the conditions mentioned above.

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72 Case C-2/92 *Bostock* [1994] ECR I-995; compare also ECrtHR 18 February 1999, No. 24833/94, *Matthews v. The UK*, where the Court established that Member States are bound by the Convention when they apply EC law.

73 Case 33/76 *Rewe* [1976] ECR 1989 and 45/76 *Comet* [1976] ECR 2043.

74 Case 276/01 *Steffensen* [2003] ECR I-3735.

75 Cases *Rewe* and *Comet*.

76 A. Arnull, 'The principle of effective judicial protection in EU law: an unruly horse', [2011] *ELR* Vol. 36, No. 1, p. 51-70.

Every time an EU citizen is of the opinion that his/her Community rights have been violated, they must be able to address a court with a request for redress.[77] The Charter puts it as follows:

'Article 47: Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.'

EU law does not determine *which* court or tribunal is competent, because this is a matter of procedural autonomy. Still, sometimes the Court needs to determine if a national institution qualifies as a court or tribunal that is allowed to ask a preliminary ruling of the Court.[78] This point, however, does not need discussion here.

EU law follows the case law of the ECrtHR quite closely. The ECrtHR has allowed some limitations in the right of access to a court, such as time-limits, court registry fees and the obligation to have legal representation.[79] However, these limitations must serve a legitimate aim and may not be stricter than what is necessary to achieve that aim.[80] The same holds true for the obligation to use preliminary proceedings, e.g. an action for objections, outside the courts. The Court sees to it that the limitations set in national law do not make it virtually impossible to make use of remedies that are available.

Some limitations are therefore not allowed, or must be compensated, like for instance the obligation to have legal representation. In complex cases or when legal representation is compulsory, the state must guarantee that citizens have adequate counsel available. In some cases this means that there needs to be a system of compensation for the costs of legal aid.[81] In criminal procedures even legal aid without a fee must be available (Article 6 § 3 ECHR). If national legal orders demand some form of security or a deposit in order to start court proceedings, this would not be in breach of Article 6, if it would serve a legitimate aim.[82] In EU cases demanding a deposit or other security as well is per-

77 Case 222/84 *Johnston* [1986] ECR 1651.
78 See e.g. Case 246/80 *Broekmeulen* [1981] ECR 2311.
79 ECrtHR 27 February 1975, *Golder, ECHR, Series A*, vol. 18.
80 ECrtHR 28 May 1985, *Ashingdane, ECHR, Series A*, vol. 93.
81 ECrtHR 9 October 1979, *Airey v. Ireland, ECHR, Series A*, vol. 32.
82 ECrtHR 13 July 1995, *Tolstoy Miloslavsky, ECHR, Series A*, vol. 323.

mitted, as long as the principles of effectiveness and equivalence are not put into question.However, requiring such a security solely from EU citizens that are non-nationals is not permitted.[83] The condition of an effective remedy also entails that the system as such needs to be transparent and coherent.[84] Limitations to the right to access to justice that are allowed as such, can still be in breach of the Convention if they could lead to misunderstandings concerning the proper proceedings.[85]

7.2 Procedural Rules

The European Convention and its case law have set standards concerning the organisation of the proceedings and the procedural rules. The Court of Justice has established similar rules in view of the principles of equivalence and effectiveness.[86] Hereafter, they will be discussed with a slight emphasis on the rules developed by the ECrtHR.

7.2.1 Public Trial

Article 6 ECHR contains the provision that, as a general rule, a trial shall be public. The Convention leaves room for exceptions in the interests of public morality, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. In the *Pupino* case the CJ made such an exception for the hearing of the young children that had been abused by their teacher.[87] This is one of the rare EU cases on the principle of a public hearing in court.

The ECrtHR has accepted several further exceptions to this rule, for instance when the case is complex and very technical. In such a situation the case may be better dealt with in a written form.[88] These exceptions could play a role in EU fraud cases. They could be necessary when biased publicity could hamper the course of justice, or in competition cases, when somehow confidential business information would become public and the interests of companies in-

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83 Case C-29/95 *Pastoors* [1997] ECR I-285.
84 ECrtHR 16 December 1992, *Geoffre de la Pradelle, ECHR, Series A*, vol. 253-B.
85 ECrtHR 4 December 1995, *Bellet, ECHR, Series A*, vol. 333-B.
86 A. Simonati, 'The Principles of European Procedure and de EU Courts: an Evolution in Progress', *REALaw* 2011, Vol. 4, No. 1, p. 45-8 and Eric Barbier de La Serre, 'Procedural Justice in the European Community Case-law concerning the Rights of the Defence: Essentialist and Instrumental Trends', *European Public Law* No. 2 (2006): 225-250.
87 Case C-105/03 *Pupino* [2005] ECR I-5285.
88 ECrtHR 24 June 1993, *Schuler-Zgraggen v. Switzerland, ECHR, Series A*, vol. 263.

volved could subsequently be seriously damaged, or where the case is extremely complicated.

The rationale of a public trial is that the defendant can exercise his right to express his views about the facts and the allegations. An oral hearing is in order when the court is not clear as to the facts as they emerge from the files.[89]

As discussed in Paragraph 6.1, in criminal charge cases the ECrtHR accepts that a public hearing is refrained from on appeal when the case concerns a minor offence or when only mild penalties can be imposed. However, in each case in which the guilt of a defendant still needs to be established, an oral and public hearing is obligatory.[90]

7.2.2 Standing

Both the ECrtHR and the CJ accept limitations when it comes to standing in court proceedings.[91] The CJ stresses that these limitations may not make it practically impossible to exercise EU rights. The consequence of this case law is, that standing should always be granted against the imposition of a sanction (penalty or measure), because unlawful sanction decisions as a general rule will infringe one's EU-rights.[92]

The CJ case law about standing mostly concerns situations in which third parties seek redress before the courts, for instance when they have been discriminated against or when they claim protection of a directive.[93] Sometimes interest groups want to have access to a court, and the question whether they must be given that right depends on the scope of the rules involved.[94] In The Netherlands it is debated whether the CJ case law would allow for further restrictions by introducing the so called Schutznorm in future procedural rules. This rule only allows those people to have access to court, whose rights are actually protected by the rules they invoke before the courts. The general conclusion is that this

89 ECrtHR 19 February 1998, *M. Jacobsson v. Sweden*, Rep. 1998-I.
90 ECrtHR 12 February 1985, *Colozza*, No. 9024/80.
91 ECrtHR 28 June 1990, *Obermeier, ECHR, Serie A*, vol. 179.
92 Case C-13/01 *Safalero* [2003] ECR I-8679.
93 C-87/90-C-89/90 *Verholen e.a.* [1991] ECR I-3757.
94 Case 361/88 *TA luft* [1991] ECR I-2607, in which the Court acknowledged that the scope of interested parties was very wide. Under the Arhus Convention members of the public all have access to justice, but it was unclear if the Convention allows for limitations of the legal grounds they want rely on. In Case C-115/09 *Trianel Kohlekraftwerk Lünen* (nyr), the Court ruled that that non-governmental organizations promoting environmental protection have a right to rely before the courts on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this. In other words, the Court has dismissed the Schutznorm for interest groups in environmental cases.

rule would be a limitation that is acceptable to the CJ, provided that it is not applied too strictly.[95]

The most important exception to limitations on standing in view of the subject of this article is the situation of the third party competitor who has an interest in the correct application of competition law. It is clear that he has access to court regarding decisions addressed to competitors, which may harm his interests on the market, e.g. consent to a merger.[96]

7.2.3 Time Limits

As indicated above the ECHR does not forbid time limits to address a court, as long as they serve a legitimate aim and are necessary to attain that aim. However, they may not make the effective use of a remedy impossible, which may be the case when the time limit is very short. The CJ also allows time limits that are 'reasonable', but sometimes reliance on time limits is not accepted if it unduly blocks access to justice. This may be the case when the authorities lead someone to believe that he has no (procedural) rights at all, or does not need to invoke them because the authorities will take care of the situation.[97] It is essential to know whether the persons involved were able to know their (procedural) rights when the time limit was running.[98] Such a situation may occur in sanctioning cases as well however, such cases have not yet been brought before the CJ.

7.2.4 Legal Assistance

As a general rule, everyone is entitled to defend himself. Many legal systems however, demand legal representation by lawyers in private law cases as well as in criminal cases. The ECrtHR has accepted this.[99] Article 6 ECHR provides the right to free legal aid, if someone does not have sufficient means to pay and when the interests of justice so require.

This right does not seem to apply in preliminary proceedings, which are a common occurrence in administrative law. Often, before addressing a court, the party involved must raise objections before the administrative authorities. This is also the case when the authorities' decision entails a measure or a penalty.

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95 G.T.J.M. Jurgens, 'De bestuursrechtelijke relativiteitseis', in: *De toegang tot de rechter beperkt* (preadvies, VAR-reeks 144), p. 90-105.

96 See a Dutch case, President of the Trade and Industry Appeals Tribunal 4 January 1991, *AB* 1991, 185, *Texaco*.

97 Case C-321/96 *Edis* [1998] ECR I-4951.

98 Case C-208/90 *Emmott* [1991] ECR I-4269 and C-326/96 *Levez* [1998] ECR I-7835.

99 ECrtHR 24 November 1986, *Gillow, ECHR, Series A*, vol. 109, ECrtHR 25 September 1992, *Croissant, ECHR, Series A*, vol. 237-B.

If in such a situation legal assistance seems necessary, in view of the complexity of the matter, these costs are often not reimbursed. This does not seem to be in violation of EU law or Article 6 ECHR, provided that it does not harm the right of effective judicial protection. It may be the case that the parties involved refrain from seeking judicial protection when they are confronted with the risk of incurring high costs which are not reimbursed. For this reason, all the circumstances need to be examined in order to determine whether the limitations applied to the right of access to the courts undermines the very core of that right, whether those limitations pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved.[100] The CJ follows this case law.[101] In general, the seriousness of the offence and the possible penalty are indicators to answer the question whether legal aid must be free for those who need it.[102] In criminal matters the ECrtHR demands free legal assistance in all criminal charge cases, which can lead to imprisonment.[103]

7.2.5 Burden of Proof

When it comes to administrative measures and penalties it is the duty of the authorities to prove that an infringement of the rules has taken place. EU law does not have written procedural rules on evidence, although some rules can be derived from the regulations in the several sectors. In addition, we can turn to the general principles of Union law, such as the rights of the defence and the principle of proportionality for guidance. In general, the rules on evidence must be assessed against the background of the principles of effectiveness and equivalence.[104] The procedural autonomy of the Member States constitutes the starting point.

The fact that the burden of proof lies with the authorities follows from the duty to underpin a decision with sufficient reasons.[105] The CJ has rejected the opinion of the Commission that it is solely up to the offender to provide evidence to the contrary. It follows from the principles of proper administration that the authorities must paint a full picture of the facts, including those that are in favour of the accused.[106] This does not mean that the accused need not bother

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100 ECrtHR 13 July 1995, *Tolstoy-Miloslavsky v. the United Kingdom*, *ECHR, Series A* No. 316-B, §§ 59 to 67, and 19 June 2001, *Kreuz v. Poland*, ECHR 2001-VI, §§ 54 and 55).

101 See the *DEB* case, C-279/09.

102 ECrtHR 10 June 1996, *Benham*, Rep. 1996-III, p. 769. In the *DEB* case (C- 279/09) the CJ has acknowledged the right of legal persons to compensation of the cost of legal aid.

103 ECrtHR 24 May 1991, *Quaranta*, *ECHR, Series A* vol. 205.

104 Reiterated in Case C-161/08 *Jan de Lely* [2009] ECR I-4075.

105 Cases 18 and 35/65 *Gutmann* [1966] ECR 150; Cases 8-11/66 *Noordwijks Cementaccoord* [1967] ECR 91.

106 Cases 56 and 58/64 *Grundig/Consten* [1966] ECR 449.

contradicting the facts as presented by the authorities. The basic idea of a fair trial entails that parties can examine each other's propositions, evidence and witnesses, and offer evidence to the contrary. For this purpose the rights of the defence have been developed. The principle of effectiveness brings about the need for the authorities to leave the offender ample opportunity to offer evidence on his behalf. Otherwise national law would render it practically impossible or excessively difficult to exercise rights conferred by Union law. It would also violate the right to a fair trial as enshrined in Article 6 ECHR. The adversarial principle brings about the right to challenge the evidence. Provisions that stand in the way of that right do not fulfil the demands of Article 6 and must be omitted.

In 2003 the CJ delivered a judgment in the *Steffensen* case in which – contrary to the rules laid down in the applicable directive – it had not been possible to obtain a second opinion on analyses of samples of foodstuff.[107] The question was whether the results of those analyses were nevertheless admissible as evidence in an action brought before a national court against an administrative decision based exclusively, or at least for the most part, on those results. It was put to the Court that the admission of such evidence would be in breach of Article 6 ECHR. This case is interesting because, according to the Court, the right to have a second opinion does not only follow from the directive itself (in which that right was expressly provided for), but also from the adversarial principle of the ECHR.

ECrtHR has held that, where the parties are entitled to submit to the court observations on a piece of evidence, they must be afforded a real opportunity to comment effectively on it in order for the proceedings to reach the standard of fairness required by Article 6(1) of the ECHR. That point must be examined, in particular, where the evidence pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on the assessment of the facts by the court.[108] In the *Steffensen* case, the Court relied on that case law and also held that, if the national court decides that the admission as evidence of the results of the analyses at issue in the main proceedings is likely to give rise to an infringement of the adversarial principle and, thus, of the right to a fair hearing, it must exclude those results as evidence in order to avoid such an infringement.

7.2.6 Full Jurisdiction

The Convention states that a court must have *full jurisdiction*, the power to assess both facts (the merits of the matter) and the legal merits of

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107 Case C-276/01 *Steffensen* [2003] ECR 3735.
108 ECrtHR 18 March 1997, *Mantovannelli*, Rep.1997-II, p. 425.

the case.[109] Its scrutiny must not only pertain to legislation, but also to general principles of law.[110] The ECrtHR has considered certain limitations to the jurisdiction of a court to be inadmissible, e.g. the limitation on rules of procedure when an administrative authority enjoys discretionary powers.[111] Especially in the case of a 'criminal charge', the courts must have full power to assess both questions of fact and questions of law.[112]

The ECrtHR has allowed limitations as to questions of fact in very specific circumstances, the need for a very specialised examination of the facts can render it unfeasible for a court to perform the task. In that case having it done by experts is permitted. However, during this procedure the parties must be informed of the findings, and they must be able to comment on those findings. This follows from the adversarial principle that was discussed above.[113]

In the *Kadi* ruling the CJ overturned the ruling of the Court of First Instance, that the Community courts had no jurisdiction to review the internal lawfulness of a Community measure intended to give effect to a resolution of the Security Council. The Court held that the review of a Community measure, that is designed to give effect to resolutions adopted by the Security Council, doesn't entail any challenge to the primacy of the resolution itself. The Court must, in principle, review the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law.[114]

The safeguard of full jurisdiction is of importance in relation to the assessment of the proportionality of a measure or penalty. In EU cases the Court has acknowledged the requirement of full jurisdiction. In competition cases it was even laid down in Regulation 17/62 (Article 17). In Regulation 1/2003 this is stated as follows:

'Article 31

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or a periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment involved.'

Unlimited jurisdiction to assess the proportionality of a periodic penalty payment is remarkable when we realise that it is not generally accepted in the Member States that a court may change such a decision. This is related to the margin of appreciation that is awarded to the administrative authorities when it comes to

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109 ECrtHR 17 December 1996, *Terra woningen*, Rep. 1996, p. 2105.
110 ECrtHR, 27 November 1991, *Oerlemans v. Netherlands, ECHR, Series A*, vol. 219.
111 ECrtHR 28 June 1990, *Obermeier v. Austria, ECHR, Series A*, vol. 179.
112 ECrtHR 2 March 1987, *Weeks v. UK, ECHR, Series A*, vol. 179.
113 ECrtHR 18 March 1997, *Mantovannelli*, Rep. 1997-II, p. 425.
114 Joint Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-06351.

the use of discretionary powers. In Dutch law, for instance, a court may only annul a periodic penalty payment when it is of the opinion that the authorities have been acting *ultra vires* by imposing a disproportional sanction. In several EU Member States the scrutiny of a measure is less intense than that of a penalty.

With regard to the fine in competition cases the CJ has held that the Courts of the European Union have unlimited jurisdiction which empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and consequently, to cancel, reduce or increase the fine or penalty payment imposed. According to the Court, this approach does not amount to a review of the Court's own motion. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas.[115]Also, the Court held that the failure to review the whole of the contested decision, i.e. the qualification as an offence and the decision to impose a sanction, of the Court's own motion does not contravene the principle of effective judicial protection. This principle does not require the Court to undertake of its own motion a new and comprehensive investigation of the file. Thus, the Court held, the review involves both the law and the facts, and it means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine.[116]

7.2.7 Reasonable Time

The ECrtHR has given extensive case law on the condition in Article 6 ECHR, that a trial must take place within a reasonable time. It is important to stress that preliminary proceedings such as procedures for objections also count when it comes to determining the length of the procedure. This means that domestic law must guarantee that all the stages of a procedure concerning a sanction can be completed within a reasonable time. Moreover, the weight of the interests involved has an influence on the length of the procedure allowed. When, for instance, an administrative authority imposes a severe sanction, the proceedings of scrutiny must be short in view of the need to be quickly clear as to the legality of the sanction.[117]

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115 Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705. Case C-312/93 *Peterbroeck* [1995] ECR I-4599. In the case *Van der Weerd* the CJ reiterated this approach, but also left ample room for national restrictions in this respect. Cases C-222/05 to C-225/05, [2007] ECR I-4233.

116 Case C-386/10 P *Chalkor AE Epexergasias Metallon/Commission*, nyr.

117 This can be derived from the case law in which the ECrtHR considers the aspect of what is at stake for the applicant as an important criterion to assess breach of the requirement of reasonable time, e.g. ECrtHR 8 July 1987, *H. v. UK, ECHR, Series A*, vol. 120; 25 November 1992, *Abdoella, ECHR, Series A*, vol. 248-A.

This also implies that states are obliged to uphold an efficient system of procedures, and that they need to put an end to delays and backlogs. An overload of cases does not serve as a sufficient excuse, unless it is a temporary situation and adequate measures have been taken to resolve the problem.[118]

In Article 47 of the Charter the right to a fair and public hearing within a reasonable time is guaranteed. EU law does not have specific requirements as to the length of national procedures, although the principle of effectiveness does limit the time span of procedures. In competition cases on EU level the Court has stated that compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of Community law whose observance the Community judicature ensures.[119] The right to legal process within a reasonable period is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law. The reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities.[120]

8 Severity of the Measure or Penalty

8.1 Proportionality

The principle of proportionality is a general principle of Union law, applicable to all Community actions, on the level of the EU as well as on the level of the Member States.[121] It is confirmed by Article 13 § 2 TEU. The principle is an important tool for the CJ to review the use of discretionary powers. The Court determines the balancing of interests by applying the criteria of suitability and necessity to the measure taken. For criminal offences the Charter states in Article 49, § 3, that the severity of penalties must not be disproportionate to the criminal offence.

The CJ sees to it that sanctions are in proportion to the offence. For those sanctions that can be directly imposed by EU organs, the Court has developed

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118 ECrtHR 10 November 1969, *Stögmüller, ECHR, Series A*, vol. 9; 13 July 1983, *Zimmermann and Steiner, ECHR, Series A*, vol. 66.

119 Case C-282/95 P *Guérin automobiles v. Commission* [1997] ECR I-1503; Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* [2006] ECR I-8725.

120 Case C-185/95 P *Baustahlgewebe* [1998] ECR I-8417, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v. Commission* [1999] ECR I-8375; and Case C-194/99 P *Thyssen Stahl v. Commission* [2003] ECR I-10821.

121 See T. Tridimas, *The general principles of EU law*, Oxford: Oxford University Press 2006.

important case law with regard to the imposition of fines in competition law by handing down a catalogue of criteria to review their proportionality. A very important criterion is to what extent the offence has interfered with the goals of Community economic policy.[122]

The Commission and the Council have broad discretionary powers to take economic measures. The Court only applies a mild proportionality test in these cases.[123] The Court reviews measures involving financial support and assistance more strictly, focusing on the rights of the individual.[124] The most intensive proportionality test is applied when fundamental rights are at stake.[125]

The goals of the EU policy in question are very important in cases in which Member States impose EU measures and penalties. It is often argued that these measures and penalties, which are increasingly dictated by EU Regulations, are harsh and disproportionate. The Court reviews them in the light of an important aspect of EU policy: combating irregularities and fraud. If the measure or penalty is necessary to adequately execute an EU Regulation and to prevent fraud, even a severe penalty is considered to be proportionate.[126]

However, if the measure or penalty is of an administrative nature and the only aim of the obligation to which it is bound is to facilitate smooth management and control, the Court requires a differentiation between this kind of reaction to an offence and the measures or penalties that can be imposed when the primary duties in the Regulation are violated, as the *Otto Preisler Weingut* case illustrates.

The EC issued a Regulation on grants for distillation of wine; distillation of wine was promoted in order to diminish the quantity of wine in store in the EC. In this Regulation it was provided that those wine producers, who had not reported their production of that year in September, were excluded from the grants. Some German producers were affected by this exclusion. In the proceedings before the German courts they held that the Regulation was invalid, because it was disproportional in its sanctions. The Court examined the purpose of the obligation to report in September, and found that the aim was to ensure that the Commission would have enough data about the production of wine and the wine in stock in December. The Commission needs these data to make an estimate at the beginning of every sales year. The Court held that for this purpose the sanction as such would not be necessary, it was disproportional to provide for such a strict deadline in combination with such a severe penalty and declared the Regulation invalid to that respect.[127]

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122 E.g. Cases 96-102, 104, 105, 108, 110/82, IAZ, [1983] ECR 3369.
123 Case 316/86 *Krücken* [1988] ECR 2213.
124 See Case 199/87 *Jensen* [1988] ECR 5045.
125 E.g. Case 44/79 *Hauer* [1979] ECR 3727.
126 See Case 240/90 *Germany/Commission* [1992] ECR I-5383.
127 Case C-319/90 *Otto Pressler Weingut* [1992] ECR I-203.

It is in competition law where the case law on the proportionality of penalties is most developed. The amount of the fine relates to the seriousness of the infringement and the consequences thereof for the market, the turnover of the companies involved, the period of time the infringement has lasted, and to the existence of aggravating circumstances such as being the initiator of or the leading player in the scheme, intent, recidivism etc.[128]

The General Court takes its task very seriously in this respect, and scrutinises the decision to impose a fine very precisely. Although it does not very often use its power to diminish the fine, it does find reason to annul a decision partly or totally when the Commission has given insufficient reasons for the fine. This automatically results in the lowering of the fine, since the underpinning grounds are not present.[129]

Article 49, para. 3 of the Charter states that the severity of penalties must not be disproportionate to the criminal offence. Until recently, the EU had only limited competence in criminal matters. However, with the Lisbon Treaty and recent case law of the Court about directives on criminal enforcement of environmental law, the powers of the EU have increased.[130] In the future Member States will be confronted more and more with EU law, demanding that certain infringements be considered and punished as criminal offences.[131] The case law on administrative sanctions will then gain importance for penal sanctions as well.

8.2 Accumulation of Sanctions

In the Charter the principle of *ne bis in idem* is laid down for criminal offences.

'Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

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

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128 See for an example Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 en T-136/02, *Bolloré SA e.al.* [2007] ECR II-947, cons. 480-484, and Case C-386/10P *Chalkor*.

129 Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd* [2004] ECR II-01181.

130 Cases C-176/03 and C-440/05 and Par. 2.

131 See for instance Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30.6.2009, p. 24-32.

An accumulation of penalties is generally seen as undesirable, because of the *ne bis in idem* principle. In some cases, national authorities can apply penalties for the same offence as described in Union regulations. In such a situation, EU law may oblige them to apply an administrative penalty, while at the same time national law may force the authorities to commence prosecution. This might happen when the public prosecutor has no discretionary power to decide on prosecution, and the expediency rule does not apply. However, it is also possible that the prosecutor considers the offence to be of such a nature that criminal proceedings are in order. The *Bonda* case, mentioned above, is example of the latter situation, combining blacklisting as an administrative sanction and the suspended sentence of imprisonment.

EU law cannot prevent this, but offers a procedural remedy and a remedy in substance. The procedural remedy is found in Regulation 2988/95. It offers a solution in Article 6 which states that the imposition of financial penalties such as administrative fines may be suspended by a decision taken by the competent authority if criminal proceedings have been initiated against the person concerned in connection with the same facts. When the criminal procedure is concluded, the administrative procedure shall be resumed. The administrative authority shall ensure that a penalty at least equivalent to that prescribed by EU rules is imposed, which may take into account any penalty imposed by the judicial authority on the same person in respect of the same facts (in German: *Anrechnungsprinzip*). This provision has been added in case the criminal proceedings as well as the administrative procedure would lead to a financial penalty, especially a fine. Other kinds of financial repercussions, like the recovery of grants or the loss of a deposit are not covered by the article in question, because they qualify as a 'measure', and do not count with respect to protection against accumulation.[132] This provision shows that EU law recognises the idea that the total of the penalties imposed may not be disproportionate to the offence. The disapplication of *ne bis in idem* when combining criminal and non criminal sanctions makes it all the more important to clearly articulate which sanctions are considered to be of a criminal nature, as the *Bonda* case shows.

The remedy in substance is, as mentioned above, the application of the principle of proportionality to the total of the sanctions. In 1969 the Court stated in the *Walt Wilhelm* case that the general principles of Community law require that in the decision to impose a sanction, earlier penalties for the same fact are taken into account, not because the *ne bis in idem* principle was violated, but because the total of the sanctions should be proportionate to the offence.[133] The case concerned the accumulation of international and EC sanctions. The Court observed in a much later, similar case that any consideration concerning the

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132 Affirmed Case C-150/10 *Bureau d'intervention et de restitution belge v. Beneo-Orafti SA*, nyr.
133 Case 14/68 *Walt Wilhelm* [1969] ECR 1.

existence of fines imposed by the authorities of a non-member State can be taken into account only under the Commission's discretion in setting fines for infringements of, in this case, Community competition law. Accordingly, although it cannot be ruled out that the Commission may take fines imposed previously by the authorities of non-member States into account, it cannot be required to do so.

It must be stressed that the Commission of course, in exercising its discretion, should also pay attention to the principle of proportionality. The (then) Court of First Instance decided that national and Community sanctions in competition law can accumulate, provided that the Commission takes into account the national sanctions already imposed for the same fact when it decides on the amount of the fine.[134] By then, it had already been suggested that this case law should also be applied in case of accumulation of national sanctions of a repairing and a punishing nature. In the *Könicke* case a deposit was forfeited because of irregularities, and at the same time national authorities commenced criminal proceedings. AG VerLoren van Themaat suggested that the application of the principle of proportionality to the total of the two sanctions could make the application of the *ne bis in idem* rule obsolete.[135] The underlying idea has been adopted in Regulation 2988/95.

In competition law the problem is tackled in Regulation 1/2003 where it states that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings. If the authorities of two or more Member States have started proceedings the Regulation provides that it is sufficient that one authority handles the case, the others should suspend the procedure or reject the complaint in question (Article 13). However, the rule does not say which authority should withdraw from the case, those who started later, or those who have a less solid case?

Article 50 of the Charter is also of importance in transnational cases. If a EU citizen is subject to a criminal charge for the same facts in several Member States, the CJ has ruled earlier in a Schengen case that the *ne bis in idem* rule applies. [136]As a consequence, offenders could be charged in one Member State with a minor offence and punished with a simple administrative sanction, whereas in the other Member State the same fact would be a criminal offence with severe criminal sanctions. This, of course, could lead to forum shopping. The CJ has also ruled that *ne bis in idem* applies to criminal proceedings instituted in a Schengen state against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Schengen

134 Case T-149/89 *Sotralenz* [1995] ECR II-1127.

135 See the conclusion in the *Könecke* case, 117/83 [1984] ECR 3291.

136 C-436/04 *Leopold Henri Van Esbroeck* [2006] ECR I-2333. This was a case about the Schengen agreement and the fact that Van Esbroeck had been subject to legal proceedings in different Contracting States for the same facts.

state. This holds, even though under the law of the state in which he was convicted, the sentence, which was imposed on him could never have been directly enforced, and in fact was not enforced at all.[137]

9 Conclusion

It is safe to say that the field of administrative sanctions has been subject to an important influence from EU law. EU law has broadened the scope of administrative sanctioning by adding a variety of sanctions to the palette of sanctions in national law. Although the CJ in the past adopted its own approach in the interpretation of the ECHR, which led to differences between the case law of the CJ and of the ECrtHR, this has changed in recent years. Especially since the preparations for the Charter and its coming into force, the case law of the CJ has followed the interpretations of the ECrtHR more closely, which helps Member States with a harmonised interpretation in administrative sanction cases. Much work has been done to make the written law of the EU complete and to live up to the standards of the rule of law.

Although the case law of both Courts are converging on most issues concerning procedural guarantees, a hot issue remains. Will the ECrtHR and the CJ agree on the qualification of certain EU administrative sanctions as not criminal in nature? As we have seen in the discussion of the cases *Otto Preisler Weingut*, *Käserei Champigon Hofmeister* and the recent *Bonda* case the CJ's line of reasoning is greatly inspired by the aim of the sanctions and by the scope of the rules. If the aim is to further the effectiveness of EU rules and protect the financial interests of the EU a sanction is considered of a repairing nature, even though some elements of deterrence and prevention are imminent, and the element of stigma is certainly there (e.g. blacklisting, surcharge). If the sanction is part of a subsidy programme that can be entered freely, it is considered as a condition by contract, even though the programme applies to a wide range of EU undertakings and is applicable to anyone who fulfils the subsidy prerequisites. It remains to be seen if the ECrtHR will follow this particularly economic and financial induced approach of the CJ in categorising.

The adoption of the Charter as part of the Lisbon Treaty has stimulated the further clarification and specification of safeguards in administrative sanctioning procedures for both measures (of a reparatory nature) and penalties (of a punishing nature). The difference in approach between both types of sanctions is gradual, which makes the reluctance of the CJ to qualify a sanction as criminal even more questionable. Most procedural safeguards that have been implemented apply to both categories. The penalties demand a more restrictive approach

137 Case C-297/07 *Klaus Bourquain* [2008] ECR I-9425.

in the sense that the authorities need to respect the guarantees that have been set by the ECHR and the Charter, when it comes to a criminal charge. However, a smooth and efficient procedure is possible in a simpler case, because denial of a public hearing is allowed by the ECrtHR in those cases in which a criminal charge does not add up to a significant degree of stigma. In other words, if it concerns a 'light' criminal charge a less strict procedure is allowed.[138]

This begs the question whether the Court will be clearer in its definitions of the categories and the consequences attached in view of the procedural guarantees. In the past, opaqueness in the qualification of sanctions served a purpose. Criminal law was not part of the competence of the EC, and therefore any hint that a sanction might be qualified as a criminal charge had to be avoided. Now the EU has gained competence in criminal matters as well, it is time to refine and clear up the matter of categories in view of the gradually higher procedural safeguards the ECHR affords in cases of a criminal charge in comparison to a 'light' criminal charge. A better understanding of these categories would serve to clarify whether some very specific safeguards, which only apply to penalties, like the principle of culpability, the right to remain silent, application of the principle of *ne bis in idem* or full jurisdiction of the severity of a sanction is required in national law or not.

138 ECrtHR 23 November 2006, *Jussila*, Report 2006-XIV.