



EDITIONS DE L'UNIVERSITE DE BRUXELLES

# Do labels still matter?

Blurring boundaries between  
administrative and criminal law  
The influence of the EU

EDITED BY  
FRANCESCA GALLI AND ANNE WEYEMBERGH



**iee** INSTITUT D'ETUDES EUROPEENNES

# The influence of the EU on the “blurring” between administrative and criminal law\*

Pedro CAEIRO

1. What exactly does *blurring* mean in this context?

A. If I understand the topic correctly, the “blurring” of administrative and criminal law can have two meanings.

It might mean that the concepts of administrative and criminal law have become fuzzy *as a whole* because they are being used indistinctly and in a way that deprives them of their particular features. As a consequence, it might become hard to say whether any given prohibition or sanction is either of an administrative or criminal nature. In short, we would not be able to discern between the two notions anymore. While the situation may well be complex, this does not seem to be the case.

B. Blurring can also mean that the *boundaries* between administrative law and criminal law are becoming hazy because there are instances where they take on some of each other’s elements.

From this perspective, which will be adopted in the following considerations, the blurring presupposes two separate but contiguous entities that can be distinguished from one another save for the area on the border between them. In the background, we have the prototypical notions of criminal law and administrative law (as ideal and more or less traditional models):

---

\* I wish to thank Prof. Anne Weyembergh for her valuable comments on an earlier version of the text. Obviously, the responsibility for the remaining mistakes and areas of unclarity lies with me.

This article was written during a stay in the *International Institute for the Sociology of Law* (IISL) – Oñati, whom I wish to thank for having kindly hosted me as a visiting scholar, allowing me to benefit from their resources. I would also like to thank *Fundação Rangel de Sampaio – Faculdade de Direito da Universidade de Coimbra* for awarding me a research grant.

– Criminal law is the branch of law that protects the most important legal interests, both individual and collective, against conduct that seriously harms or endangers them, when such conduct cannot be effectively prevented through other means of state intervention. To that effect, criminal law establishes penalties with a punitive purpose (be it deterrence, retribution or positive prevention), which are applied by a court following a due procedure. In many countries, punishment requires “guilt / culpability” (*Schuld, culpa*), whereas other systems accept instances of “objective responsibility” (strict liability, *infractions matérielles*).

In addition to the sanctions, it is commonly understood that some measures taken by the authorities in the course of a penal procedure (e.g. pre-trial detention, seizure of objects, freezing of assets etc.) or after the trial (security measures) also pertain to the criminal law area. Such a normative environment should afford a higher level of protection to the guarantees affected by those measures by providing a set of procedural rights that are not necessarily present in administrative proceedings.

– Administrative law is the branch of the law that regulates the activity of the public authorities, especially the State’s and its bodies’ activity, when they carry out the tasks assigned to them, namely the protection of collective safety against more or less unspecified dangers, as well as fostering and promoting general well-being, by actively supplying public goods and subsidies in various domains (production, education, health, etc.).

In that context, the administration applies measures and sanctions (for the time being, both terms will be used interchangeably, even if they may have different meanings under European law) that might impinge upon individual rights irrespective of whether or not they result from the perpetration of a concrete act or omission.

C. It is submitted that the basic distinctive feature of criminal law is that it prohibits acts under the threat of sanctions – distinctive only in the very narrow sense that there can be no *criminal sanctions* proper without an *offence*, i.e., an unlawful violation of a norm that provides for a penalty. This is not to say that the violation of criminal norms cannot attract sanctions that are administrative in nature<sup>1</sup>, nor does it mean – obviously – that all public law sanctions for certain acts or omissions are of a criminal nature<sup>2</sup>. However, even if it has a limited value, the proposed definition allows for the affirmation that the “offence”, as a concrete unlawful act or omission, is not only a core element of any understanding of criminal law / procedure / sanctions, but is also located at its very centre.

It follows that a given measure / sanction can only be labelled as criminal if it reacts to the commission of an unlawful act, or is part of the procedure undertaken

<sup>1</sup> Arguably, security measures applicable to unaccountable offenders are penal from a formal point of view but administrative in nature (see M.J. ANTUNES, “O passado, o presente e o futuro do internamento de inimputável em razão de anomalia psíquica”, *Revista Portuguesa de Ciência Criminal*, 2003, 13, p. 361 and f.). The same can be said of some instances of extended confiscation: see P. CAEIRO, “Sentido e função do instituto da perda de vantagens relacionadas com o crime no confronto com outros meios de prevenção da criminalidade reditória (em especial, os procedimentos de confisco *in rem* e a criminalização do enriquecimento ‘ilícito’)”, *Revista Portuguesa de Ciência Criminal*, 2011, 21, p. 267 and f.

<sup>2</sup> See *infra*.

for the investigation of that act or for the prosecution or trial of its perpetrator. In fact, all the restrictions of individual rights along the procedure aim at the ultimate target of imputing the unlawful act to the defendant, which will take concrete form as an allocation of responsibility (a sanction proper) and / or a security measure to prevent the danger of the future commission of similar acts.

As a consequence, administrative proceedings / measures / sanctions can only lead to a blurring with criminal law in the same circumstances, i.e., when they suppose the commission of a concrete unlawful act, which will lead to a limitation of the infringer’s rights, either as a response, by the public power, to that violation, or as a means of ascertaining it.

Other kinds of administrative measures, which pursue the prevention of danger in a more general manner, cannot be held accountable for the blurring of borders with criminal law even where they assume similar material content and cause severe restrictions of individual rights (e.g. the deprivation of freedom or of property rights). This is the paradigmatic case of preventive detention and freezing of assets when they do *not* arise from a (suspected or proven) concrete offence and thus are not part of proper criminal proceedings<sup>3</sup>. Irrespective of the extent to which they might be (i) legitimate under human rights law (namely, the rights to liberty and property)<sup>4</sup>, those measures (and the proceedings where they are applied) do not result from the proven or suspected perpetration of a concrete unlawful *act*, but are adopted to prevent someone from committing an offence, or, more generally, engaging in unlawful activities. Consequently, in spite of their material content, they cannot contribute to the blurring between criminal and administrative law.

D. The administrative measures and sanctions that suppose the commission of an unlawful act can be split into three basic groups, according to their *purpose*:

1) *Restorative measures* aim to bring things back to the *statu quo ante*, i.e., the situation in which the concrete public interest affected was before the failure to comply or collaborate (e.g. restitution of unduly obtained advantages accruing interests, loss of securities or deposits paid as compensation for the risk).

2) *Preventative measures* aim to prevent danger from turning into damage. The particular feature of these measures is that they are based on an unlawful act or omission which causes an (actual or potential) danger to the public interest. Hence, preventative measures bear a close connection to the danger that they intend to

<sup>3</sup> In this vein, the European Court of Human Rights (ECtHR) ruled that, in the absence of a “sufficient causal connection” between the conviction for an offence and the application of preventive detention as a (criminal) security measure (“*Sicherungsverwahrung*”), the deprivation of liberty inherent in the latter cannot be justified under Article 5, para. 1(a) ECHR, as “detention after conviction” (although it might be valid, in the abstract, under the other subparagraphs regulating preventive detention). This means that the Court makes a distinction between the deprivation of freedom *resulting* from an offence (either as a penalty or as a security measure) and the other forms of detention: see ECtHR, 17 December 2009, *M. v. Germany* and the commentary in C. MICHAELSEN, “From Strasbourg, with Love” – Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights”, *Human Rights Law Review*, 2012, 12, 1, p. 148 and f.

<sup>4</sup> See, in this respect, ECtHR, 19 February 2009, *A. and others v. United Kingdom*.

react against and thus have their scope and duration limited to the persistence of the situation (e.g. the temporary withdrawal of a permit needed for the functioning of a factory which is not complying with certain safety rules).

3) *Punitive measures* are admonitions, pursuing general and individual deterrence, in contrast to *criminal* punishment, the particular feature of which lies in the purpose of reassuring society at large as to the validity and effectiveness of the norms protecting valuable legal interests (the so-called "positive prevention"). They also pursue a punitive purpose (*lato sensu*) in the sense that, contrary to the previous categories, they are intended as a response *caused by the act itself*, not by the damage or by the dangerous situation produced by the act.

2. Bearing in mind this general framework, let us now analyse which administrative measures can actually be held liable for blurring administrative and criminal law.

*Restorative measures* clearly do not belong to this group, because they are subject to a whole different logic, closer to commutative justice.

As for *preventative measures*, the situation is not so clear, because they might assume the same material content of measures and sanctions of a different nature. Take, for instance, the example of temporarily suspending the functioning of a factory: depending on the case at hand, it might be a *true* preventative measure (because it simply reacts to the failure to comply with the safety rules that condition the activity), a punitive administrative measure (if there is a specific provision in administrative law attaching that *sanction* to that particular failure) or even a penalty *stricto sensu* (if the law punishes such failure with penal *sanctions*). The identification of the type of measure at stake requires a thorough analysis of its regime (competent authorities, procedure, duration of the measure, etc.). In any case, *true* preventative measures should not induce any confusion with criminal law because they do not aim to allocate responsibility for the unlawful act but rather pursue a *prophylactic purpose regarding a given situation*.

Finally, it is obvious that *administrative punitive measures* are the category which can easily lead to blurring between administrative and criminal law because they share the content of some penal sanctions (mostly, the payment of an amount of money, the deprivation of the right to apply for grants or public tenders and the temporary ban on exercising a given profession, and, in some systems and to a lesser extent, the deprivation of freedom for a short period of time), as well as a punitive purpose (*lato sensu*). Moreover, the norms that provide for administrative punitive measures have virtually the same structure as penal norms: they threaten with punishment conduct that is established in a more or less precise fashion. Additionally, they regulate areas that are also subject to criminal law (economic activity, public health and other collective interests).

In short, the blur with criminal law is the very history of administrative punitive law, starting, at least, from the moment when the administration became subject to the law. In this sense, the blur has always been there: regardless of the content we might give to the concept "administrative punitive law", it is safe to say that the boundaries between the two branches were always permeable, especially in the fields where the administration is more active (production and consumption, public health, taxing, financial markets, etc.).

This blur exists both in the systems that extend their penal law to some infringements against administrative interests (*contraventions et peines de police*, the nature of which is disputed, and which are in any case different from the *sanctions administratives* and the *sanctions administratives n'ayant pas un caractère pénal*<sup>5</sup>) and in the systems that handle those infringements within administrative law, which explicitly defines itself as "non-criminal" (as the German *Ordnungswidrigkeiten*, punishable with *Geldbussen*<sup>6</sup>, and the Portuguese law that took inspiration from them<sup>7</sup>). In the latter case, the administrative nature of the law does not prevent it from borrowing many features from criminal law and there is a steady "flow" of prohibited conduct between the two, in both directions. For instance, driving under the influence of alcohol and evading taxes might be criminal or rather mere administrative offences depending on more or less contingent political decisions (e.g. concerning the rate of blood alcohol content or the amount of the fraud) that will ultimately establish the border between the two branches.

In this sense, the blur is a structural part of the picture and it will certainly stay there as long as there is a need to apply punitive measures outside the framework of a formal penal system.

3. The first dimension of the blurring described above is an interesting field of work for lawmakers and the academia but might not work in favour of individual freedoms. With the knowledge that criminal law and criminal sanctions are circumscribed by several limits and guarantees, both at the domestic and the international level, the States might be tempted to manipulate their domestic definitions by giving penal intervention a different name (e.g. administrative law) so as to evade those limits and guarantees<sup>8</sup>.

In order to ward off such a possibility, the ECtHR has established autonomous notions of "criminal charges" and "criminal offences" to the effects of the application of the Convention [ECHR], namely Articles 6 and 7. The practical consequence is that the guarantees of the Convention might extend to offences and procedures that are considered as administrative – and remain as such – in the domestic legal systems, which means that national authorities must deal with them *as if* they were of a criminal nature inasmuch as the said guarantees apply (including the ones laid down in the protocols to the ECHR)<sup>9</sup>. Hence, the purpose of protecting individual rights is the second cause of the blurring between administrative and criminal law.

<sup>5</sup> For an overview, e.g. of the French system, see E. BREEN, "Country Analysis – France", in O. JANSEN (ed.), *Administrative Sanctions in the European Union*, Cambridge, Intersentia, 2013, p. 197.

<sup>6</sup> See G. DANNECKER, "Country Analysis – Germany", *ibid.*, p. 221.

<sup>7</sup> See P. CAIRO and M.Â. LEMOS, "Country Analysis – Portugal", *ibid.*, p. 470.

<sup>8</sup> See F. OST, "The original canons of interpretation of the European Court of Human Rights", in M. DELMAS-MARTY (ed.), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions*, The Hague, Martinus Nijhoff, 1992, p. 306.

<sup>9</sup> See ECtHR, 7 June 2007, *Sergey Zolotukhin v. Russia*, paras. 29 and f., establishing the applicability of the principle *ne bis in idem* to an accumulation of administrative punitive sanctions and criminal sanctions *stricto sensu*. The Court found that the "words 'in criminal

The relevant jurisprudence in that respect is well-known and it will suffice to point out the most important aspects: according to the ECtHR's case law, the qualification issue only arises when the domestic system at hand unequivocally considers the offence or the charges as *non-criminal*<sup>10</sup>. In those cases, the Court applies certain criteria related to the nature of the offence and the severity of the penalty to confirm whether or not the qualification as non-criminal by the State of origin is admissible<sup>11</sup>. Over time – actually: as early as 1984, in the *Öztürk* judgment<sup>12</sup> –, the Court modified the second criterion, shifting the analysis of the nature of the offence from the socio-ethical relevance of the charges to the aim of the applicable sanctions: the offence is deemed to be criminal in nature if the applicable sanctions are deterrent and punitive<sup>13</sup>. By the same token, the Court put forward the requirement that the norm violated be “general in character”, which was later applied in a number of cases<sup>14</sup>.

This approach and its consequences will be analysed in more detail later in this study. At this point, it suffices to point out that the current case law of the ECtHR

proceedings’ and ‘penal procedure’ used in the text of Article 4 of Protocol no. 7 – rendered in the French text as ‘*pénale*ment’ and ‘*procédure pénale*’ – must be interpreted in the light of the general principles concerning the corresponding words ‘criminal charge’ (*‘infraction pénale’*) and ‘penalty’ respectively in Articles 6 and 7 of the Convention”; see also the Judgment of the Grand Chamber in the same case, of 10 February 2009, paras. 94 and f., para. 120, and the commentary of J.A.E. VERVAELE, “*Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*”, *Utrecht Law Review*, 2013, 9/4, p. 211 and f. In the same direction, see the recent judgment ECtHR, 4 March 2014, *Grande Stevens and others v. Italy*.

<sup>10</sup> ECtHR, 8 June 1976, *Engel and Others v. The Netherlands*, para. 81.

<sup>11</sup> *Ibid.*, para. 82: “In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government. However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the ‘criminal’ sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so”.

<sup>12</sup> ECtHR, 21 February 1984, *Öztürk v. Germany*.

<sup>13</sup> *Ibid.*, para. 53.

<sup>14</sup> *Ibid.*; ECtHR, 22 May 1990, *Weber v. Switzerland*, para. 33; ECtHR, 27 August 1991, *Demicoli v. Malta*, para. 33; ECtHR, 23 March 1994, *Ravnsborg v. Sweden*, para. 34; and ECtHR, 11 January 2001, *Inocencio v. Portugal*.

considers as criminal, for the purposes of the Convention, the offences that meet one of the following conditions<sup>15</sup>:

- are qualified as such by the national system of origin;
  - are punishable with sanctions that pursue a deterrent and punitive aim, except if the norm does not have a general character;
  - are punishable with sanctions that, due to their severity, are analogous to penal sanctions / criminal penalties.
4. To this extent, we can conclude that blurring between administrative punitive law and criminal law is caused by a number of different factors:
- they share some common areas of social activity as the object of their regulation;
  - some prohibited acts “travel” between the two branches in time and space: depending on the moment and the country, they might be administrative violations or criminal offences;
  - some sanctions with similar content are applicable in both systems;
  - the minimum individual rights and guarantees that can be used to oppose State intervention are virtually the same in both branches, under the influence of the ECtHR case law.

How can the EU influence the existence and development of this blur?

5. To answer the main question of this study, it is necessary to sketch the way in which the EU might intervene in the sanctions field. Actually, its role can be seen as twofold.

In the first place, the protection of the interests of the EU requires that Member States apply effective, proportionate and dissuasive sanctions to those who prejudice or endanger them even where EU law does not explicitly call for sanctioning instruments (principle of loyal cooperation) (*infra, A.*).

In the second place, the EU can legislate on sanctions, which should be applied either by EU bodies or national authorities, either preceding or not a legislative intervention by the Member States (*infra, B.*).

*A.* The principle of loyal cooperation does not specify which branch of law should be used by the Member States, allowing for a situation where the various States might adopt sanctions and procedures of a different nature to protect the same interests against the same conduct. Does the generic formulation of the principle enhance the blur?

<sup>15</sup> In ECtHR, 23 November 2011, *Jussila v. Finland [GC]*, paras. 31 and f., after having acknowledged some fluctuations in its case-law (namely in *Morel*), the Court clarified that the second and third criteria are “not necessarily cumulative”, because the qualification as criminal will obtain if either one is met. Nevertheless, “this does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge”. Adding to the oscillation of the criteria commented upon *infra*, 6, one might also recall what seems to be the abandonment of the comparative test put forward in *Engel* and *Öztürk* (which, by the way, was never performed in a very deep fashion: see, in this respect, the *Dissenting Opinion of Judge Matscher* in the *Öztürk* Judgment, A, 2).

Obviously, there will be no increased blur at the level where the protection is actually enacted – that is to say, the national level. In each Member State, the means chosen will be administrative, or criminal, or of any other kind that complies with the European requirement.

But can we say the same with respect to the European level? From an EU perspective, is there not a certain blur when the required protection can be adequately provided, regardless of whether it is through administrative or criminal law?

One might be tempted to ask whether or not the interchangeability between the two branches indicates that criminal law is not really necessary (*ultima ratio*). The answer should be that, when the EU does not specify the branch of law to be used (either because it lacks the competence to do so or because it is unwilling to exercise it), the responsibility for the choice – and thus the establishment of the criteria that differentiate the use of administrative and criminal law – lies with each Member State and the type of intervention deemed appropriate might differ from one State to the other according to each one's particular circumstances. Hence, the general rule on the duty to apply effective, proportional and dissuasive measures causes no blur, either at the national or at the European level.

A similar issue can be found in the way in which the EU exercises its competence over the liability of legal persons for criminal offences, in the cases where it imposes on MS the duty to *incriminate* certain acts.

Due to the resistance shown by some Member State vis-à-vis the *criminal* liability of legal persons, European instruments invariably state that it is the duty of the States to ensure that legal persons “can be held liable” for those offences and are subject to “effective, proportionate and dissuasive sanctions”. The particular feature presented by the insertion of this command into acts providing for the mandatory *criminalisation* of conduct is that, by contrast with the use of the general formula, such legislation apparently disrespects either the *ultima ratio* principle (since administrative law seems to suffice if the offence is perpetrated by a certain kind of offender) or the principle of effective protection (because criminal law is deemed necessary to prevent and punish that kind of conduct, but the European legislator opens the door to mere administrative intervention if the offence is perpetrated by a certain kind of offender).

Arguably, a way out of this conundrum can be the assertion that, regarding legal persons (as opposed to individual offenders), the effectiveness of the two kinds of measures does not differ significantly.

**B.** In another direction, and as one might expect, the possible influence of the EU on the blur between administrative and criminal law concerns the administrative “measures” and “penalties” laid down in some European regulations.

Regulation 2988/95 draws a distinction between the two, which has some consequences, namely in terms of the subjective element: intent or negligence are required only for the application of (administrative) penalties, not measures, and the latter are not to be regarded “as penalties” (Articles 4 and 5)<sup>16</sup>. Other regulations

<sup>16</sup> On this, see A. DE MOOR-VAN VUGT, “Administrative Sanctions in EU Law”, *Review of European Administrative Law*, 2012, 5/1, p. 12 and f.

explicitly state that the sanctions that they provide for “shall not be regarded as criminal penalties”<sup>17</sup>.

Additionally, the Court of Justice has found a number of times that some administrative penalties, albeit pursuing a deterrent aim, are not “criminal sanctions”. That was the case in *Internationale Handelsgesellschaft*<sup>18</sup> and *Maizena* (forfeiture of securities and deposits)<sup>19</sup>, *Germany v. Commission* (exclusion)<sup>20</sup>, *Käserei Champignon*

<sup>17</sup> See, e.g., Article 3(5) of the Commission Regulation 150/2001 of 25 January 2001 laying down detailed rules for the application of Council Regulation 104/2000 as regards the penalties to be applied to producer organisations in the fisheries sector for irregularity of the intervention mechanism and amending Regulation 142/98 (repealed by Commission Implementing Regulation 1420/2013 of 17 December 2013); and Article 25(3) of the Council Regulation 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*, no. L 1, 4 January 2003, p. 1.

<sup>18</sup> CJ, 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-11/70, *ECR*, p. 1161, paras. 17 and f.: “The plaintiff in the main action also points out that forfeiture of the deposit in the event of the undertaking to import or export not being fulfilled really constitutes a fine or a penalty which the Treaty has not authorized the Council and the Commission to institute. Para. 18. This argument is based on a false analysis of the system of deposits which cannot be equated with a penal sanction, since it is merely the guarantee that an undertaking voluntarily assumed will be carried out”.

<sup>19</sup> CJ, 18 November 1987, *Maizena Gesellschaft mbH and others v. Bundesanstalt für landwirtschaftliche Marktordnung (BALM)*, C-137/85, *ECR*, p. 4587, paras. 13 and f.: “(...) Thus in a system involving advance release of the security, the penalty constitutes the corollary of the system of security and is intended to achieve the same objectives as the security itself. That sanction is imposed at a flat rate and is independent of any culpability on the part of the trader. It is therefore an integral part of the system of security at issue and is not criminal in nature. Para. 14. Consequently, in a system of security such as that described above, the two principles typical of criminal law referred to by the national court, namely the *principles nulla poena sine culpa* and *in dubio pro reo*, are not applicable. Para. 15. However, the Parties are not for that reason deprived of legal protection. As the Court has held (...), a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis. Moreover, the Court has always emphasized that fundamental rights are an integral part of the general principles of community law, which it is called upon to enforce. Finally, it is settled law (...) that the provisions of community law must comply with the principle of proportionality (...)”.

<sup>20</sup> CJ, 27 October 1992, *Germany v. Commission*, C-240/90, *ECR*, p. I-05383, para. 25: “the exclusions at issue do not constitute penal sanctions”, although the person concerned by exclusion and surcharges “suffers a financial loss greater than the mere reimbursement, perhaps with interest, of the aid improperly received”.



(reduction of refunds)<sup>21</sup> and, more recently, *Bonda* (partial exclusion)<sup>22</sup>.

<sup>21</sup> CJ, 11 July 2002, *Käserei Champignon Hofmeister GmbH & Co. KG v Hauptzollamt Hamburg-Jonas*, C-210/00, ECR, p. I-6453, paras. 38 and f.: "As the Court pointed out in paragraph 19 of the judgment in *Germany v. Commission*, cited above, temporary exclusion from the benefit of a scheme of aid, like surcharges calculated based on the amount of aid unduly paid, are intended to combat the numerous irregularities which are committed in the context of agricultural aid, and which, because they weigh heavily on the Community budget, are of such a nature as to compromise the action undertaken by the institutions in that field to stabilise markets, support the standard of living of farmers and ensure that supplies reach consumers at reasonable prices. Para. 39. In the same vein, the ninth recital in the preamble to Regulation 2988/95 states that Community measures and penalties laid down in pursuance of the objectives of the Common Agricultural Policy form an integral part of the aid systems and that they pursue their own ends. Para. 40. Regulation 2945/94, which amended Regulation 3665/87, states in the first recital in its preamble, that the Community rules provide for the granting of export refunds on the basis of solely objective criteria, in particular concerning the quantity, nature and characteristics of the product exported as well as its geographical destination; whereas in the light of experience, measures to combat irregularities and notably fraud prejudicial to the Community budget should be intensified; whereas, to that end, provision should be made for the recovery of amounts unduly paid and sanctions to encourage exporters to comply with Community rules. Para. 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 to take advantage of an agricultural aid scheme (see, to that effect, *Maizena*, para. 13, and *Germany v. Commission*, para. 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. (...) Para. 43. Lastly, it should be pointed out that the penalty laid down in point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 consists of the payment of a penalty, the amount of which is determined on the basis of the amount which would have been unduly received by the trader had an irregularity not been detected by the competent authorities. It is, therefore, an integral part of the export refund scheme in question and is not of a criminal nature. Para. 44. It follows from all of the foregoing considerations that point (a) of the first subparagraph of Article 11(1) of Regulation 3665/87 cannot be said to be of a criminal nature. It follows that the principle *nulla poena sine culpa* is not applicable to this penalty. (...) Para. 48. Contrary to the submissions of KCH, the fact that Hansen concerned national penalties does not make it completely irrelevant for the purposes of describing the state of Community law. The Court was asked about the interpretation of Community law and, moreover, explicitly concluded, in paragraph 20 of its judgment, that the general principles of Community law do not preclude the application of national provisions under which an employer whose employees infringe a Community regulation may incur strict criminal liability. (...) Para. 51. Secondly, although Article 5(2) of Regulation 2988/95 provides that irregularities which are not intentional or negligent may give rise only to those penalties laid down in Article 5(1) which are not equivalent to a criminal penalty, there is no indication that, when examining that condition, criteria are to be applied which differ from those used by the Court in paragraphs 35 to 44 of this judgment. Para. 52. Lastly, it should be recalled that the fact that the principle *nulla poena sine culpa* is not applicable to penalties such as those at issue in the main proceedings does not leave the person subject to the regulation without legal protection. The Court has held in this connection that a penalty, even of a non-criminal nature, cannot be imposed unless it

It seems that, in this context, the Court uses the word "criminal" in a very narrow sense, deeply marked by the quarrel over the competence of the EC to pass criminal law, which has experienced one of its most intense episodes in the *Germany v. Commission* (1992) case. This is confirmed by the judgments in which the Court ruled that the competence to pass criminal legislation remained, in principle, with the States<sup>23</sup>, as well as the notorious decision in *Commission v. Council* (2005), where the Court ruled that the Community legislature could take measures related to the criminal law of the Member States when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities was essential for the full effectiveness of the protection of the environment<sup>24</sup>.

It is clear that, in those decisions, the CJ used a concept of criminal law / penalties *stricto sensu*, since the *competence* of the EU to establish administrative penalties was not being disputed. In the same vein, the framework decisions and directives through which the EU directs Member States to ensure that a given conduct "is punishable" create a duty to *incriminate* such conduct, providing for criminal sanctions proper (in the eyes of domestic law). That duty would not be fulfilled if the States adopted administrative punitive sanctions – even if they would qualify as "criminal" in the light of the ECHR.

To those effects, the use of a narrow concept is justified. It is in fact a way of *avoiding* the blur in the sense that it is crucial to distinguish accurately, at the competence level, between the requisites for the adoption of each kind of sanction.

6. However, it is also clear that the CJ draws more consequences from the non-criminal nature of the penalties than the competence of the EU to pass them. It allows the Court, for instance, to assert the admissibility of strict liability for those administrative penalties (*Maizena* and *Käserei*), as well as the inapplicability of the principles *in dubio pro reo* (*Maizena*) and *ne bis in idem* to the effect of preventing criminal penalties (*Bonda*).

The question is whether, while assessing the nature of those sanctions in a context where the protection of individual rights is at stake<sup>25</sup>, the CJ is bound to strictly follow the case-law of the ECtHR, namely by applying the *Engel* criteria<sup>26</sup>, or, at least, whether there are good reasons to do so – and what impact the answers have on the blur between the two legal branches.

rests on a clear and unambiguous legal basis. Moreover, it is settled case-law that provisions of Community law must comply with the principle of proportionality".

<sup>22</sup> CJ, 5 June 2012, *Criminal proceedings against Łukasz Marcin Bonda*, C-489/10 (yet unpublished) paras. 26 and f.

<sup>23</sup> See, e.g., CJ, 11 November 1981, *Criminal proceedings against Guerrino Casati*, C-203/80, ECR, p. 2595, para. 27.

<sup>24</sup> CJ, 13 September 2005, *Commission v. Council*, C-176/03, ECR, p. I-07879, para. 48.

<sup>25</sup> Arguing for a dual qualification of criminal sanctions in EU law, according to the purpose it should serve (competence issues *versus* procedural guarantees), see also J. ÖBERG, "The definition of criminal sanctions in the EU", *European Criminal Law Review*, 2014, 3/3, p. 273 and f.

<sup>26</sup> In *Bonda*, the CJ has applied explicitly and in a detailed manner the *Engel* criteria for the first time, following the lead of the opinion of Advocate General Kokott.

A. Article 52(3) of the Charter of Fundamental Rights of the European Union (CFREU) provides that, in so far as the rights contained therein correspond to rights guaranteed by the ECHR, “the meaning and scope of those rights shall be the same as those laid down by the said Convention” although this “shall not prevent Union law providing more extensive protection”. The interpretation of the actual scope of this norm exceeds the purpose of the present study, but it does not seem possible to avoid some reflections on the issue, even if perfunctory.

It has been suggested that this norm would imply *ipso jure* the reception, in EU law, of the case law of the ECtHR regarding the construction of homologous rights in the ECHR<sup>27</sup>. This would have the practical consequence that the CJ would be bound to apply, e.g. the *Engel* criteria (or any other that the ECtHR might use in the future), to determine the *scope* of the rights attached to a “criminal charge” or a “criminal offence” (namely, those contained in Articles 48, 49 and 50 CFREU).

This would arguably mean a self-imposed *de facto* subjection of EU authorities (CJ included) to the *decisions* of the ECtHR. Although it is a viable interpretation of that norm, it might be hard to adopt it in the absence of a specific provision to that effect, if we bear in mind that the accession of the EU to the ECtHR is in the process of being negotiated, whatever the result of such a negotiation might be. In short, such a construction might be an unwarranted anticipation, at the normative level, of a political decision that is yet to come. Hence, as far as the CJ is concerned, it is submitted that the respect for the first limb of Article 52(3) means that: 1) the CJ cannot interpret the CFREU in a way that would be incompatible with the text of the Convention<sup>28</sup>, which is, in some instances, more detailed than the Charter (compare, e.g., Articles 47 and 48 of the former with Articles 6(1) and 6(3) of the latter); 2) the CJ must take into due consideration the jurisprudence of the ECtHR, as well as the legal literature, so as to determine, pursuant to its own jurisdictional powers, the scope (and meaning) of the rights laid down in the Convention. At most, there might be a sort of presumption in favour of the constructions upheld by the ECtHR; but the formal obligation to follow them will emerge only with the accession of the EU to the Convention – in the terms that will be defined in the accession agreement.

B. The second question is whether, even in the absence of a strict duty to adopt the constructions established by the ECtHR, the CJ *should* follow the *Engel* criteria in the determination of what “criminal charges” and “criminal offences” are, as opposed to their administrative counterpart.

1) The irrelevance, for this purpose, of the label of the charges / offences / sanctions under EU law (first criterion) is a sound starting point, and the same can be said of the analysis of the severity of the penalty (third criterion). In this sense, the “blur” created by the ECtHR for the sake of protecting individual rights against possible manipulation of the labels by the holder of the *ius puniendi* is certainly well-founded and should be adhered to by the CJ.

<sup>27</sup> J.A.E. VERVAELE, *op. cit.*, p. 220.

<sup>28</sup> It does not seem necessary to stress that such incompatibility could only result from a lower level of protection since a higher level of protection could hardly be seen as incompatible with an instrument that guarantees individual rights, at least in the public law field.

In fact, the problem here might be, not the divergence of the formal criteria, but rather the difference in their contents. As the CJ does not seem to apply the severity criterion very often (see *infra*), it remains to be seen whether it is prepared to acknowledge the criminal nature of a sanction on the basis of its severity in the possibly few cases where a severe penalty does not meet the second criterion (*i.e.* where it does not act as a deterrent or is not punitive).

2) As a matter of fact, the CJ has applied more often the second criterion put forward by the ECtHR in its post-*Öztürk* jurisprudence and has assessed the nature of the offence through the aims of the sanctions at stake, excluding from the scope of punitive sanctions those which are not of general application. Such an approach systematically leads to the conclusion that EU measures applied in the ambit of the common agricultural policy and similar sectors, especially surcharges / reduction of refunds and exclusion / blacklisting do not have a punitive aim and, moreover, are not of general application.

This would seem in line with the case law of the ECtHR. However, under the formal convergence of the criteria, there is considerable divergence between their contents: it is not clear that a reduction of export refunds and a tax surcharge are different enough to be characterised in opposite ways<sup>29</sup>. In both cases, the application of *the law* to the actual facts (the true situation of the individual regarding the aid or his fiscal duties, regardless of his false declarations) leads to the legitimate expectation that his property is valued X. It is therefore the law that gives rise to legitimate expectations, not the actual decision taken by the authorities: such a decision (respectively) grants the right to the aid or quantifies the amount of the tax due. If the false declaration leads to a decrease of the said value X by the means of a reduction or a surcharge, the financial loss *caused* by the irregularity is similar (although not exactly the same, as the value X is potential in the former case and actual in the latter).

In the opposite direction, it has been held that “with regard to this prospect of aid, there is no legitimate expectation of aid where a beneficiary of aid has knowingly made false declarations: he knew from the start that he would not get any aid which was not reduced if he made false declarations”<sup>30</sup>; as a consequence, in the absence of a legitimate expectation, there could be no severe penalty. I respectfully disagree. In the first place, the lack of a legitimate expectation would not contend with the severity of the penalty, but rather with its very existence: the sanction would really have no content. In the second place, that argument would also lead to denying the punitive nature of tax surcharges or financial penalties in general: the very fact of perpetrating an offence would, *ipso jure*, cancel out the legitimate expectations of the offender to his property in its actual configuration, since he knows, or should know, that he incurs a penalty entailing a financial loss. Such an argument cannot be accepted: it is the actual imposition of the reduction that cancels out the legitimate expectation to receive the refunds corresponding to the true situation.

<sup>29</sup> Compare *Maizena*, para. 13, and ECtHR, 23 July 2002, *Janosevic v. Sweden*, para. 68.

<sup>30</sup> Opinion of Advocate General Kokott, 15 December 2011, *Lukasz Marcin Bonda*, C-489/10, para. 71.



Thus, the possible divergence between the case law of the two courts in this respect enhances the blur between administrative and criminal law: sanctions with the same or similar contents, which are administrative in their law of origin, might be qualified, *to the same effect of protecting individual guarantees*, as either criminal or administrative, depending on whether or not they are under the jurisdiction of the CJ (*rectius*: on whether or not they are provided for by EU law<sup>31</sup>, because, if they pertain to national law, the CJ will refer their qualification back to the national courts<sup>32</sup>... which are bound to apply the ECtHR criteria!).

It is hard not to see this result as odd and undesirable because the scope of the guarantees set out in the ECHR should not depend on the circumstance that the sanctions are provided for by domestic rather than EU law – especially when the CJ and the very Charter of Fundamental Rights defer so vehemently to the Convention. In a way, the problem will be solved by the accession, if the ECtHR be conferred the power to rule ultimately on the alleged violation of human rights by EU bodies and agencies. However, if that might avoid the blur caused by dual jurisdiction over the same issues, it will not solve, but rather expand, the unwarranted blur inherent in the construction of the “second criterion” by the current case law of the ECtHR.

3) In fact, there are additional and separate problematic issues in the “second criterion” as established by the CJ in *Öztürk* and the case law thereafter.

As said<sup>33</sup>, the construction of “criminal charges” and “criminal offences” as autonomous concepts began in a case where *disciplinary* sanctions were applied (*Engel*), whereas their ulterior development addressed mostly common administrative (regulatory) offences. This might explain the evolution of the Court’s case law after *Engel* and *Campbell and Fell*<sup>34</sup>. In fact, in spite of often reciting its faithfulness to the *Engel* criteria, the Court has elaborated further (and modified) those criteria over time. Already in *Öztürk*, the Court referred to the two aspects that are of direct interest to our subject: in the first place, it assessed the criminal nature of the offence through the deterrent and punitive aim of the applicable sanctions<sup>35</sup>; in the second place, it

<sup>31</sup> See J.A.E. VERVAELE, *op. cit.*, p. 225.

<sup>32</sup> CJ, 26 February 2013, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, para. 37.

<sup>33</sup> *Supra*, 3.

<sup>34</sup> ECtHR, 28 June 1984, *Campbell and Fell v. The United Kingdom*, para. 71.

<sup>35</sup> According to S. STAVROS, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights*, The Hague, Kluwer, 1993, p. 24, explaining the disparity between *Öztürk* and the previous jurisprudence of the Court in this regard is a “daunting” task.

explicitly underlined the requirement – only implicit, if at all, in *Engel*<sup>36</sup> – that the rule violated be “general in character”, which was later applied in a number of cases<sup>37</sup>.

a) Concerning the former issue, it is submitted that assessing the *nature of the offence* through the *aims of the sanctions*, instead of examining the socio-ethical relevance of the acts and the interests protected, amounts to mixing up different aspects and might lead to some shortcomings.

Firstly, finding a punitive aim in the sanctions, as different from “mere” deterrence, can be a tricky task, because it cannot be done without a general definition of the purpose of (criminal) punishment, which in turn is not available – or, at least, does not seem to have been spelt out by the ECtHR. A punitive aim cannot be equated exclusively to retribution (“*zweckgelöste Majestät*”) or blunt repression (“just deserts”). To the view of some, punishment *is* deterrence. To others’, the functionalisation of the sanctions to the *protection* of a certain social sub-system of high relevance, to which they are an integral part<sup>38</sup>, would not be incompatible with criminal law, but would rather be a sign of the legitimacy of its use<sup>39</sup>. The diversity of constructions in this realm leads also to the circumstance that the “punitive aim” might not be an exclusive feature of criminal sanctions, even if only for the purpose of protecting human rights<sup>40</sup>. Whereas other criteria point to a more clear-cut definition of the epitome of criminal offences (need for an act or omission; strong socio-ethical resonance; severity of the penalties), it seems adventurous to exclude that administrative law might also entail a punitive aim.

As a result, this parameter is vulnerable to uncertainty and arbitrariness. At the end of the day, it might be ascribing the same guarantees to (mere) administrative punitive law *via* the deterrent and punitive aim of the sanctions (including pure administrative “light” fines), which is precisely what national legislators wish to avoid in many processes of decriminalisation. By rendering the resort to administrative law much

<sup>36</sup> Apparently, in *Engel*, the Court was satisfied that the offence (the violation of a military rule by a serviceman) was disciplinary / administrative in nature and proceeded immediately to the third criterion (the severity of the sanctions applied to the plaintiff): “When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law” (*ibid.*, para. 82).

<sup>37</sup> *Öztürk*, para. 53; *Weber v. Switzerland*, para. 33; *Demicoli v. Malta*, para. 33; *Ravnsborg v. Sweden*, para. 34; and *Inocencio v. Portugal* (see *infra*).

<sup>38</sup> See the case law of the CJ quoted in note 18 and f.

<sup>39</sup> Actually, the ECtHR has somehow acknowledged the functional dimension of criminal law *stricto sensu* in *Grande Stevens*, para. 96: “Quant à la nature de l’infraction, il apparaît que les dispositions dont la violation a été reprochée aux requérants visaient à garantir l’intégrité des marchés financiers et à maintenir la confiance du public dans la sécurité des transactions. La Cour rappelle que la CONSOB, autorité administrative indépendante, a comme but d’assurer la protection des investisseurs et l’efficacité, la transparence et le développement des marchés boursiers (...). Il s’agit là d’intérêts généraux de la société normalement protégés par le droit pénal”.

<sup>40</sup> In this direction, correctly, the Joint Partly Dissenting Opinion of Judges Costa, Cabral Barreto and Mularoni joined by Judge Caffisch, paras. 8 and f., appended to *Jussila*.

less attractive, this approach might (albeit unwillingly) put in jeopardy the policies of decriminalisation<sup>41</sup>.

Furthermore, this line of reasoning, as it is, leaves undesirably uncovered by the Convention the public imputation, by the State, of acts that bear an unequivocal criminal connotation, in the cases where national law qualifies them as administrative infringements and the sanctions provided are not severe enough to meet the third criterion. For instance: the current construction of the *Engel* criteria would probably exclude from the ambit of Articles 6 and 7 the (hypothetical) case where national administrative law sanctioned women suspected of committing illegal abortion with mandatory attendance on a course on parenting or psychotherapy sessions (no punitive aim). Nevertheless, it seems that the mere assertion, by the State, that an individual has committed acts with this kind of ethical "weight" should entitle him / her to the guarantees provided for by the Convention for "criminal charges" and "criminal law", irrespective of the aim pursued by the sanctions or of their severity.

It is important to stress that the object of the enquiry should be the *concrete acts* charged (or for which the person was convicted) and not their abstract label (e.g. fraud, tax evasion, false declarations, careless driving). A false declaration regarding taxes does not have the same ethical connotation as a false declaration by a doctor that someone is fit to drive a train. The deliberate violation of a rule ensuring the safety conditions of a vehicle does not have the same weight as unknowingly infringing upon the same rule, punishable under strict liability<sup>42</sup>. Actually, that is precisely the reason why most offences are punishable (as criminal offences!) only if committed with intent.

The ethical resonance of the acts (and the inherent social unrest) should be assessed in the context of the jurisdiction of origin because it is in that environment that the

<sup>41</sup> The objections raised by Judge Matscher in his Dissenting Opinion, B, 3, in the *Öztürk* Judgment, seem still valid.

<sup>42</sup> This is not the place to perform an in-depth analysis of the case-law of the ECtHR regarding strict liability (which seems in any case pressing, especially concerning the particular issue of its compatibility with the Convention). The Court is right when it states that strict liability cannot exclude, *per se*, the criminal nature of the prohibition to the effects of the Convention: ECtHR, 7 October 1998, *Salabiaku v. France*, para. 27 ("(...) In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States") and ECtHR, 23 July 2002, *Västberga Taxi Aktieföretag and Vulic v. Sweden*, para. 79 ("It is true that the tax surcharges were imposed on the applicants on objective grounds without the need to establish any criminal intent or negligence on their part. However, the lack of subjective elements does not necessarily deprive an offence of its criminal character; indeed, criminal offences based solely on objective elements may be found in the laws of the Contracting States (...)"). However, this assertion is primarily directed to ensuring that a State *does not deviate* from the duties under the Convention by creating offences of strict liability. It cannot counter the obvious fact that intentional and even negligent infringements are generally considered to be graver, from a socio-ethical perspective, than those where the offender acts unknowingly and cannot be blamed for that, which might lead to a qualitative difference in terms of the nature of the prohibition.

disrespect for the individual's rights (e.g., not being able to deny the facts in a public hearing or not being informed of the charges in a language he understands) might have grievous consequences. The meaning and the *formal* scope of Articles 6 and 7 of the Convention must be uniform – but the *content* of the scope inevitably varies, because there is no material definition of criminal offences in the ECHR. Indeed, that is the reason why the criteria are needed. As a consequence, it is possible, and even likely, that this criterion leads to the result that the same act, qualified as administrative in two jurisdictions, gives rise to a criminal qualification by the ECtHR in one case, due to its social relevance therein, but not in the other. This is not surprising: already under the current jurisprudence of the ECtHR, if one jurisdiction explicitly qualifies a given act as criminal, it will immediately attract the guarantees of the Convention, with no further enquiry by the Court; whereas its qualification as administrative in another jurisdiction might well be upheld by the Court and the application of Articles 6 and 7 denied.

The logic behind assessing the nature of the facts confers more relevance to the indications provided by national law. It is not usual that acts bearing a significant negative socio-ethical connotation are mere administrative offences. Therefore, one might accept a sort of presumption in favour of the qualification performed by national law. Again, it should be borne in mind that the *extension* of the guarantees of the Convention regarding criminal law was meant as a way of controlling manipulations of criminal law by the States – not as a twisted way of extending those guarantees to *administrative* law.

The result of this assessment might also lead to situations of *non liquet*. In such cases, the Court should proceed with the analysis of the severity of the penalties, arguably applying a less strict standard than in the cases where the conduct is clearly not criminal in nature. This solution would be in line with the stance taken in *Jussila* regarding the appropriateness, in some cases, of a "comprehensive" assessment of both criteria<sup>43</sup>.

Finally, if the ECtHR reinstated the analysis of the acts as a relevant criterion, it is unclear that the assessment of the aim pursued by the sanctions would still bring any added value. It would serve to capture cases of little or no socio-ethical relevance, which are punished with penalties that are not severe. In those cases, the sole remaining interests might be the rights affected by the measures taken during the procedure, which can amount to serious restrictions of rights and which might indeed (also) be taken into consideration by the Court in the interpretation of "criminal charges". Apart from them, it is hard to see how the punitive aim of the sanction on its own (*i.e.* disconnected from the negative connotation of the acts and the severity of the penalties) might impact on individual guarantees.

b) In the second place, the requirement that the norm be of *general scope* was clearly introduced as a necessary compensation for the (new) criterion of assessing the nature of the offence by determining the aims of the sanction: under a certain understanding of *punishment*, disciplinary and criminal law share the aims of deterring and punishing the perpetrator, and the intended exclusion of disciplinary sanctions (save for the most

<sup>43</sup> See *supra*, note 14.

severe ones) from the ambit of Articles 6 and 7 ECHR could only be achieved by stressing the need for the general character of the norm infringed<sup>44</sup>. It is, in this sense, a “negative” requisite.

However, not only has the application of this criterion not always been consistent, but it is also doubtful that it should be applied at all.

In *Inocêncio*, the Court found that

“[w]ith regard to the nature of the offence, it would appear that the requirement to obtain a permit before carrying out construction work should be regarded as a means of controlling the use of property for the purposes of a balanced town-planning policy. A penalty for failing to comply with such a requirement cannot constitute a punitive criminal measure of general application to all citizens. This aspect is therefore not sufficient in itself for the penalty in issue to be regarded as inherently criminal”.

Apparently, this reasoning should apply to all the cases where individuals are sanctioned for not complying with the duty to have a permit or a licence for carrying out a certain activity, which are in turn mere instances of the broader category of infringements that suppose the breach of a special duty that limits the scope of the norm. Nonetheless, the Court found, in *Öztürk*, that the traffic norm violated by the plaintiff (which punished “careless driving”) was “directed towards all citizens in their capacity as road-users”, and, in *Jussila*<sup>45</sup>, concerning the failure to pay the VAT by a registered entrepreneur, that the applicant “was liable in his capacity as a taxpayer”<sup>46</sup>. Arguably, the norm violated by Mr. Inocêncio was directed to all citizens in their capacity as house owners wishing to refurbish their houses. It is also interesting to observe that, in the recent *Grande Stevens et al. v. Italia* case, the Court did not hesitate in affirming the criminal nature of the administrative sanctions punishing certain acts of market manipulation<sup>47</sup>. True, the Italian norm has a general scope (“*chiunque*”) and is not restricted to those who operate in the stock market. However, taking into consideration the reasoning followed by the Court<sup>48</sup>, one fails to see why a hypothetical limitation of the scope of the prohibition to market operators should lead to a different decision.

<sup>44</sup> See *Öztürk*, para. 53.

<sup>45</sup> *Jussila*, para. 38.

<sup>46</sup> For further inconsistencies in this regard, see P. VAN DIJK and G.J.H. VAN HOOF, *Theory and Practice of the European Convention on Human Rights*, 3<sup>rd</sup> ed., The Hague, Kluwer, 1998, p. 411.

<sup>47</sup> *Grande Stevens*, para. 96.

<sup>48</sup> *Ibid.*: “Quant à la nature de l’infraction, il apparaît que les dispositions dont la violation a été reprochée aux requérants visaient à garantir l’intégrité des marchés financiers et à maintenir la confiance du public dans la sécurité des transactions. La Cour rappelle que la CONSOB, autorité administrative indépendante, a comme but d’assurer la protection des investisseurs et l’efficacité, la transparence et le développement des marchés boursiers (...). Il s’agit là d’intérêts généraux de la société normalement protégés par le droit pénal (...). En outre, la Cour est d’avis que les amendes infligées visaient pour l’essentiel à punir pour empêcher la récidive. Elles étaient donc fondées sur des normes poursuivant un but à la fois préventif, à savoir de dissuader les intéressés de recommencer, et répressif, puisqu’elles sanctionnaient une irrégularité (...)”.

Basically, the requirement for the “general” scope of the norm, inserted in the *Engel* criteria with the pragmatic goal of excluding disciplinary sanctions, except where they are severe (third criterion), seems an unfortunate development. Contrary to the other criteria, it does not help to frame the *specificum* of criminal punishment better: indeed, there is no incompatibility between the two terms, as there are many criminal offences *stricto sensu* that have a limited scope (*echte Sonderdelikte*), the criminal nature of which cannot be doubted (*e.g.* misconduct in public office).

c) In the last place, this construction of the second criterion practically renders the third criterion redundant. The severity of the penalties will play an autonomous role only to the extent of ensuring that the guarantees provided for by the Convention are applicable to disciplinary sanctions (which are in principle excluded by the requirement of the general scope of the norms), because otherwise it is hard to conceive of a severe penalty that is not deterrent *and* punitive (although the reverse is obviously not true).

C. The transposition of these considerations to the context of the EU would also imply a change in the perspective of the adjudication by the CJ.

Taking the example of *Käserei* and *Bonda*, it is clear that false declarations to the State, in general, are a criminal offence. However, the circumstance that they were made in the particular field of subsidy law – analogous to tax law, where administrative law always played a central role in the sanctioning of failure to “tell the truth” – and that the plaintiff acted unknowingly would be strong signs in favour of the non-criminal nature of the offence. It would then be for the Court to assess whether the sanctions imposed (reduction of refunds) were severe enough to qualify as a criminal penalty.

7. It is now time to draw some conclusions from the above considerations.

“Blurring”, in general, carries a negative connotation, especially when it comes to the legal field: adapting Lord Coke’s famous quote, *justum est per legem discernendum*.

However, the blur between the borders of criminal and administrative punitive law seems inevitable due to the fact that they share similar purposes and discipline the same fields of social life. Moreover, to some extent, such a blur is a positive development in that it allows for a more extensive protection of individual guarantees and human rights in the criminal area. In that sense, the autonomous notion of criminal offences / charges / sanctions purported by the ECtHR is warranted so as to include therein administrative measures / procedures that bear an analogous impact on human rights (namely freedom, honour and property) as a public response to an unlawful act or omission.

Until now, the EU has used the expression “criminal” in a narrow sense, referring to what the Member States deem to be criminal in their own jurisdictions, both when the CJ adjudicates on the sanctioning competence of the EU as well as when the European legislator orders Member States to make certain acts “punishable”. When the EU directs the States to enact the protection of its interests through measures that are proportionate, effective and dissuasive, the apparent indifference between criminal and administrative does not enhance the (existing) blur, either at national or European level, because the option to use measures of either nature is explicitly

committed to the States and no European pattern (other than the mandatory features of the protection) is applicable.

The definitions of criminal offences / sanctions resulting from the case law of the CJ and the ECtHR do not seem to coincide entirely. The former still bears the visible marks of the discussion of the concept to the effects of determining the legislative competence of the EU and, up until now, has not clearly differentiated the assessment of the notions in the context of the protection of individual rights.

Recent CJ case law suggests that it will be willing to follow the jurisprudence of the ECtHR more closely, namely as regards the application of the *Engel* criteria, although it has no strict duty to do so until the EU formally accedes to the ECHR (in the terms that the agreement will provide). Nevertheless, this does not mean that, in the meantime, further blurring of the notions will be avoided, as the contents of the criteria might continue to differ. In that respect, the presumption of conformity of EU law with human rights established by the ECtHR (*Bosphorus*) and the irrelevance, in the EU legal ambit, of national constitutional guarantees that prevent the uniform application of a European instrument (*Melloni*) make the CJ the *maximum pontifex* of human rights within EU law.

On the other hand, the relative autonomy of the CJ in this field could provide the opportunity to contribute to reviewing the current formulation of the *Engel* criteria by reinstating the analysis of the socio-ethical relevance of the acts – which seems to be almost abandoned by the ECtHR – as the “second criterion” and relegating the enquiry into the aims pursued by the sanction to a marginal position.

Such a move might even lead both courts to a common, comprehensive approach, more adapted to the current sanctioning schemes in place, with a clearer definition of the scope of the notions “criminal charges / offences”, which might also entail (as hinted at by the ECtHR in *Jussila*) a differentiated application of the guarantees contained in the Convention.

## Inter-state cooperation at the interface of administrative and criminal law

Michiel LUCHTMAN \*

### 1. Introduction

This contribution deals with transnational cooperation at the interface of criminal law and administrative law and the influence of the European Union on it. The aim is to present an oversight of the interaction between the two dominant forms of cooperation – mutual assistance in administrative matters (MAA) and mutual legal assistance in criminal matters (MLA) – and their interaction in the legal order of the European Union. As has become apparent from other contributions to this volume, the relationship between criminal law and administrative law is already complicated at the national level<sup>1</sup>. It raises serious questions and sometimes concerns with respect to, *inter alia*, the respect for fundamental rights (*e.g.* the *nemo tenetur* principle and *ne bis in idem* principle). One does not need to have a lot of imagination to see that these problems will increase in transnational relationships where national authorities cooperate on the basis of divergent national rules. How are these authorities able to do this? How are fundamental rights and legal safeguards protected? What should the EU's ambitions be in this respect? All those issues will be addressed in this contribution.

I will start in Section 2 with a brief overview of the two main instruments for cooperation (MAA and MLA) and their specific role in the European Union. I then wish to demonstrate how these forms overlap and why this is problematic (Section 3). I shall not restrict myself to a description of the *status quo*. The dynamics of European integration, certainly after the Lisbon Treaty, beg the question as to what else the

\* This article was concluded on 1<sup>st</sup> September 2013.

<sup>1</sup> Cf. for instance to Katja ŠUGMAN STUBBS' contribution and the other case studies in this same book.