

MARKUS KÄRNER

Changing Contours of Punishment
in EU Law: The Interplay Between
Criminal Law and Punitive
Administrative Sanctions After Lisbon



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Punitive Administrative Sanctions After Lisbon



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LIST OF ORIGINAL PUBLICATIONS

This dissertation is based on the following publications:

Publication I

K. Rosin, M. Kärner. The Limitations of the Harmonisation of Criminal Law in the European Union Protected by Articles 82(3) and 83(3) TFEU. – *European Journal of Crime, Criminal Law and Criminal Justice*, 2018, Vol 26 (4), pp. 315–334.

Publication II

M. Kärner. Punitive Administrative Sanctions After the Treaty of Lisbon: Does Administrative Really Mean Administrative? – *European Criminal Law Review*, 2021, Vol 11(2), pp. 156–176.

Publication III

M. Kärner. Interplay between European Union criminal law and administrative sanctions: Constituent elements of transposing punitive administrative sanctions into national law. – *New Journal of European Criminal Law*, 2022, Vol 13(1), pp. 42–68.

Publication IV

M. Kärner. Procedural Rights in the Outskirts of Criminal Law: European Union Administrative Fines. – *Human Rights Law Review*, 2022, Vol 22(4).

Publication V

P. Pikamäe, M. Kärner. The Effect of European Union Law on the Criminal and Quasi-Criminal Liability of Legal Persons in Estonia. *Juridica International* 33/2024, pp. 89–101.

Author's contribution to the publications

The author of this dissertation is the exclusive author of Publications II, III and IV. K. Rosin was the main author of Publication I and the author of the dissertation assisted with elaborating the discussion. Publication V was equally co – authored by both authors.

ANALYTICAL COMPENDIUM TO A CUMULATIVE DISSERTATION

1. INTRODUCTION

1.1. The research problem

Soon after the establishment of the European Economic Community (EEC), it became clear that the policy goals of the Community could not be attained without punitive enforcement. Since criminal law was traditionally regarded as a core domain of national sovereignty,¹ the Member States were reluctant to accept a Community competence in criminal matters. The Court of Justice (ECJ) nevertheless came to recognise, in the absence of an express Treaty basis, that the Community could require Member States to provide for criminal penalties. The Treaty of Lisbon subsequently sought to constitutionalise and delimit the Union's criminal-law competence.² Art 83 of the Treaty on the Functioning of the European Union (TFEU) now confers on the Union an express competence to establish minimum rules concerning the definition of criminal offences and sanctions. At the same time, the criminal justice systems of the Member States are protected by specific safeguards, including the emergency brake procedure in Art 83(3) TFEU, designed to protect fundamental aspects of national criminal justice systems. The sensitivity of this field is also reflected in the opt-outs that some Member States negotiated from Title V TFEU.

The evolution and limits of the Union's criminal-law competence have been the subject of extensive scholarly discussion. Considerably less attention has been paid to the Union's non-criminal punitive sanctioning requirements, often described as *administrative sanctions*. Although EU prescriptions for punitive non-criminal sanctions can be traced back to the early days of the EEC, their initial development posed relatively little threat to the protected domain of national criminal law. Admittedly, in fields such as the common agricultural policy, the common fisheries policy and the protection of the Community's financial interests, systems of administrative measures and sanctions gradually emerged. These sanctioning architectures, however, were typically based on reductions or exclusions from aid, the recovery of undue advantages, and penalties linked to amounts wrongfully obtained or to the value of the relevant commitments. They were not generally characterised by very high fine ceilings. Nor did such regimes usually entail specific obligations to sanction natural persons.

More generally, pre-Lisbon EU requirements concerning punitive non-criminal sanctions were relatively limited in detail, left considerable discretion to

¹ For a thorough overview with further references see Kettunen, M. *Legitimizing European Criminal Law. Justifications and Restrictions*. Heidelberg: Springer 2020, pp 47–53.

² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. – OJ C 306, pp 1–271.

the Member States, and did not usually involve sanctions of exceptional severity. Post-Lisbon EU law, by contrast, has taken punitive non-criminal enforcement to a new level. It is increasingly characterised by very high fine ceilings, an express emphasis on the *administrative* nature of sanctions, more detailed procedural requirements, possible restrictions on procedural safeguards, and, in some instances, limitations on the use of national criminal or quasi-criminal enforcement models.

The Commission's 2011 communication on EU criminal policy reflects this shift. It presents the choice between criminal and administrative sanctions as a balance between the principle of *ultima ratio*, which reserves criminal law for the most serious infringements, and the requirement of effectiveness, with particular attention given to the efficiency and streamlined nature of administrative sanctioning procedures.³

This development has resulted in the adoption of numerous directives and regulations requiring Member States to provide for very high administrative fines for infringements of EU law, often for both natural and legal persons. Such offences have aptly been described as *mega administrative offences* (*Mega-Ordnungswidrigkeiten*).⁴ For example, the General Data Protection Regulation (GDPR) provides for administrative fines of up to 20 000 000 EUR.⁵ The Artificial Intelligence Act goes further, providing for administrative fines up to 35 000 000 EUR, or, for undertakings, up to 7% of total worldwide annual turnover.⁶ Moreover, through the adoption of the ECN+ Directive,⁷ the Union has deliberately sought to limit the use of criminal or quasi-criminal models for

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law. Brussels, 20.9.2011. COM(2011) 573 final. – <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0573> (10.11.2025).

⁴ Sieber, U. Administrative Sanction Law in Germany. – in Dyson, M., Vogel, B. (eds.). The Limits of Criminal Law. Anglo-German Concepts and Principles. Cambridge: Intersentia 2018, p 308.

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

⁶ Art 99(3) of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828. – OJ L 2024/1689.

⁷ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. – OJ L 11, pp 3–33.

competition infringements, on the premise that administrative sanctions offer a more effective and efficient enforcement model.⁸

This parallel punitive enforcement regime raises fundamental questions of legitimacy. The difficulty lies not only in the severity of the sanctions, but also in the uncertain boundary between criminal and non-criminal punishment. Criminal law is generally treated as a distinct legal field, separate from public and private law, because of the particular significance of criminal punishment.⁹ Consequently, there is no Member State without criminal law or a criminal justice system. Despite considerable differences between national criminal justice systems, the core institutional features of criminal punishment are relatively recognisable: imprisonment is the paradigmatic sanction; a prosecutor represents the State; guilt is determined by a court; and the accused enjoys a range of procedural guarantees, including the right to legal assistance. Moreover, since all Member States are parties to the European Convention on Human Rights (ECHR), criminal proceedings are subject to a common baseline of procedural safeguards.

The punitive powers of the State are not, however, exhausted by criminal law. Many punishable infringements are dealt with outside the formal criminal law framework under labels such as administrative sanctions, misdemeanours, civil penalties or regulatory sanctions. Although criminal sanctions may express a higher degree of moral condemnation, the basic functions of criminal and non-criminal punitive sanctions often coincide: both punish past conduct and deter future infringements.¹⁰ This diversity of national sanctioning models also means that EU legislation on punitive non-criminal fines may affect Member States in different ways, depending on how their domestic legal systems distinguish between criminal, administrative and quasi-criminal enforcement.

At the same time, the diversity of national classifications does not mean that the distinction between criminal and non-criminal punishment is left entirely to the discretion of the legislature. The distinction between criminal and non-criminal punitive sanctions acquired particular significance after the European Court of Human Rights (ECtHR) developed the *Engel* criteria in 1976. Under the *Engel* approach, the guarantees applicable to criminal proceedings under the ECHR cannot be avoided merely by classifying a sanction as non-criminal under national law. If the sanction is criminal in substance, the relevant criminal-head guarantees

⁸ European Commission. Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Brussels, 22.03.2017. COM/2017/0142 final, 2017/0063 (COD). – <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017PC0142> (10.11.2025), p 5, Chapter V.

⁹ Roxin, C., Greco, L. *Strafrecht. Allgemeiner Teil. 5., vollständig neu bearbeitete Auflage*. Munich: C. H. Beck 2020, pp 2–3.

¹⁰ For the aims of a criminal sanction see: Wessels, J., Beulke, W., Satzger, H. *Strafrecht. Allgemeiner Teil. Die Straftat und ihr Aufbau. 47. neu bearbeitete Auflage*. Heidelberg: C.F. Müller 2017, pp 7–9. According to the ECtHR, the aim of administrative sanctions can correspond to criminal sanctions. – ECtHR 34619/97, *Janosevic v. Sweden*, p 68.

apply.¹¹ This was reaffirmed in *Öztürk*, where the ECtHR extended those guarantees to German administrative offences (*Ordnungswidrigkeiten*).¹² In EU law, the distinction is also significant because it bears on the boundary between the Union's criminal-law competence under Title V TFEU and its ability to provide for non-criminal punitive sanctions on other legal bases.

The closer punitive administrative sanctions come to criminal sanctions in their function, severity and effects, the more difficult it becomes to justify treating them as ordinary regulatory tools, and the stronger the justification must be for treating them differently from criminal sanctions under EU law. This is the central tension that provides the backdrop for the research objectives of this dissertation.

1.2. Previous research and research gap

This dissertation is not the first piece of academic literature to identify the blurred boundary between administrative and criminal law. Previous research has examined several points of interaction between EU criminal and administrative law, but has not addressed the specific research questions of this dissertation. Moreover, some of the foundational literature either predates the Lisbon Treaty or was written relatively soon after its entry into force, before later developments in EU legislation and case-law could be fully taken into account.

In 2000, Ligeti identified the use of administrative sanctions as a means of addressing the enforcement deficit of the Community. She also noted that the term “administrative” could be used to disguise the Community's criminal-law ambitions and emphasised the need to ensure procedural rights.¹³ In 2012, de Moor-van Vugt analysed EU administrative sanctions, especially in the fields of protection of the Union's financial interests and competition law, through the lens of procedural safeguards. She showed that the ECJ had largely avoided directly classifying administrative sanctions as criminal and argued that, after the Charter of Fundamental Rights of the European Union (Charter)¹⁴, greater clarity was needed as to which sanctions qualify as criminal for the purposes of procedural safeguards.¹⁵ In 2016, Weyembergh and Joncheray similarly showed that, from the perspective of procedural safeguards, punitive administrative sanctions occupy a blurred zone between administrative and criminal law. They argued that divergent approaches by the EU legislator, the ECJ, the ECtHR and national

¹¹ ECtHR 5100/71, *Engel and Others v. the Netherlands*, p 82.

¹² ECtHR 8544/79, *Öztürk v. Germany*.

¹³ Ligeti, K. European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law. – Acta Juridica Hungaria Vol. 41, 2000, pp 199–212.

¹⁴ Charter of Fundamental Rights of the European Union. – OJ C 326, pp 391–407.

¹⁵ de Moor–van Vugt, A. Administrative Sanctions in EU Law. – in Jansen, O. (ed). Administrative Sanctions in the European Union. Cambridge: Intersentia, 2013, pp 607–639. An elaborated version has also been published – de Moor–van Vugt, A. Administrative Sanctions in EU Law. – Review of European Administrative Law Vol. 5, Issue 1, 2012, pp 5–41.

courts create uncertainty as to the applicability and scope of procedural safeguards.¹⁶ These analyses are particularly relevant to the procedural-rights dimension of this dissertation.

Other scholarship has addressed the issue from a broader systemic or conceptual perspective. In 2014, Galli and Weyembergh edited a volume on the blurred boundaries between administrative and criminal law and the influence of EU law on that development.¹⁷ The volume was based on the results of a conference held by the European Criminal Law Academic Network in May 2013.¹⁸ While the topic is closely related to this dissertation, the scope of that volume is broader. It analyses selected fields, including trafficking in human beings, terrorism, protection of the Union's financial interests, market abuse, environmental offences and competition law, and focuses more generally on the interaction between administrative and criminal enforcement. Punitive administrative sanctions form part of that discussion, but they are not the exclusive overarching focus of the volume. Nor does the volume address the specific research questions pursued in this dissertation. In 2016, Herlin-Karnell analysed how the "battle of sanctions" has shaped EU criminal law. She noted the importance of administrative sanctions before the Union acquired express criminal-law competence and showed that administrative sanctions remained relevant after the Lisbon Treaty, thereby raising questions about the feasibility and desirability of dual sanctioning regimes.¹⁹

More recently, in 2022, Franssen and Harding edited a volume on criminal and quasi-criminal enforcement mechanisms in Europe. The volume covers national legal traditions and selected substantive and procedural issues. While relevant to the distinction between criminal and quasi-criminal enforcement, its focus is not specifically on post-Lisbon EU punitive administrative sanctions or on the obligations imposed on Member States when EU law labels a sanction as administrative.²⁰ In 2022, Andrijauskaitė defended a doctoral dissertation on the principles of administrative punishment under the ECHR. That dissertation examines the application of ECHR guarantees to administrative sanctions and is therefore relevant to the procedural-rights dimension of the present dissertation. Its focus,

¹⁶ Weyembergh, A., Joncheray, N. Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture that Needs to be Addressed. – *New Journal of European Criminal Law* Vol. 7, Issue 2, 2016, pp 190–209.

¹⁷ Galli, F., Weyembergh, A. (eds). *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, Brussels: Editions de l'Université de Bruxelles 2014.

¹⁸ European Criminal Law Academic Network. Annual Conferences. *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU.* – https://eclan.eu/en/annual_conference/do-labels-still-matter-blurring-boundaries-between-administrative-and-criminal-law-the-influence-of-the-eu (09.05.2026).

¹⁹ Herlin-Karnell, E. Is administrative law still relevant? How the battle of sanctions has shaped EU criminal law. – in Mitsilegas, V., Bergström, M., Konstadinides, T. (eds). *Research Handbook on EU Criminal Law*. Cheltenham: Edward Elgar Publishing 2016, pp 233–248.

²⁰ Franssen, V., Harding, C. (eds.). *Criminal and Quasi-criminal Enforcement Mechanisms in Europe. Origins, Concepts, Future*. Oxford: Hart Publishing 2022.

however, is the Council of Europe framework rather than post-Lisbon EU law.²¹ In 2025, Korkka-Knuts and Melander analysed the contours of a principled corporate sanction policy in the EU. Their article is critical of EU corporate sanctioning policy, which they argue lacks clear foundations. They criticise the reliance on effectiveness as a justification for sanctioning choices and propose a more constitutionally principled approach aimed at a more rational and legitimate use of corporate sanctions.²² In 2026, Maugeri analysed the EU's administrative punitive power as regards the protection of the financial interests of the Union in light of the case-law of the Court of Justice of the European Union (CJEU) and ECtHR. She explored the differences between remedial measures and punitive sanctions as well as the application of principles such as legality, culpability, proportionality and *ne bis in idem*.²³

Existing scholarship has therefore established that the boundary between administrative and criminal law can be blurred, provided important foundations for the application of procedural safeguards, and identified several problems arising from the coexistence of criminal and administrative enforcement. What remains less systematically examined are the post-Lisbon effects of EU punitive administrative sanctions from three connected perspectives: national implementation, systemic effects and EU-constitutional limits. This dissertation addresses those issues.

1.3. Independent contribution, scope and delimitations of the dissertation

The novelty of this dissertation does not lie in identifying the blurred boundary between administrative and criminal law as such. Its independent contribution lies instead in shifting the focus from the existence of that overlap to its post-Lisbon legal consequences. The dissertation asks what follows when EU law requires Member States to introduce punitive sanctions that the Union legislature formally classifies or structures as administrative, even though such sanctions may partly overlap with criminal law in function and severity and produce significant systemic effects. From that perspective, the dissertation examines three connected issues: first, what EU law explicitly or implicitly requires from Member States when such sanctions are transposed or applied; second, what systemic effects this development has on EU criminal law, procedural safeguards and national sanctioning systems; and third, what limits EU constitutional law

²¹ Andrijauskaitė, A. *The Principles of Administrative Punishment under the ECHR*. Vilnius: Deutsche Universität für Verwaltungswissenschaften 2022.

²² Korkka-Knuts, H., Melander, S. *Contours of a principled corporate sanction policy in the EU: Exploring a constitutionally justified balance between criminal and administrative sanctions*. – *New Journal of European Criminal Law* Vol. 16, Issue 1, 2025, pp 31–52.

²³ Maugeri, A. M. *Administrative Punitive Power of the EU: Regulation No 2988/1995 on the Protection of the European Union's Financial Interests in Light of the case-law of the CJEU and the ECtHR*. – *Archivio Penale* 2026, no. 1, pp 1–100.

places on the Union's ability to pursue non-criminal punitive enforcement outside the framework of EU criminal-law harmonisation. Particular attention is given to the more recent post-Lisbon trend of establishing administrative fines of significant severity for both natural and legal persons. The dissertation therefore adds a national-implementation, systemic and EU-constitutional perspective to the existing literature by analysing how EU punitive administrative sanctioning law affects EU criminal law, procedural safeguards and Member State sanctioning autonomy.

This national-implementation perspective is particularly important because, unlike national criminal justice systems, which share certain common institutional and procedural features, non-criminal punitive enforcement frameworks differ significantly across the Member States. In some Member States, administrative offences are institutionally and conceptually distinct from criminal law. In others, they are closely integrated with, or even form part of, criminal law. Consequently, the influence of EU legislation on punitive administrative sanctions may differ in its impact on the national sanctioning systems, including criminal justice systems, of individual Member States. Moreover, the systemic use of the administrative label and the pursuit of effectiveness might limit the use of national criminal law, resulting in a negative harmonisation of criminal law.

This dissertation focuses on the non-criminal punitive obligations that post-Lisbon EU law imposes on the Member States. Such obligations may take the form of sanctioning requirements that must be implemented through national legislation, or of directly applicable supranational rules on punitive sanctions that national authorities are required to enforce.

The direct sanctioning powers of EU institutions fall outside the scope of the study. However, case-law arising from such mechanisms, particularly in competition matters, is relied upon where it is relevant to the issues examined in this dissertation. Non-punitive measures whose primary purpose is preventive, restorative or compensatory are likewise outside the scope of the dissertation.

Since the central concern of the thesis is the boundary between administrative and criminal sanctions in the post-Lisbon EU legal order, the analysis is confined to sanctions that EU law itself classifies as administrative rather than criminal. Particular attention is paid to regimes involving high administrative fines, since those are most likely to encroach upon the criminal-law domain. For that reason, the administrative sanctioning systems developed in fields such as agriculture and the protection of the Union's financial interests are not the central focus of the thesis, as they are not generally characterised by the same model of very high punitive administrative fines found in newer instruments. They are not ignored altogether, however, since several judgments of the Court of Justice relevant to this dissertation originate in those fields.

Accordingly, the dissertation examines the post-Lisbon obligations imposed on Member States to enforce EU law through punitive administrative sanctions of significant severity, intended principally to punish and deter, and explores the interaction between those sanctions, EU criminal law and national sanctioning autonomy.

1.4. The research objectives, questions and structure of the dissertation

Against the background set out above, the research objective of this dissertation is to examine the legal and systemic consequences that follow from the post-Lisbon emergence of EU punitive administrative sanctions as a parallel punitive enforcement regime alongside EU criminal law, and to identify the EU-constitutional limits that should govern that development.

The dissertation pursues this objective through a tripartite structure: obligations, effects and limits. First, it examines the explicit and implicit features of punitive administrative sanctions that Member States must take into account when implementing EU sanctioning requirements (obligations). Secondly, it analyses the systemic effects of this parallel punitive enforcement regime on EU criminal law, procedural-rights protection and national sanctioning systems, including Member State sanctioning autonomy (effects). Thirdly, it considers the EU-constitutional limits governing the development of punitive administrative sanctions, including limits arising from Art 83 TFEU, conferral, subsidiarity, proportionality and fundamental rights (limits).

The research objective is met by addressing the following research questions:

- 1) What explicit and implicit obligations does EU law impose on Member States for the national implementation of punitive sanctions that the EU legislature classifies or structures as administrative?
- 2) What systemic effects does EU punitive administrative sanctioning law have on EU criminal law, procedural-rights protection and national sanctioning systems?
- 3) What EU-constitutional limits, including fundamental-rights limits, should govern EU punitive administrative sanctioning law?

The dissertation consists of five original publications and an analytical compendium.

Publication I analyses the limits of EU criminal law harmonisation through the emergency-brake procedures in Arts 82(3) and 83(3) TFEU and interprets the concept of “fundamental aspects” of national criminal justice systems. It contributes to the dissertation by showing that EU criminal law approximation is constitutionally sensitive not only where it affects fundamental principles of criminal law, but also where it interferes with core structural choices of national criminal justice systems. The delimitation between criminal offences, misdemeanours and administrative offences may itself constitute a fundamental aspect of a national criminal justice system. It should therefore, in principle, be capable of protection under the emergency brake mechanism.

Publication II examines the post-Lisbon development of EU punitive administrative sanctions against the background of the evolution of the Union’s sanctioning powers and the policy goals that drive the choice between criminal and administrative sanctions. It shows how punitive administrative sanctions became part of the Union’s broader punitive and criminal-policy framework after Lisbon. It asks whether EU law contains a clear concept of an “administrative sanction” and what legal consequences the administrative label has for national implementation, particularly in light of the objectives that the Union seeks to achieve through such sanctions. Together with Publication III, it provides the foundation for identifying the explicit obligations stemming from EU legislation on punitive administrative sanctions that Member States must take into account.

Publication III builds on Publication II by analysing the constituent elements of EU punitive administrative sanctions in legislation requiring Member States to lay down rules on such sanctions. Its contribution to the dissertation is central: it examines whether EU law provides a coherent set of elements distinguishing administrative sanctions from criminal sanctions, what Member States are required to take into account when implementing administrative sanctioning obligations, and whether the administrative label may limit the use of criminal law, thereby amounting to a form of negative harmonisation of criminal law. These findings are important because the systemic effects of administrative sanctions depend on which obligations the administrative label creates and whether it limits criminal or quasi-criminal law.

Publication IV examines the application of criminal-head guarantees to EU punitive administrative sanctions under the ECHR and EU law. Its contribution to the dissertation is twofold. First, it shows that the administrative label does not exempt the EU or the Member States from providing criminal-law safeguards where a sanction is criminal in substance. Second, it demonstrates that significant uncertainty remains both in determining when an administrative fine is punitive in nature and in defining the level of procedural protection applicable to punitive fines that fall outside the hard-core of criminal law. This is important not only for determining which procedural safeguards Member States must guarantee, but also for assessing how far EU law may, on grounds of effectiveness, place pressure on higher national standards of procedural-rights protection. The publication therefore also supports the dissertation’s analysis of the systemic effects of EU punitive administrative sanctioning law on procedural safeguards.

Publication V analyses the effect of EU law on the liability of legal persons in Estonian criminal and quasi-criminal sanctioning law, with particular attention to the implications of the judgment in *Deutsche Wohnen*.²⁴ It supports the dissertation’s broader claim that EU administrative sanctioning law may contain far-reaching implicit requirements that Member States must take into account when implementing EU law, and that such requirements may significantly affect the coherence of national sanctioning systems.

²⁴ ECJ C-807/21, *Deutsche Wohnen SE v Staatsanwaltschaft Berlin*, ECLI:EU:C:2023:950.

The analytical compendium serves as the framing text that integrates the individual publications of the doctoral thesis into a coherent whole. Its purpose is neither to repeat nor to substitute for the analyses and findings set out in the publications in their entirety. Rather, it summarises, synthesises and further develops the conclusions reached in those publications in order to answer the research questions. It also arranges the prior research in a logical sequence, thereby guiding the reader through the argument of the dissertation as a whole.

The format of a cumulative dissertation inevitably means that the analysis in the compendium is not always symmetrical. Where a publication already provides a comprehensive analysis of a particular question, the compendium discusses that issue only to the extent necessary for the purposes of the research objective, even if the question itself is central to the dissertation. Conversely, where a point addressed in a publication requires further development, clarification or reframing in order to answer the research questions, the compendium deals with it in greater detail. Accordingly, the analytical compendium is intended to be read together with the publications.

Following the introduction, the compendium is structured into five substantive chapters and a conclusion. Each chapter addresses one or more of the research questions, while the findings of the preceding chapters remain relevant to those that follow.

Chapter 2 examines the evolution of the EU's punitive competence from the pre-Lisbon to the post-Lisbon era and the emergence of punitive administrative sanctions as a distinct and increasingly detailed field of EU approximation. It explains why administrative sanctions became an important form of EU punitive enforcement despite the introduction of express criminal-law competence in Art 83 TFEU, what factors drove their post-Lisbon development and identifies the policy considerations guiding the choice between criminal and administrative sanctions. This provides the foundation for distinguishing punitive administrative sanctions from criminal sanctions, identifying their constituent features, and assessing the limits and systemic effects of non-criminal punitive harmonisation.

Chapter 3 examines the explicit obligations EU law imposes on Member States when sanctions are classified or structured as administrative, and how such sanctions interact with EU criminal-law instruments adopted under Arts 82 and 83 TFEU. This is necessary for assessing whether the Union legislature uses the "administrative" label in a meaningful and coherent way, and to what extent that label restricts Member State discretion in implementing EU punitive administrative sanctioning law.

Chapter 4 examines whether, and to what extent, the principle of effectiveness and the requirement of uniform application entail implicit features of punitive administrative liability that Member States must take into account when implementing EU rules on punitive administrative sanctions. It also examines how procedural safeguards may operate as implicit features of EU punitive administrative sanctions in two opposite directions: as minimum guarantees limiting EU and national enforcement, and as standards whose reduced stringency may, on grounds of effectiveness, also limit the national level of procedural-rights

protection. The chapter therefore builds on the explicit features identified in Chapter 3 and, together with them, demonstrates that the effect of EU punitive administrative sanctioning law on national legal systems may be more extensive than the wording of the relevant EU act itself suggests.

Chapter 5 analyses the systemic effects of EU punitive administrative sanctioning law on EU criminal law, the level of protection of procedural safeguards and national sanctioning systems. Drawing on the explicit and implicit features identified in Chapters 3 and 4, it examines how the expansion of punitive administrative sanctions may influence the development of EU criminal law, affect procedural-rights protection and place pressure on coherent national sanctioning systems. The Estonian misdemeanour model is used as a stress test to demonstrate the difficulties that may arise when fragmented EU administrative sanctioning regimes are implemented within a coherent national quasi-criminal framework, and the far-reaching systemic effects this may have on national sanctioning law.

Chapter 6 examines, on the basis of the preceding research, the EU-constitutional limits to the development of EU punitive administrative sanctioning law. It focuses, first, on Art 83 TFEU in order to delimit the Union's criminal-law competence from its competence to harmonise punitive administrative sanctions. In that context, it analyses the meaning of "criminal" for the purposes of EU competence and the capacity of Title V TFEU safeguards, including the emergency brake mechanism, to protect national criminal justice systems from the effects of EU punitive administrative sanctioning law. It then considers further limits deriving from EU primary law, including conferral, subsidiarity, proportionality and fundamental rights. Drawing on the preceding analysis, it also makes suggestions for developing a more coherent framework for EU punitive administrative sanctioning law.

Chapter 7 presents the conclusions and answers the research questions.

1.5. Methods and sources

The dissertation is a legal-dogmatic study. It builds on and engages with case-law and legal scholarship, with a view to presenting the findings in a coherent analytical framework.

Descriptive legal research is used to identify and map the relevant rules on criminal and punitive administrative sanctions in EU legislation. Doctrinal and analytical methods are then employed to interpret those rules, assess their relationship to one another, and answer the research questions addressed in the dissertation. The primary sources consist of EU primary law, EU secondary legislation, and the case-law of the CJEU and the ECtHR. Legal scholarship, institutional documents and preparatory materials are used as secondary sources.

In certain parts of the dissertation, reference is also made to the national law of selected Member States. These references do not constitute a comprehensive comparative study. Rather, they are used to illustrate the diversity of national

sanctioning systems and the different ways in which EU legislation may affect them. The Estonian misdemeanour model is examined in greater detail, not as a representative model for all Member States, but as a stress test for assessing the impact of EU punitive administrative sanctioning law on a coherent quasi-criminal enforcement framework.

Artificial Intelligence tools (Microsoft Copilot and ChatGPT) were used for linguistic and stylistic editing of text authored by the researcher.

2. THE EVOLUTION OF THE EU'S PUNITIVE COMPETENCE

2.1. Pre-Lisbon: non-criminal sanctions as the default enforcement mechanism

The punitive competence of the EU has its roots in the early days of the EEC.²⁵ The cornerstone of the 1957 Treaty establishing the European Economic Community (Treaty of Rome) was the creation of a common market, which required the adoption of common rules and mechanisms for their enforcement. Ensuring free competition was essential to the functioning of a common market. As such, Art 87(2)(a) of the Treaty of Rome required the Council to lay down appropriate regulations or directives to ensure observance of the competition rules by the institution of fines or penalties. Apart from that provision, the Treaty did not provide an explicit punitive competence of the EEC. In 1962 Regulation No 17²⁶ was adopted empowering the Commission to impose fines on undertakings or associations of undertakings (Art 15). According to Art 15(4), the decisions on fines “shall not be of a criminal law nature”. This confirmed the formally non-criminal character of the Commission’s fining powers and avoided any suggestion that Regulation No 17 conferred criminal-law powers on the Commission.

Already in the 1960s the EEC adopted some legislation that required Member States to impose *penalties* for infringements of Community law, without classifying the nature or type of the sanction.²⁷ The case-law of the ECJ avoided the competence issue by treating adverse measures, such as forfeitures of deposits, as a compliance mechanism rather than a penalty.²⁸

²⁵ The historical evolution of the EU’s punitive competence, including the use of non-criminal sanctions to fill the criminal-competence gap, has already been examined in earlier scholarship and in Publication II. This chapter therefore does not seek to reconstruct that history in full. Its purpose is narrower: to identify the background against which the post-Lisbon expansion of EU punitive administrative sanctions can be understood. For previous research into this evolution, see Ligeti (n 13), pp 199–209; de Moor–van Vugt (n 15), pp 5–10 and Herlin–Karnell, *Is administrative law still relevant?* (n 19), pp 233–248.

²⁶ Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty. – OJ 1962 013/204.

²⁷ E.g. Art 6(2) – Commission Directive 65/276/EEC of 13 May 1965 on the procedure to be followed as regards delivery of opinions on the official approval of slaughterhouses and cutting plants in intra-Community trade in fresh meat. – OJ 93, pp 1607–1610 and Art 18(1) – Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonisation of certain social legislation relating to road transport. – OJ L 77, pp 49–60. This became more common starting from the 1970s, e.g. Art 7 – Regulation (EEC) No 2259/71 of the Council of 19 October 1971 on the organisation of a survey on wages and salaries in industry. – OJ L 238, pp 1–2.

²⁸ ECJ C-25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster*, ECLI:EU:C:1970:115, p 33 and ECJ C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, pp 17–18.

The 1977 *Amsterdam Bulb*²⁹ and 1989 *Greek Maize*³⁰ judgments introduced the principles of effectiveness and equivalence in the field of punitive sanctions. According to the ECJ, even where Community law did not itself prescribe sanctions, Member States were required to penalise infringements of Community law under conditions analogous to those applicable to comparable infringements of national law. In any event, such penalties had to be effective, proportionate and dissuasive. Likewise, in the 1992 *Germany v Commission* judgment, the Court did not exclude the possibility that the EEC could provide for measures that go beyond mere repayment or refund.³¹

In the fields of the common agricultural policy and the common fisheries policy, the measures adopted within the EEC could even be described as forming a system of administrative measures and sanctions.³² This, in turn, contributed to the establishment of a system of administrative penalties for the protection of the financial interests of the Community.³³ The range of administrative responses to infringements evolved over time to encompass both administrative fines, regarded as penalties, and measures of a less overtly punitive character, such as forfeitures of guarantee deposits and disqualifications from eligibility for aid schemes.³⁴

In parallel, the Commission made efforts to introduce criminal law measures. These attempts remained unsuccessful, but forced the Member States, as a compromise, to more readily accept a non-criminal punitive competence of the Community.³⁵

Following the Treaty of Maastricht³⁶ and Treaty of Amsterdam³⁷, the Member States agreed to allow for the harmonisation of criminal law as part of the third pillar of the European Union, subject to unanimity. This did not bring the competence dispute to an end. In *Environmental Crime* (2005) and *Ship-Source Pollution* (2007), the ECJ held that the Community could, in certain circumstances, require Member States to introduce criminal penalties where such penalties were

²⁹ ECJ C-50/76, *Amsterdam Bulb BV v Produktschap voor siergewassen*, ECLI:EU:C:1977:13, pp 32–33.

³⁰ ECJ C-68/88, *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:1989:339, pp 23–24.

³¹ ECJ C-240/90, *Federal Republic of Germany v Commission of the European Communities*, ECLI:EU:C:1992:408, pp 10–29.

³² See also Vervaele, J. A. E. Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions? – in Vervaele, J. A. E. (ed.). *Administrative Law Application and Enforcement of Community Law in the Netherlands*. Deventer/Boston: Kluwer 1994, pp 175–201.

³³ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests. – OJ L 312, pp 1–4.

³⁴ *Ibid*, Arts 4–5.

³⁵ Miettinen, S. *Criminal Law and Policy in the European Union*. London/New York: Routledge 2013, pp 18–19.

³⁶ Treaty on European Union. – OJ C 191, pp 1–110.

³⁷ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. – OJ C 340, pp 1–144.

essential to ensuring the effectiveness of Community legislation. However, as the Court emphasised in *Ship-Source Pollution*, the determination of the type and level of criminal penalties did not fall within the Community's sphere of competence.³⁸

This brief historical overview shows that the Community recognised from the outset the need for punitive enforcement of Community law. Its punitive prescriptions were non-criminal for two main reasons. First, until *Environmental Crime* and *Ship-Source Pollution*, the existence of a Community criminal-law competence was generally rejected. This left the Community with little choice but to avoid classifying sanctions as criminal. Second, criminal-law enforcement of many Community rules would have been clearly disproportionate. In such areas, non-criminal sanctions were not merely sufficient to enforce Community law; they were often the only viable punitive solution. The Union's punitive competence therefore has its roots in non-criminal enforcement.

2.2. Post-Lisbon: punitive administrative sanctions as a distinct field of approximation

The Treaty of Lisbon codified the Union's criminal-law competence in Art 83 TFEU. Art 83(1) TFEU allows for the establishment of minimum rules in areas of particularly serious crime with a cross-border dimension (securitised criminalisation),³⁹ while Art 83(2) TFEU allows criminal-law approximation where it proves essential for the effective implementation of a harmonised Union policy (functional criminalisation).⁴⁰ Art 83 TFEU thus responded to *Environmental Crime* and *Ship-Source Pollution* by recognising an express EU criminal-law competence, while also delimiting that competence through specific substantive and procedural conditions, including the emergency brake mechanism.

This changed the function of non-criminal punitive sanctions. The previous section identified two principal reasons for reliance on non-criminal sanctions in the pre-Lisbon era: the absence of an express Community criminal-law competence and considerations of proportionality or *ultima ratio*. The functional criminali-

³⁸ ECJ C-176/03, *Commission of the European Communities v Council of the European Union*, ECLI:EU:C:2005:542 and ECJ C-440/05, *Commission of the European Communities v Council of the European Union*, ECLI:EU:C:2007:625.

³⁹ In 2022, the Council identified the violation of Union restrictive measures as such an area of crime. – Council Decision (EU) 2022/2332 of 28 November 2022 on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union. – OJ L 308, pp 18–21. Attempts to extend the list to hate speech and hate crime have not, so far, resulted in the required Council decision. – Communication from the Commission to the European Parliament and the Council. A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime. Brussels, 09.12.2021. COM/2021/777 final. – <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021DC0777> (10.11.2025).

⁴⁰ See also Mitsilegas, V. *EU Criminal Law*. Second Edition. Oxford: Hart Publishing 2022, pp 115–120.

sation competence in Art 83(2) TFEU meant that non-criminal sanctions were no longer needed merely to compensate for the absence of criminal-law competence.

At the same time, Art 83 TFEU did not exhaust the Union's punitive competence. It defined the conditions under which the Union may approximate criminal offences and sanctions, but it did not preclude the adoption of non-criminal punitive sanctions on other Treaty bases. Whereas before Lisbon – or, more precisely, before *Environmental Crime* and *Ship-Source Pollution* – punitive prescriptions generally had to remain non-criminal unless adopted under the third pillar, the nature of post-Lisbon punitive prescriptions became a matter of legislative choice. It therefore became necessary to articulate the criteria for choosing between criminal and non-criminal sanctions.

Two Commission communications were instrumental in shaping the subsequent development of EU policy in this field. The 2010 Communication on reinforcing sanctioning regimes in the financial services sector called for the approximation of national sanctioning regimes, including through a core set of administrative sanctions and sufficiently high administrative fines applicable to both individuals and institutions. At the same time, it envisaged criminal sanctions for the most serious infringements.⁴¹ The 2011 Communication on EU criminal policy addressed the choice between administrative and criminal sanctions in greater depth. It framed it as a policy choice to be made in light of the effectiveness, proportionality and dissuasiveness of the sanctioning regime.⁴² These Communications therefore marked an important step in the post-Lisbon emergence of punitive administrative sanctions as a distinct field of approximation.

Pre-Lisbon legislation on non-criminal sanctions was relatively restrained and left considerable discretion to the Member States. Even though policy areas such as agriculture and fisheries could be described as having in place a system of administrative measures and sanctions, their severity and structure differed markedly from the exceptionally high fines prescribed by post-Lisbon legislation. With some exceptions, mainly in the fields of agriculture and fisheries,⁴³ the levels of administrative fines were rarely approximated, nor was the legislation on the procedure and type of sanctions overly strict. For example, Member States were merely required to ensure that, in conformity with their national law, appropriate administrative measures could be taken or administrative sanctions could be

⁴¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Reinforcing sanctioning regimes in the financial services sector. Brussels, 08.12.2010, COM(2010) 716 final. – <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0716:FIN:EN:PDF> (10.11.2025).

⁴² Communication. Towards an EU Criminal Policy (n 3).

⁴³ E.g. Chapter IX – Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999. – OJ L 286, pp 1–32.

imposed against persons responsible for insider dealing, market manipulation or money laundering.⁴⁴

This relatively modest interference with national sanctioning legislation can be explained by several factors. First, the harmonisation of national law was, in most areas of Community law, less dense and less intrusive than it is today. Earlier Community legislation did not regulate fields such as financial markets, data protection, or digital regulation with the same degree of detail and complexity that characterises contemporary EU law. Given the comparatively thinner regulatory framework, and the ancillary role of sanctions within it, general obligations to provide for effective, proportionate and dissuasive penalties were regarded as sufficient. Second, the constitutional disputes surrounding the punitive competence of the Community meant that an excessive emphasis on punitive harmonisation, or on detailed rules governing punitive enforcement, would likely have provoked constitutional concern and political resistance. General sanctioning clauses therefore offered a prudent compromise. Third, the practical shortcomings resulting from significant divergences in the national enforcement of EU law had not yet become as apparent as they did in the aftermath of the financial crisis.

The post-Lisbon instruments in the financial services sector (as envisaged in the 2010 communication) led the way towards a new era of harmonisation of administrative sanctions. The prescriptions on administrative sanctions became increasingly detailed and onerous. Member States had to provide for exceptionally high administrative fines that could be imposed against natural persons.⁴⁵ Moreover, increasing emphasis was placed on the *administrative* character of these sanctions. The new sanctioning regime in the financial services sector had a spill-over effect on other areas. The most notable example is the GDPR, which stipulates maximum administrative fines of up to 20 000 000 EUR, which could also be imposed on natural persons. That absolute maximum was later exceeded by the Artificial Intelligence Act, which provides for administrative fines up to 35 000 000 EUR (or 7% of the worldwide annual turnover in the case of undertakings).⁴⁶

⁴⁴ Art 14 – Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). – OJ L 96, pp 16–25; Art 39 – Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. – OJ L 309, pp 15–36.

⁴⁵ E.g. a maximum administrative fine of at least 5 000 000 EUR – Art 70(4)(g) in Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. – OJ L 173, pp 349–496.

⁴⁶ Art 99(3) of Regulation (EU) 2024/1689 (n 6).

2.3. Policy goals underpinning the choice between criminal and punitive administrative sanctions

The previous section showed that, after Lisbon, the legislature was no longer constrained by the absence of an express criminal-law competence, but could choose, as a matter of legislative policy, whether to enforce EU law by means of criminal or administrative sanctions.

From the perspective of EU law, criminal sanctions approximated based on Art 83(2) TFEU and punitive administrative sanctions approximated on other Treaty bases share the same general aim: ensuring the effective implementation of Union policy. Both pursue that aim in a similar way, namely through punishment and deterrence. Accordingly, both criminal and punitive administrative sanctions must satisfy the *Greek Maize* criteria: they must be effective, proportionate and dissuasive.

The factors relevant to the choice between criminal and administrative sanctions, as outlined in the 2010 and 2011 Communications, closely follow the *Greek Maize* criteria. The 2011 Communication on criminal policy emphasised that criminal sanctions are justified where the seriousness of the offence requires stronger disapproval, accompanied by greater procedural guarantees that reflect the seriousness of the offence, to ensure greater deterrence. Administrative sanctions, by contrast, were presented as less procedurally burdensome and, in some circumstances, more effective than criminal sanctions. According to the Communication, administrative sanctions should be considered where the offence is not particularly serious, where infringements occur in large numbers, or where administrative procedures are otherwise suitable and effective, for example because of the need for complex economic assessments.⁴⁷

The distinction between criminal and administrative punitive enforcement therefore turns on an overall assessment of the seriousness of the offence and the efficiency of enforcement. This assessment is not mechanical, since the relevant criteria interact with one another. Proportionality may point away from criminal law where criminal punishment would be excessive in light of the seriousness of the infringement.⁴⁸ Dissuasiveness depends both on the severity of the sanction and on the likelihood that it will actually be imposed and enforced.⁴⁹ The first element is limited by proportionality, while the second is closely connected to effectiveness. Effectiveness may be understood broadly as the capacity of the sanction to achieve its objectives, including deterrence, or more narrowly as the

⁴⁷ Communication. Towards an EU Criminal Policy (n 3).

⁴⁸ On this principle: ECJ C-537/16, *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)*, ECLI:EU:C:2018:193, p 48.

⁴⁹ Similarly: ECJ C-387/02, *Criminal proceedings against Silvio Berlusconi (C-387/02)*, *Sergio Adelchi (C-391/02)* and *Marcello Dell'Utri and Others (C-403/02)*, ECLI:EU:C: 2005:270, opinion of AG J. Kokott, p 89.

procedural ability to detect infringements and conduct proceedings efficiently.⁵⁰ In either sense, it partially overlaps with dissuasiveness, as the dissuasiveness of a sanctioning system also depends on how effectively infringements are detected and punished.

Where the EU legislature has chosen between administrative and criminal sanctions in directives adopted under Art 83(2) TFEU, the preference for criminal penalties has been justified by the need to express stronger social disapproval than that conveyed by administrative sanctions, thereby ensuring a stronger deterrent effect.⁵¹ Conversely, as discussed in Publication III, the pursuit of effectiveness has been a key driver behind the EU's decision to require Member States to address breaches of competition law through administrative sanctions rather than criminal-law measures.

The decisive question is therefore no longer whether EU law may rely on either non-criminal or criminal sanctions. It may do both. The more difficult question is what follows from a decision to classify such sanctions as administrative: whether that classification merely signals that Member States are not required to lay down criminal sanctions, thereby excluding the application of Art 83 TFEU, or whether, in light of the policy goals underlying the choice of administrative sanctions, it also carries implications for national sanctioning systems, procedural guarantees and the permissible use of criminal or quasi-criminal enforcement models. Those questions are addressed in the following chapters.

⁵⁰ Similarly: Klip, A. *European Criminal Law. An Integrative Approach*. 4th edition. Cambridge: Intersentia 2021, p 81, in the context of limitation periods – ECJ C-291/24, *Steiermärkische Bank und Sparkassen AG and Others v Österreichische Finanzmarktaufsichtsbehörde (FMA)*, ECLI:EU:C:2026:52, p 41.

⁵¹ Recital 4 – Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC. – OJ L 2024/1203; Recital 6 – Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive). – OJ L 173, pp 179–189.

3. EXPLICIT FEATURES OF EU PUNITIVE ADMINISTRATIVE SANCTIONS

3.1. The significance of the “administrative” label

According to settled case-law, where EU legislation does not specifically provide any penalty for an infringement, or refers for that purpose to national laws, the choice of penalties remains within the discretion of the Member States, provided that the principles of equivalence and effectiveness are met.⁵² Where EU law prescribes a specific type or level of sanction, Member States must comply with that requirement. The central question addressed in this chapter is what follows where EU law expressly classifies a sanction as either criminal or administrative. That distinction is important both for determining the scope of the Union’s powers and for clarifying the obligations imposed on Member States when implementing EU punitive sanctioning requirements.

Where EU law classifies conduct as criminal, the position is relatively clear. Although Art 83 TFEU does not define what makes an offence or sanction “criminal”, obligations adopted on that basis must, in principle, be transposed through national criminal law in the strict sense. This is especially evident where EU law requires imprisonment. Even where a directive requires conduct to be punishable as a criminal offence without prescribing imprisonment, transposition through a purely non-criminal fine would be difficult to reconcile with the purpose of Art 83 TFEU, unless the instrument itself expressly allows such a deviation. The criminal label reflects the seriousness of the offence and also enables the use of mutual legal assistance and other instruments of judicial cooperation in criminal matters. Accordingly, when EU law requires criminalisation, Member States must reflect that classification in national law.

The position is less clear where EU law designates a sanction as “administrative”. The first function of that label is evident: it distances the sanction from criminal law and indicates that the Union is not approximating criminal law within the meaning of Art 83 TFEU. The more difficult question is whether the label does more than that. Does it require a specific type of procedure, a specific institutional model, or the exclusion of criminal or quasi-criminal enforcement mechanisms?

The difficulty arises because national approaches to non-criminal punitive sanctioning differ considerably.⁵³ As explained in Publications II and III, the term

⁵² ECJ C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, ECLI:EU:C:2019:283, p 37.

⁵³ For some of the latest studies see: Banchuk, O., Taylor, G. Law on administrative offenses: the experience of Western and Eastern Europe. Centre of Policy and Legal Reform, 08.11.2012. – <https://pravo.org.ua/en/law-on-administrative-offenses-the-experience-of-western-and-eastern-europe/#> (23.01.2026); Jansen, O. (ed). *Administrative Sanctions in the European Union*. Cambridge: Intersentia, 2013; ACA-Europe. *Administrative penalties in European law*. Seminar in Ljubljana from 23 to 24 March 2017. General Report and National Reports. –

“administrative”, when contrasted with “criminal”, may refer to several different features: 1) the sanction is imposed by an administrative authority; 2) both the substantive and procedural regulations are governed by and classified as administrative law; 3) the sanctions are imposed for violations of administrative law, *i.e.* not for actions that are inherently wrong, but for transgressions against administrative provisions created by the state (*mala prohibita*). By contrast, in criminal proceedings: 1) the sanction is imposed by a court; 2) the substantive and procedural law forms a distinct body of law formally classified as criminal law; 3) the sanctions are imposed for actions that are considered wrong in themselves (*mala in se*).

None of these features are decisive across all Member States. Some non-criminal fines are imposed by courts on application by administrative authorities; some systems, such as the Estonian misdemeanour model, are formally part of penal law. Others occupy an intermediate position between administrative and criminal law, including through the limited *mutatis mutandis* application of criminal-law concepts or procedure. These systems are sometimes described as *quasi-criminal*. Appeals against non-criminal sanctions may also lie before courts having jurisdiction in criminal matters. Nor does the distinction between *mala prohibita* and *mala in se* provide a reliable dividing line, since modern criminal law often also covers conduct consisting primarily in the breach of administrative or regulatory norms.

In this context, the administrative label is often used primarily to emphasise the contrast with criminal law and to indicate the central role of an administrative authority rather than a prosecutor or criminal court. Administrative or otherwise non-criminal punitive sanctions are generally associated with less burdensome procedures, lower stigma and a more differentiated level of procedural protection than formal criminal proceedings. These features help explain why the label may matter, but they do not provide a uniform definition.

The significance of the administrative label became particularly visible during the parallel negotiations of the Market Abuse Regulation (MAR)⁵⁴ and the Market Abuse Directive on Criminal Sanctions (CSMAD)⁵⁵, against the broader background of financial-services legislation requiring Member States to introduce administrative sanctions. The Legal Service of the Council of the European Union (CLS) did not define the constituent elements of an administrative sanction, but took the view that systematic references to administrative sanctions bind Member

<https://aca-europe.eu/index.php/en/seminars/513-seminar-in-ljubljana-from-23-to-24-march-2017> (23.01.2026); Council of Europe. European Committee on Crime Problems (CDPC). Replies to Questionnaire on Administrative Sanctions. CDPC(2019)1 Bil. – <https://rm.coe.int/cdpC-2019-1-replies-to-questionnaire-on-administrative-sanctions/168093669b> (23.01.2026); Franssen and Harding (n 20).

⁵⁴ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. – OJ L 173, pp 1–61.

⁵⁵ 2014/57/EU (n 51).

States to that classification.⁵⁶ At the same time, its position was ambiguous as to what Member States were bound by in practical terms. It acknowledged that, in line with subsidiarity and procedural autonomy, the classification of a measure as “administrative” and its implementation by “competent authorities” allows Member States the discretion to designate the authorities that best fit their respective systems, including the possibility of addressing administrative offences and sanctions within a judicial framework where this aligns with the particular features of their national structures. The CLS opinion therefore highlights the possible significance of the administrative label, but does not resolve its meaning.

Considerable ambiguity therefore remains as to what the “administrative” label denotes in itself. Does it merely distinguish such sanctions from the exercise of EU criminal-law competence, or does it entail more – for example, at least a role for an administrative authority in the imposition of the sanction? It is also necessary to determine whether EU legislation on punitive administrative sanctions contains a coherent set of constituent elements, since this affects not only national transposition, but also the possible systemic consequences of implementing such sanctions in national law.

This chapter builds on the findings of Publications II and III and examines whether EU legislation itself provides a coherent set of explicit features that characterise punitive administrative sanctions and distinguish them from criminal sanctions and proceedings. It does so from two directions: first, by analysing instruments that expressly require punitive administrative sanctions, and second, by considering whether EU criminal-law instruments adopted under Arts 82 and 83 TFEU provide a clearer counterpoint to the administrative label.

3.2. Constituent elements in EU legislation on punitive administrative sanctions

3.2.1. The role of administrative authorities

The clearest express feature of EU punitive administrative sanctioning law concerns the role of an administrative authority in the imposition of the sanction. In this respect, the “administrative” label has an institutional meaning: it functions not only as an antonym of “criminal”, but also, and perhaps more concretely,

⁵⁶ Contribution of the Legal Service. Proposals for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, a Regulation on insider dealing and market manipulation and other instruments regarding the harmonisation of administrative sanctions in the framework of financial services. Brussels, 27.07.2012, 12979/12 – <https://data.consilium.europa.eu/doc/document/ST-12979-2012-INIT/en/pdf> (10.11.2025), pp 16–18 and 43–46.

as an antonym of “judicial”.⁵⁷ From the perspective of the policy goals discussed in Chapter 2.3, this institutional feature is linked to effectiveness. Administrative authorities are presumed to possess the sector-specific expertise necessary to detect and assess regulatory infringements, and direct sanctioning powers are expected to make enforcement faster and less burdensome than judicial proceedings.

EU legislation is, however, not uniform in the requirements it lays down concerning the role of an administrative authority. Some instruments merely require Member States to lay down rules on administrative penalties without specifying the role of an administrative authority.⁵⁸ Others require administrative authorities to have sanctioning powers.⁵⁹ A third group allows administrative sanctions to be imposed through different institutional models. For example, the Artificial Intelligence Act⁶⁰ allows administrative fines to be imposed by competent national courts or by other bodies, without expressly requiring the supervisory authority to play a role in the imposition of those fines.⁶¹ Other instruments permit various alternatives, including judicial involvement, provided that the administrative authority retains a central role in initiating or pursuing the sanction.⁶²

The GDPR illustrates the uncertainty surrounding the institutional element particularly clearly. Art 83(9) GDPR provides that, where the legal system of the Member State does not provide for administrative fines, the rules on administrative fines may be applied in such a manner that the fine is initiated by the competent supervisory authority and imposed by competent national courts. Recital 151 refers to Denmark and Estonia. However, as discussed in Publication III, the Estonian exception appears superfluous, since Estonian administrative authorities have direct sanctioning powers in misdemeanour proceedings. This reading is supported by later legislation containing similar exception clauses

⁵⁷ This juxtaposition is also evident in the so-called OMNIBUS Directive on strengthening consumer rights. See Recital 14 of Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules. – OJ L 328, pp 7–28.

⁵⁸ *E.g.* Art 21(1) – Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds. – OJ L 115, pp 18–38.

⁵⁹ *E.g.* Art 48(2) – Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (recast). – OJ L 354, pp 37–85.

⁶⁰ Art 99(9) – Regulation (EU) 2024/1689 (n 6).

⁶¹ The Member States that choose such alternative routes must, however, ensure that such rules have an equivalent effect.

⁶² In such cases, the instruments often allow for the imposition of a sanction by an administrative authority either 1) directly; 2) in collaboration with other authorities; 3) under their responsibility by delegation to such other authorities; or 4) by application to the competent judicial authorities – *e.g.* Art 28(7) of Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849. – OJ L 150, pp 1–39.

without any reference to Estonia: Recital 23 of the Regulation on the European Health Data Space only refers to Denmark, whereas other instruments do not identify any specific Member State as requiring such an exception.⁶³

This gives rise to a degree of internal inconsistency in EU legislation. The GDPR and some comparable instruments appear to treat systems in which administrative authorities lack direct fining powers as systems that do not “provide for” administrative fines. Other instruments, by contrast, treat judicial imposition as one possible modality of imposing administrative fines, provided that the administrative authority retains a sufficient role and the national rules have equivalent effect. The ECN+ Directive adds a further variation by requiring, where the fine is imposed by a court, that the proceedings be “non-criminal judicial proceedings”. That issue is examined separately below.

It follows that the role of an administrative authority is an important constituent element of EU administrative sanctioning legislation, but not a uniform one. EU law does not always require direct imposition of fines by administrative authorities. It often accepts judicial involvement, provided that the administrative authority retains a central role and the national model ensures comparable effectiveness. The concrete requirements therefore depend on the wording and structure of the specific legal act rather than on the administrative label alone.

3.2.2. Express clauses on the relationship between administrative and criminal sanctions

Despite the absence of a uniform concept of administrative sanctions, the potential overlap between administrative and criminal sanctions has not gone unnoticed by the EU legislature. Directives and regulations, particularly in the financial-services sector, address that relationship in different ways. Three models can be identified: 1) instruments that require Member States to lay down rules on administrative sanctions without addressing their relationship with criminal

⁶³ E.g. Art 34(8) – Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive). – OJ L 333, pp 80–152; Art 18 – Regulation (EU) 2024/1106 of the European Parliament and of the Council of 11 April 2024 amending Regulations (EU) No 1227/2011 and (EU) 2019/942 as regards improving the Union’s protection against market manipulation on the wholesale energy market. – OJ L 2024/1106; Art 33(3) – Regulation (EU) 2024/1787 of the European Parliament and of the Council of 13 June 2024 on the reduction of methane emissions in the energy sector and amending Regulation (EU) 2019/942. – OJ L 2024/1787; Art 68(2) – Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC. – OJ L 2025/40; Art 64(8) – Regulation (EU) 2025/327 of the European Parliament and of the Council of 11 February 2025 on the European Health Data Space and amending Directive 2011/24/EU and Regulation (EU) 2024/2847. – OJ L 2025/327.

sanctions;⁶⁴ 2) instruments that require administrative sanctions “without prejudice” to the right of Member States to provide for and impose criminal sanctions;⁶⁵ and 3) instruments that also expressly allow Member States not to lay down administrative sanctions where the relevant infringements are subject to criminal sanctions under national law.⁶⁶

These models leave considerable ambiguity. The first provides no guidance on the relationship between administrative and criminal sanctions. The second preserves the possibility of criminal sanctions, but does not make clear whether such sanctions may be imposed only in addition to administrative sanctions or may also replace them. The formula that an obligation applies “without prejudice” to a right normally suggests that the obligation does not affect that right, which supports the former interpretation. In some contexts, however, the formula may also be read as an exception to a rule,⁶⁷ thereby supporting the latter interpretation.

The third model is clearer and may be used as a counterpoint to argue that, in the second model, criminal sanctions may supplement but not replace administrative sanctions. It is, however, still not free from uncertainty. Under most instruments falling within the third model, Member States may decide not to lay down rules on administrative sanctions for infringements that “are subject” to criminal sanctions under their national law.⁶⁸ In some instruments, however, the exception is framed more narrowly, referring only to infringements that were subject to criminal sanctions in national law by the date of transposition of the relevant legal act.⁶⁹ It is therefore uncertain whether the exception is intended merely to avoid

⁶⁴ E.g. Art 21 – Regulation (EU) No 346/2013 (n 58).

⁶⁵ E.g. Art 42(1) – Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks. – OJ L 317, pp 17–27 and Art 28(1) of amended Directive 2004/109/EC – Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC. – OJ L 294, pp 13–27.

⁶⁶ E.g. Art 32(1) and 34(1) – Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012. – OJ L 347, pp 35–80.

⁶⁷ See e.g. ECJ C-358/16, *UBS Europe SE and Alain Hondequin and Others v DV and Others*, ECLI:EU:C:2018:715, p 27.

⁶⁸ Art 34(1) – (EU) 2017/2402 (n 66), pp 35–80.

⁶⁹ Recital 76 – Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. – OJ L 168, pp 12–82.

an obligation to decriminalise pre-existing offences, or whether it also preserves Member States' discretion to make future policy choices in favour of criminal enforcement.

These coexistence and exception clauses appear to respond primarily to situations in which the same conduct is, or may be, treated as a criminal offence in the strict sense under national law. This is understandable, since criminal-law enforcement often relies on sanctions, such as imprisonment, that cannot be easily compared with administrative fines. Where Member States rely on criminal-law enforcement, they must ensure an equivalent level of effectiveness, proportionality and dissuasiveness. Some instruments expressly emphasise that the possibility of imposing criminal sanctions must not be used to circumvent the sanctioning regime established by the relevant directive.⁷⁰ That assessment may be difficult where the sanctioning models are not readily comparable, for example where imprisonment or the stigma of criminal conviction is compared with an administrative fine of 5 000 000 EUR.

The divergence between these clauses prevents any coherent general conclusion as to how EU legislation understands the relationship between administrative and criminal sanctions, or how far it permits reliance on criminal or quasi-criminal enforcement. As a rule, Member States must ensure that the required fine levels can be imposed and that the role of the administrative authority corresponds to the requirements of the instrument. The ordinary coexistence and exception clauses appear to be aimed primarily at judicial criminal law in the strict sense. On that reading, neither the “administrative” label nor such clauses, in themselves, preclude the use of quasi-criminal enforcement mechanisms. By contrast, the availability of judicial criminal-law enforcement as a substitute for administrative sanctioning regimes depends on the wording and purpose of the specific legal act. The ECN+ Directive challenges this understanding, since it goes beyond ordinary coexistence clauses and seeks more directly to ensure that fines imposed for competition-law infringements are available through administrative enforcement or non-criminal judicial proceedings, rather than through a quasi-criminal enforcement model.

3.2.3. The ECN+ Directive and the preference for “administrative” enforcement

The ECN+ Directive represents the clearest example of EU legislation seeking more directly to require an administrative, rather than criminal or quasi-criminal, enforcement model for the imposition of competition fines. As analysed in Publication III, the Directive was adopted against the background of concerns

⁷⁰ Recital 36 – Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions. – OJ L 257, pp 186–213.

that criminal and quasi-criminal enforcement models were less effective than administrative fine proceedings. It therefore requires Member States to ensure that national administrative competition authorities may either impose fines in their own enforcement proceedings or request their imposition in non-criminal judicial proceedings.

In that sense, the Directive comes closest to a form of negative harmonisation of criminal or quasi-criminal enforcement in favour of administrative sanctioning. Admittedly, Art 13(4) of the ECN+ Directive preserves the possibility of criminal sanctions imposed in judicial proceedings, provided that they do not affect the effective and uniform enforcement of Arts 101 and 102 TFEU. However, the broader legislative context shows a clear preference for replacing ineffective criminal or quasi-criminal enforcement with a more efficient administrative sanctioning model. Given the Directive's detailed requirements concerning the powers of national administrative competition authorities and the procedure for imposing fines, the possibility of parallel criminal enforcement is rather theoretical.

The Directive therefore encroaches more directly on national procedural autonomy than many financial-services instruments by prescribing specific procedural and institutional features of enforcement. At the same time, it does not clearly define what "non-criminal judicial proceedings" means. Nor does it identify with sufficient precision which features of criminal or quasi-criminal systems are regarded as impairing effectiveness.

The ECN+ Directive therefore illustrates the central difficulty with the "administrative" label: EU law may attach concrete transposition consequences to that label, while leaving unclear where administrative enforcement ends and quasi-criminal enforcement begins.

3.3. The criminal-law counterpoint

3.3.1. Criminal offences and sanctions under Art 83 TFEU

Since the entry into force of the Treaty of Lisbon, EU law has established minimum rules on criminal offences and sanctions under both Arts 83(1) and 83(2) TFEU. Publication III analysed the terminology and types of sanctions used in those instruments. For the purposes of the present chapter, the relevant question is whether EU criminal-law instruments provide a clear counterpoint to the constituent elements of a punitive administrative sanction.

In relation to natural persons, the criminal-law directives require Member States to ensure that the conduct described in them is punishable as a criminal offence. Although the directives do not define the concept of a criminal offence, the requirement of criminalisation itself is significant, as discussed in Chapter 3.1. While some instruments do not harmonise the type and level of the sanction, imprisonment remains the criminal sanction *par excellence*, whereas fines are framed as additional, not primary sanctions for natural persons.

Despite the absence of a clear delimitation between criminal and administrative sanctions, the criminal-law directives appear to operate primarily on a different axis: criminal versus non-criminal, rather than criminal versus administrative. First, Art 7(4) of the 2017 PIF Directive⁷¹ allows Member States to provide for “other than criminal sanctions” where the offence involves damage or an advantage of less than 10 000 EUR. Second, there is a clear trend towards the inclusion of a wider range of additional sanctions and measures, which may be non-criminal in nature. These include, for example, disqualification, exclusion from public funding, withdrawal of permits and authorisations, publication of decisions, compensation or restoration obligations, and other measures also familiar from administrative sanctioning regimes.⁷²

Third, the sanctioning regime for legal persons is hardly distinguishable from the administrative sanctioning regimes, as it requires the imposition of fines, which can be either criminal or non-criminal. In contrast to administrative sanctions legislation, earlier criminal-law directives did not harmonise the level of such fines. More recent instruments, however, have moved closer to administrative fine regimes by introducing minimum requirements for maximum fine levels, including turnover-based thresholds.⁷³ Furthermore, the array of additional sanctions has also expanded, moving closer to the administrative sanctioning regimes.

In conclusion, the directives adopted on the basis of Arts 83(1) and (2) TFEU refer increasingly to non-criminal sanctions, penalties and measures, yet they do not explain the essential distinction between criminal and non-criminal or administrative sanctions.⁷⁴ Nor do they regulate the procedural framework for imposing sanctions. As such, they only provide for a partial counterpoint to punitive administrative sanctions by reserving imprisonment as a criminal sanction and requiring a national criminal classification when transposing such sanctions. Instead, the developments, especially as regards sanctions for legal persons, reveal a growing convergence between criminal and administrative sanctioning regimes. The broader systemic significance of that convergence is discussed in Chapter 5.

⁷¹ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law (the PIF Directive). – OJ L 198, pp 29–41.

⁷² *E.g.* Art 5(3) of (EU) 2024/1203 (n 51).

⁷³ *Ibid*; Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673. – OJ L 2024/1226.

⁷⁴ CSMAD, the PIF Directive and the Directive on environmental crime emphasise the importance of EU legislation on administrative sanctions, which should remain unaffected.

3.3.2. Criminal proceedings under Art 82 TFEU

Publications III and IV showed that instruments adopted on the basis of Art 82 TFEU appear, at first sight, to offer a stronger counterpoint to the “administrative” label, since they at least seek to define the scope of “criminal proceedings”. The weakness of this approach lies, however, in the inconsistency between instruments and in the ambiguity of that concept.

Several instruments acknowledge that “criminal proceedings” constitute an autonomous concept of EU law, to be interpreted by the CJEU, which may be informed by the *Engel/Bonda* approach. Under that approach, proceedings concerning even relatively modest punitive administrative fines – and *a fortiori* proceedings concerning severe fines – may fall within the criminal head of the ECHR or the Charter (see Chapter 4.3).⁷⁵

Some instruments adopted under Art 82 TFEU appear to maintain a relatively formal distinction between criminal proceedings, on the one hand, and civil or administrative proceedings, on the other.⁷⁶ The legislature seems to intend those instruments to apply only to criminal proceedings in the strict sense, while also recognising that the definition of “criminal proceedings” cannot depend solely on national classification. This explains why the relevant instruments still describe criminal proceedings as an autonomous concept of EU law to be interpreted by the CJEU, without prejudice to the case-law of the ECtHR.

This tension is particularly clear in the Directive on the presumption of innocence and the right to be present at trial. Recital 11 acknowledges that “criminal proceedings” constitute an autonomous concept of EU law, to be interpreted by the CJEU without prejudice to the case-law of the ECtHR. At the same time, it points towards a formal delimitation by excluding civil and administrative proceedings that may lead to sanctions in fields many of which would fall within the criminal head under the *Engel/Bonda* criteria. It appears designed to preserve a formally narrower scope for the Directive, while avoiding a direct conflict with the autonomous and potentially broader concept of a criminal charge under the ECHR and the Charter.⁷⁷

Other instruments add a further layer of distinction by limiting the application of procedural rights in certain minor-offence proceedings or by defining their scope in more detail. These provisions are useful because they reveal what the

⁷⁵ It is arguable whether the ECJ would necessarily adopt that approach in full when defining the scope of instruments adopted under Art 82 TFEU. It is equally possible that the Court would adopt a narrower, systemic understanding of “criminal proceedings” for the purposes of Title V instruments, especially since the concept of criminal law under Art 83 TFEU is narrower than the broader *Engel/Bonda* concept of a criminal charge (see Chapter 6).

⁷⁶ E.g. Art 1(4) and Recital 13 of Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. – OJ L 303, pp 1–38.

⁷⁷ See also Mitsilegas. EU Criminal Law. Second Edition (n 40), p 278 and Lamberigts, S. The Directive on the Presumption of Innocence. A Missed Opportunity for Legal Persons? – The European Criminal Law Associations’ Forum Issue 1/2016, p 3.

EU legislature appears to regard as falling within, or at least bordering on, criminal proceedings.

The scope of several Roadmap Directives is limited, in respect of certain “minor offences”, to the judicial phase of the proceedings. This limitation is telling. It supports an *a contrario* argument that, without such a limitation, those proceedings would – at least in the view of the EU legislature – fall within the concept of criminal proceedings for the purposes of the relevant directive. Two categories can be distinguished: 1) judicial proceedings before a court having jurisdiction in criminal matters concerning minor criminal offences; and 2) appeal proceedings concerning minor offences where an authority other than a court having jurisdiction in criminal matters imposes the sanction, but the sanction may be appealed or referred to such a court.

The first category does not, in itself, delimit criminal offences from administrative offences, since it still concerns offences formally classified as criminal. Its rationale is that, in some Member States, certain minor offences – such as traffic offences, breaches of general municipal regulations and public-order offences – are considered criminal offences, but the full application of the Roadmap Directives before the judicial stage was regarded as unreasonable.⁷⁸ Since the directives do not identify the Member States or systems they have in mind, it is not entirely clear whether this category refers to offences treated as criminal in the strict sense, or also to quasi-criminal systems in which such offences formally form part of penal law, such as the Estonian misdemeanour system (see Chapter 5.3).

The second category is more relevant for the distinction between criminal and administrative proceedings. It describes, at least at the pre-judicial stage, a situation resembling an administrative offence: an authority other than a court imposes a sanction for an offence that is not formally classified as criminal, but the sanction may be appealed or otherwise referred to a court having jurisdiction in criminal matters. A comparable approach is found in the Directive on the European Investigation Order (EIO),⁷⁹ which applies to proceedings brought by administrative or judicial authorities in respect of acts punishable under the law of the issuing State as infringements of rules of law, where the decision may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters.⁸⁰

⁷⁸ See Recital 17 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. – OJ L 294, pp 1–12.

⁷⁹ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. – OJ L 130, pp 1–36.

⁸⁰ These categories are “borrowed” from Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties. – OJ L 76, pp 16–30.

In relation to the Roadmap Directives, the first question is what is meant by “minor”. It is unlikely that the legislature consciously intended the scope of this category to turn on a meaningful assessment of severity in such cases. There is little logical reason why the Directives should apply to minor offences,⁸¹ but not to proceedings concerning more serious administrative offences carrying significant fines. More plausibly, the reference to “minor” reflects the assumption that sanctions imposed by administrative authorities generally concern less serious offences, whereas judicial criminal law is reserved for more serious wrongdoing.⁸² Thus, the reference to “minor” appears to have no independent practical value.

The more important question, both under the Roadmap Directives and under the EIO Directive, is therefore what constitutes a “court having jurisdiction in criminal matters”.

This concept was interpreted by the ECJ in *Balaž*. AG Sharpston proposed that “a court having jurisdiction in particular in criminal matters” is a court before which the person concerned will benefit from the rights guaranteed by Art 6(1), (2) and (3) of the ECHR when the case is tried.⁸³ The ECJ did not fully adopt that approach, but it would also be inaccurate to state that it disregarded it entirely. According to the Court, the concept covers any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure.

The Court did not provide an exhaustive list of those characteristics. In finding that the Austrian *Unabhängiger Verwaltungssenat in den Ländern* qualified as such a court, it relied on several features: the court acted as an appeal body in relation to administrative offences, including road-traffic offences; the appeal had suspensive effect; the body had unlimited jurisdiction; and the applicable procedure complied with safeguards associated with criminal matters, including legality, culpability and proportionality.⁸⁴

Although the ECJ did not expressly mention the *Engel/Bonda* criteria, its reasoning comes relatively close to that approach. The difficulty is that the majority of EU punitive administrative sanctions would arguably require the application of the criminal-head guarantees under the *Engel/Bonda* criteria (see Chapter 4.3). If that approach were transposed directly into the scope of Art 82 TFEU instruments, at least some of the Roadmap Directives would apply to the judicial phase of such proceedings, and instruments such as the EIO Directive could also become available.

⁸¹ Traffic offences were the example given in Recital 16 of Directive 2013/48/EU (n 78).

⁸² It appears that the ECtHR classified market manipulation, punishable by significant administrative fines, as “minor offences” – ECtHR 18640/10, *Grande Stevens and Others v. Italy*, p 138. It is also possible that the drafters had in mind offences that the ECtHR has described as having a criminal connotation, but which are too trivial to be governed by ordinary criminal law and procedure. If so, that delimitation should have been made clearer in the directives themselves.

⁸³ ECJ C-60/12, *Marián Baláž*, ECLI:EU:C:2013:733, opinion of AG E. Sharpston.

⁸⁴ ECJ C-60/12, *Marián Baláž*, ECLI:EU:C:2013:733.

It is doubtful whether such a broad extension of scope was intended by the drafters. It is more likely that the reference to a court having jurisdiction in criminal matters was intended to cover quasi-criminal proceedings, rather than purely administrative sanctioning proceedings. In quasi-criminal proceedings, the case is not merely subject to criminal-head procedural guarantees because of the punitive nature or severity of the sanction; it is also assessed according to standards that are substantively and procedurally close to criminal law. The judgment in *Balaž*, particularly its reluctance to expressly adopt the *Engel/Bonda* criteria and its references to principles of culpability, creates some ambiguity, but still leaves room for such a delimitation.

In summary, instruments adopted under Art 82 TFEU provide some insight into the types of proceedings that the EU legislature has treated as criminal for the purposes of those instruments. The underlying difficulty is that “criminal proceedings” may constitute an autonomous concept of EU law, potentially informed by the *Engel/Bonda* criteria, which may be too broad for the practical application of such instruments. This has led the legislature to rely on practical carve-outs and limiting clauses. At the same time, proceedings concerning administrative offences that may be reviewed by a court having jurisdiction in criminal matters appear, in several Art 82 TFEU instruments, to be treated as falling within, or at least bordering on, criminal proceedings. The boundary remains uncertain, however, because the concept of a “court having jurisdiction in criminal matters” is itself ambiguous.

3.4. Interim conclusions

The analysis in this chapter shows that, although the “administrative” label in EU legislation on punitive administrative fines has legal significance, EU legislation does not provide a coherent set of express constituent elements defining that label for the purposes of national implementation. At a minimum, the label indicates that the Union is not exercising its criminal-law competence under Art 83 TFEU and is therefore not approximating criminal law in the strict sense. Beyond that, the label is most often used to indicate the role of an administrative authority in the imposition or initiation of the sanction. In this sense, “administrative” frequently functions as the opposite of “judicial”. The analysis nevertheless reveals significant inconsistency between different instruments and does not provide a clear answer as to whether there is a meaningful distinction between instruments that require punitive fines without using the “administrative” label and instruments that expressly use it.

EU criminal-law instruments provide only a partial counterpoint to the “administrative” label. Directives adopted under Art 83 TFEU do not define the concept of a criminal offence as the counterpart of an administrative offence, although, unless otherwise provided, they require transposition through national criminal law. At the same time, those instruments increasingly refer to non-criminal sanctions, penalties and measures, thereby revealing growing convergence between

criminal and non-criminal sanctioning regimes. Instruments adopted under Art 82 TFEU are useful in showing how EU law attempts to delimit criminal proceedings from administrative proceedings. Yet they too remain ambiguous. Several Art 82 TFEU instruments treat administrative offence proceedings that may be reviewed by a court having jurisdiction in criminal matters as falling within, or at least bordering on, criminal proceedings. This may support an argument that fines imposed through such proceedings are not “administrative”. However, it does not necessarily follow that such proceedings cannot be used to implement EU administrative sanctioning obligations, since Art 82 TFEU instruments pursue different objectives and any restriction of Member States’ procedural autonomy would require clear justification.

EU legislation on punitive administrative sanctions is inconsistent both in its terminology and in the sanctioning models it permits. This is apparent, for example, in the varying approaches to whether direct sanctioning powers must be vested in an administrative authority, or whether Member States may provide for judicial fines initiated by administrative authorities. Consequently, the obligations imposed on Member States may differ from one legal act to another, often without clear justification.

Provided that the substantive requirements laid down in the relevant legal act are satisfied, transposition through quasi-criminal or even formally criminal proceedings, as classified under national law, does not appear to be necessarily precluded. Specific requirements in a given instrument – such as a requirement that an administrative authority possess direct sanctioning powers, or requirements concerning the type and level of sanctions – may nevertheless make transposition through criminal law difficult or unlikely.

The clearest example of an attempt to negatively harmonise criminal or quasi-criminal enforcement in favour of administrative sanctioning is the ECN+ Directive. Although that Directive lays down substantially more detailed rules on administrative sanctioning than most EU instruments in this field, it stops short of expressly regulating which features of a criminal or quasi-criminal sanctioning system Member States are required to avoid, or how its requirements apply to systems occupying an intermediate position between administrative and criminal law.

These conclusions are important for the following chapters, which examine the implicit features of EU punitive administrative sanctions and the limits and effects of their implementation in national law.

4. IMPLICIT FEATURES OF EU PUNITIVE ADMINISTRATIVE SANCTIONS

4.1. Sources and scope of implicit features

The preceding analysis has shown that EU legislation on punitive administrative sanctions typically harmonises the type and level of sanctions and, in some instances, the involvement of an administrative authority. The instruments also often regulate the criteria to be taken into account when determining the type and level of administrative sanctions. Beyond that, however, procedural rules and the substantive conditions for attributing responsibility are often left unregulated. This does not mean that Member States remain entirely free to design those rules as they see fit.

In addition to the aspects of administrative liability expressly regulated in EU legislation, EU punitive administrative sanctions may also contain implicit features that set limits to Member States' law. These implicit features can arise from three partly overlapping sources: first, the principle of effectiveness; second, the autonomous interpretation of EU legislation and the need for its uniform application; and third, fundamental-rights requirements under the Charter and the ECHR. The apparently modest degree of harmonisation of procedural and substantive rules may therefore be deceptive: the autonomy afforded to Member States may in practice be more restricted than it first appears.

As examined in Chapter 2.3, one of the policy objectives for favouring administrative sanctions over criminal sanctions is the view that administrative sanctioning regimes are more effective than criminal or quasi-criminal systems. As discussed in the previous chapter, most EU legislation on administrative sanctions does not expressly preclude transposition through a criminal or quasi-criminal framework. However, as argued in Publication II, where Member States choose such a model, their national legislation is likely to be subject to closer scrutiny as to the effectiveness of the sanctioning system.

That assessment of effectiveness may limit national choices in the transposition or application of EU rules on administrative sanctions. When assessing whether national rules governing the imposition of administrative sanctions are effective, the ECJ has held that the Member States are responsible for ensuring that the rights conferred by EU law are effectively protected in each case and that that principle requires, in particular, that the authorities of the Member States do not render practically impossible or excessively difficult the exercise of rights conferred by EU law.⁸⁵

While Art 83 TFEU confines the Union to minimum harmonisation in criminal matters, other Treaty bases used for instruments on administrative sanctions may, in certain regulatory fields, allow for more far-reaching – and in some instances full – harmonisation of administrative liability regimes. In addition, unlike substantive criminal-law instruments, which may be adopted only in the form of

⁸⁵ In the context of limitation periods – C-291/24 (n 50), p 41.

directives, administrative sanctions may also be established through directly applicable regulations. Moreover, national administrative sanctioning frameworks do not attract the same degree of constitutional sensitivity as criminal law, where considerations of procedural autonomy are more likely to prevail over efficiency concerns.

It is against this background that the following sections focus on two categories of implicit features: substantive conditions of liability and procedural safeguards. The selection is not exhaustive. These categories are examined because they are the areas in which the implicit effect of EU law can be analysed on the basis of concrete case-law. This does not exclude the possibility that other elements of national sanctioning systems may also be scrutinised on grounds of effectiveness. Features characteristic of criminal or quasi-criminal systems – including strict evidentiary rules, requirements of immediacy, or the separation of supervisory and punitive proceedings – may in principle be relevant where they make the imposition of EU-required administrative fines practically impossible or excessively difficult.

As regards substantive conditions of liability, Publication V analysed the 2023 *Deutsche Wohnen* judgment⁸⁶ and its consequences for the liability of legal persons. Read together with *Nacionalinis visuomenės sveikatos centras*,⁸⁷ those judgments treated the GDPR as leaving no discretion for Member States to add further substantive conditions that would undermine the effectiveness and uniform application of the Regulation. Although those judgments concerned the administrative liability scheme under the directly applicable GDPR, their reasoning has already had a spill-over effect on the interpretation of the substantive conditions for imposing fines under the AMLD regime in *Steiermärkische Bank und Sparkassen AG and Others*.⁸⁸ The Court's approach may therefore be relevant beyond regulations and may also influence the interpretation of directives requiring Member States to provide for administrative sanctions. This chapter examines that development through the examples of strict liability, intent and negligence, the liability of legal persons and limitation periods.

As regards procedural safeguards, the chapter builds on Publication IV and examines the application of criminal-head guarantees to EU punitive administrative fines. It shows that procedural safeguards may also operate as implicit features of EU administrative sanctioning law in two directions: they may require Member States to provide minimum guarantees flowing from the Charter and the ECHR, while also allowing EU law to limit higher national procedural safeguards where those safeguards undermine the effectiveness of EU administrative sanctioning regimes.

⁸⁶ *Deutsche Wohnen* (n 24).

⁸⁷ ECJ C-683/21, *Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos v Valstybinė duomenų apsaugos inspekcija*, ECLI:EU:C:2023:949.

⁸⁸ C-291/24 (n 50).

4.2. Substantive conditions of liability as implicit features: the *Deutsche Wohnen* and AMLD example

4.2.1. Strict liability, intent and negligence

As regards intent and negligence, the referring courts in *Deutsche Wohnen* and *Nacionalinis visuomenės sveikatos centras* asked whether Art 83 GDPR required proof that the infringement was committed intentionally or negligently, or whether the objective existence of an infringement is sufficient for the imposition of an administrative fine. The latter approach was described by the referring courts as *no-fault* or *strict liability*. The difficulty arose from the fact that Art 83 GDPR contains no express rule requiring intent or negligence as a condition for imposing a fine. It refers to the intentional or negligent character of the infringement only in Art 83(2)(b) GDPR, as one of the factors to be taken into account when deciding whether to impose an administrative fine and when determining its amount.

By contrast, the criminal-law directives generally require Member States to criminalise only intentional conduct, subject to certain exceptions.⁸⁹ More lenient *mens rea* requirements are often one of the features distinguishing administrative offences from criminal offences in many Member States.⁹⁰ The ECJ has also previously indicated that limiting subjective grounds of defence and avoiding the need to establish a mental element contribute to the effectiveness of an administrative sanctioning system in the field of market abuse.⁹¹

The concept of strict liability is, however, not uniform. Its meaning depends on national understandings of guilt, fault, presumptions of fact and law, intent, negligence, strict liability and objective liability. The strictness of such liability depends on whether the person concerned may rely on exculpatory defences. In its purest form, strict liability – or absolute liability – means that the objective breach is sufficient for the imposition of a sanction and that the absence of fault is irrelevant. Such a model is rare. Strict liability regimes often preserve at least some defences, including due diligence defences.⁹² Where such defences are available, the distinction between strict liability and negligence becomes difficult to maintain, since negligence itself may cover situations in which the person was unaware of the relevant facts but should have become aware of them by exercising due care. Liability based on negligence is not *sine culpa*, since the element of fault lies in the breach of a duty of care.

⁸⁹ Art 3(1) of (EU) 2024/1203 (n 51).

⁹⁰ E. Herlin-Karnell also seems to associate administrative sanctions with strict liability – Herlin-Karnell, E. *The Constitutional Dimension of European Criminal Law*. Oxford: Hart 2012, pp 57 and 176.

⁹¹ ECJ C-45/08, *Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)*, ECLI:EU:C:2009:806, p 37.

⁹² Blomsma, J. *Mens rea and defences in European criminal law*. Cambridge: Intersentia 2012, pp 209–233, in particular, pp 210, 214, 222–223.

The plurality of meanings attached to strict liability was also noted by AG Campos Sánchez-Bordona in *Deutsche Wohnen*. In his view, different methods of attributing *culpa* may be applied to conduct that some courts would describe as strict liability.⁹³ Similarly, AG Emiliou, in *Nacionalinis visuomenės sveikatos centras*, appeared to associate strict liability with presumed liability, where the person concerned may prove that they were not responsible for the infringement. He also emphasised that the line between an entirely unintentional no-fault infringement and a negligent infringement may be very fine.⁹⁴

The ECJ's case-law on the principle of *nulla poena sine culpa* reveals a degree of flexibility. In some cases, national systems of strict liability, including strict criminal liability, have not been found to be incompatible with EU law, even without any express consideration of available defences. The Court has nevertheless emphasised that Member States must ensure compliance with the principle of proportionality.⁹⁵ In other cases, the Court has treated presumptions of responsibility as a form of strict liability and, by reference to the case-law of the ECtHR, has attached importance to the possibility of rebutting such presumptions.⁹⁶ Overall, the case-law suggests that, in quasi-criminal contexts, the ECJ has not adopted a very strict approach to the protection of the principle of *nulla poena sine culpa*.⁹⁷

In *Deutsche Wohnen* and *Nacionalinis visuomenės sveikatos centras*, the ECJ relied primarily on the wording of Art 83 GDPR, in particular the references to intent and negligence in Art 83(2)(b) and Art 83(3), as well as on the general scheme and purpose of the Regulation. It found that the “EU legislature did not find it necessary, in order to ensure such a high level of protection, to provide for

⁹³ C-807/21 (n 24), opinion of AG Campos Sánchez-Bordona, pp 76–77.

⁹⁴ C-683/21 (n 87), opinion of AG N. Emiliou, pp 79 and 82.

⁹⁵ ECJ C-322/16, *Global Starnet Ltd v Ministero dell'Economia e delle Finanze and Amministrazione Autonoma Monopoli di Stato*, ECLI:EU:C:2017:985, p 63; ECJ C-497/15 and C-498/15, *Euro-Team Kft. and Spirál-Gép Kft v Budapest Rendőrfőkapitánya*, ECLI:EU:C:2017:229, pp 51–66; ECJ C-443/13, *Ute Reindl v Bezirkshauptmannschaft Innsbruck*, ECLI:EU:C:2014:2370, p 42; ECJ C-210/10, *Márton Urbán v Vám- és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága*, ECLI:EU:C:2012:64, pp 45–59; ECJ C-177/95, *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others*, ECLI:EU:C:1997:89, p 36; ECJ C-326/88, *Anklagemyndigheden v Hansen & Soen I/S*, ECLI:EU:C:1990:291, pp 14–19; ECJ C-7/90, *Criminal proceedings against Paul Vandevenne, Marc Wilms, Jozef Mesotten and Wilms Transport NV*, ECLI:EU:C:1991:363, pp 16–17.

⁹⁶ ECJ C-671/18, *Proceedings brought by Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB)*, ECLI:EU:C:2019:1054, pp 51–58 and C-45/08 (n 91), pp 39–44.

⁹⁷ de Jong, F. Four Dimensions of *Nulla Poena Sine Culpa*: The Principle of Individual Culpability in Contexts of Criminal and Quasi-Criminal Law Enforcement in Europe. – in Franssen and Harding (n 20), pp 137–219. See also Panebianco, G. The *Nulla Poena Sine Culpa* Principle in European Courts case-law. – in Ruggeri, S. (ed.). *Human Rights in European Criminal Law. New Developments in European Legislation and case-law after the Lisbon Treaty*. Heidelberg: Springer 2015, pp 47–78 and Rosanò, A. Some Developments of the Principle of *Mens Rea* in the case-law of the Court of Justice of the European Union. – *New Journal of European Criminal Law* Vol. 7, Issue 3, 2016, pp 302–314.

administrative fines to be imposed in the absence of wrongdoing. Therefore Art 83 GDPR does not allow an administrative fine to be imposed in respect of an infringement referred to in paragraphs 4 to 6 thereof, without it being established that that infringement was committed intentionally or negligently by the controller and that, consequently, a culpable infringement constitutes a condition for such a fine to be imposed.”

The Court nevertheless appears to have left open the possibility that, where necessary to ensure a high level of protection, EU law could provide for administrative fines in the “absence of wrongdoing”. In the Author’s view, such a possibility should be approached with caution. A fine imposed irrespective of any wrongdoing can hardly pursue punitive aims and is, as such, difficult to reconcile with a culpability-based understanding of such sanctions. Purely objective liability may be justified where the purpose is primarily compensatory or restorative, for example in a manner comparable to product liability in tort law.

As regards the actual definition of intent and negligence, despite the existence of a wider array of available case-law on that matter,⁹⁸ the ECJ relied on its case-law in competition matters⁹⁹ and found that a controller may be penalised for conduct falling within the scope of the GDPR where that controller “could not be unaware of the infringing nature of its conduct, whether or not it is aware that it is infringing the provisions of the GDPR”. This formulation is problematic. It appears to address primarily the question of mistake of law rather than providing a comprehensive definition of intent or negligence. In some legal systems, intent and negligence concern the factual elements of the offence, whereas mistake of law is treated separately and may, in exceptional circumstances, exclude guilt.¹⁰⁰

This distinction is particularly relevant in the GDPR context. Breaches of data protection rules may frequently involve situations in which the controller is aware of the relevant legal prohibition but unaware of the factual circumstances giving rise to the breach, for example in cases of unknown vulnerabilities in IT systems or mistakenly forwarded e-mails with sensitive personal data. In such cases, the definition of negligence adopted in *Intertanko* may have been better suited. There, negligence was understood as an unintentional act or omission by which the person responsible breaches his duty of care.¹⁰¹

It remains uncertain whether *Deutsche Wohnen* establishes a general benchmark for other instruments requiring administrative fines. In finding that intent or negligence are prerequisites for fines under the GDPR, the Court relied on the fact that the GDPR itself refers to those notions, albeit in provisions concerning

⁹⁸ Klip. European Criminal Law. 4th edition (n 50), pp 269–274.

⁹⁹ E.g. ECJ C-681/11, *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG and Others*, ECLI:EU:C:2013:404.

¹⁰⁰ Bohlander, M. Principles of German Criminal Law. Oxford: Hart Publishing 2009, pp 70–74 and 119–121.

¹⁰¹ ECJ C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, ECLI:EU:C:2008:312, pp 75–77.

the decision whether to impose a fine and the determination of its amount. Instruments using similar wording are likely to be interpreted in a similar manner.¹⁰² Other instruments do not refer expressly to intent or negligence, but require the “degree of responsibility” to be taken into account when determining the type or level of the administrative penalty.¹⁰³ That may also be read as an implicit reference to responsibility based on “wrongdoing”. However, some instruments require Member States to lay down rules on administrative sanctions without any reference to intent, negligence or degree of responsibility.¹⁰⁴ It is therefore uncertain whether, in such cases, Member States are precluded, on grounds of effectiveness, from treating intent or negligence as prerequisites for liability; whether they are required to treat them as such; or whether the matter remains within their discretion.

The *Deutsche Wohnen* and *Nacionalinis visuomenės sveikatos centras* judgments do not establish an implicit uniform EU-law rule on *mens rea* for all administrative fines. Rather, they show that the ECJ may derive such a requirement from the wording, structure and purpose of the relevant instrument. Conversely, where the Court does not recognise such a requirement, Member States may be precluded, on grounds of effectiveness and uniform application of EU law, from making liability subject to intent, negligence or comparable subjective conditions. In either scenario, Member States’ discretion may be restricted even where the legislation does not expressly define the subjective conditions of liability.

4.2.2. Liability of legal persons

In the *Deutsche Wohnen* case the referring German court asked whether Art 83 GDPR precludes national legislation under which an administrative fine may be imposed on a legal person only if the infringement has first been attributed to an identified natural person. Without repeating the analysis developed in Publication V, certain aspects of that judgment and subsequent developments should be highlighted in this chapter.

Models of liability for legal persons vary considerably between jurisdictions. Since a legal person can act only through natural persons, every system of liability of legal persons must determine which acts, committed by which persons and under which conditions, may be attributed to the legal person.¹⁰⁵

¹⁰² E.g. Art 25(4)(b) – Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising. – OJ L 2024/900.

¹⁰³ E.g. Art 67 and 68(2)(b) – Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP). – OJ L 198, pp 1–63.

¹⁰⁴ E.g. Art 48 – (EU) 2016/2341 (n 59).

¹⁰⁵ For an overview of different models of liability, see Wells, C. Containing Corporate Crime: Civil or Criminal Controls? – in Gobert, J., Pascal, A.-M. (eds.). *European Developments in Corporate Criminal Liability*. London/New York: Routledge 2011, pp 23–28.

The GDPR contains no provisions specifying the model of liability for legal persons. According to the ECJ, however, Art 83 GDPR establishes an autonomous EU-law model of organisational liability for administrative fines. Under that model, a Member State must be able to impose a fine directly on a controller, including where the controller is a legal person, without making that fine dependent on the prior attribution of the infringement to an identified natural person. National rules that add further substantive conditions for the liability of legal persons are therefore incompatible with the effectiveness and uniform application of EU law.

Furthermore, both *Deutsche Wohnen* and *Nacionalinis visuomenės sveikatos centras* draw on the case-law concerning competition infringements. The Court held that, where an infringement is committed by a legal person, liability does not depend on an action, or even knowledge, on the part of the management body.¹⁰⁶

Following *Deutsche Wohnen*, an Austrian court requested a preliminary ruling concerning the administrative liability of legal persons for breaches of AMLD IV in *Steiermärkische Bank und Sparkassen AG and Others*. The Austrian model of liability was comparable to the German model at issue in the *Deutsche Wohnen* case¹⁰⁷ in so far as it was derivative: the liability of a legal person was derived from the liability of a natural person.¹⁰⁸

Two important elements distinguished the AMLD issue from the GDPR issue. First, AMLD IV is a directive providing for minimum harmonisation,¹⁰⁹ whereas the GDPR is a directly applicable regulation. Moreover, the ECJ had previously emphasised that Member States enjoy significant discretion when transposing the AMLD requirements concerning administrative penalties.¹¹⁰ Second, Art 60(5) and (6) AMLD IV contain a model of liability for legal persons identical to that found in criminal-law directives, whereas the GDPR contains no such provisions.

AG Čapeta, also citing Publication V, acknowledged the diversity of national approaches to the attribution of liability to legal persons. In her view, the imputation models set out in Art 60 AMLD IV were intended to accommodate those different approaches, rather than to require Member States to make substantial adjustments to their legal systems in order to achieve the objectives of EU

¹⁰⁶ The judgments referred to ECJ C-100/80 to 103/80, *SA Musique Diffusion française and others v Commission of the European Communities*, ECLI:EU:C:1983:158, p 97 and ECJ C-94/15 P, *Tudapetrol Mineralölerzeugnisse Nils Hansen KG v European Commission*, ECLI:EU:C:2017:124, p 28.

¹⁰⁷ It should be pointed out that the parties in the *Deutsche Wohnen* case challenged the German courts' interpretation of national law (see pp 27 and 33–37 of the judgment).

¹⁰⁸ On the *derived* or *derivative* liability and a description of such a system in Estonian law, see Sootak, J., Kärner, M. Corporate Criminal Law and Criminal Compliance in Estonia. – in Papathanasiou, K. (Hrsg.). Unternehmensstrafrecht und Criminal Compliance. Corporate Criminal Law and Criminal Compliance. Wien: Jan Sramek Verlag 2023, pp 237–252.

¹⁰⁹ ECJ C-22/23, *'Citadeles nekustamie īpašumi' SIA v Valsts ieņēmumu dienests*, ECLI:EU:C:2024:327, p 48.

¹¹⁰ ECJ C-671/23, *M v Lietuvos bankas*, ECLI:EU:C:2025:457, p 34.

legislation. She therefore proposed that AMLD IV did not preclude the Austrian model of liability for legal persons.¹¹¹

The ECJ did not follow that approach. Instead, it relied on the reasoning in *Deutsche Wohnen*. According to the Court, Art 60(5) and (6) AMLD IV merely identify the natural persons whose acts or omissions, committed for the benefit of a legal person, may give rise to the liability of that legal person. Those provisions do not, however, make the liability of the legal person dependent on a prior finding that the breach was committed by a natural person. Referring to *Deutsche Wohnen*, the ECJ held that such a requirement would risk weakening the effectiveness and deterrent effect of administrative sanctions.

The Court's reasoning in *Steiermärkische Bank und Sparkassen AG and Others* is surprisingly brief, especially since AMLD IV, unlike the GDPR, contains express provisions on the model of liability of legal persons and links that liability to the acts or omissions of natural persons. On the one hand, the Austrian model was indeed specific and restrictive. The imposition of a fine on a legal person required that: first, a natural person had been given the formal status of an accused person; second, the operative part of the decision imposing the penalty on the legal person referred to that natural person by name; and third, the decision stated that the natural person had committed an unlawful and culpable act constituting an offence attributable to the legal person.

On the other hand, the wording used by the ECJ in the operative part of the judgment appears to go beyond the Austrian model. It precludes not only that specific approach, but also, more generally, systems that make the “liability of a legal person subject to the prior finding that the breach was committed by a natural person”. This is difficult to reconcile with the wording of Art 60(5) and (6) AMLD IV, according to which only acts or omissions of specific categories of natural persons can give rise to the liability of the legal person. Moreover, a legal person can act only through natural persons. It is difficult to see, for example, how a Member State could apply the model expressly provided for in Art 60(5)(c) AMLD IV – liability for a breach committed for the benefit of a legal person by a person having a leading position within that legal person, based on an authority to exercise control – without establishing that the breach was committed by such a natural person, for instance a member of the management body.

It would therefore have been preferable for the ECJ either to confine its reasoning to the specific features of the Austrian legislation or to hold more narrowly that the liability of a legal person cannot be made dependent on a prior finding that a natural person is also *liable* for the breach, as opposed to having *committed* the act.

The ECJ's reasoning is likely to be extended to other instruments on administrative sanctions that contain models of liability for legal persons comparable to Art 60(5) and (6) AMLD IV.¹¹² Moreover, since the Court based its reasoning on

¹¹¹ C-291/24 (n 50), opinion of AG T. Čapeta, pp 52–53.

¹¹² Such as Art 28(5) and (6) of (EU) 2023/1113 (n 62); Art 17(5) and (6) – Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information

Deutsche Wohnen, where the GDPR contained no express rules on the model of liability, the same approach will almost certainly spill over more broadly into EU legislation on administrative sanctions. It thereby reveals an effectiveness-based implicit feature of administrative liability: the liability of a legal person may not be made dependent on the prior attribution of the infringement to an identified natural person.

4.2.3. Limitation periods

Limitation periods may also affect the effectiveness of an administrative sanctioning system. It is therefore appropriate to address this issue briefly in this chapter.¹¹³

Most EU legislation on punitive administrative fines contains no specific rules on limitation periods. One example of an exception is Art 29 of the ECN+ Directive. In *Steiermärkische Bank und Sparkassen AG and Others*, the referring court asked whether, despite the absence of any provisions on limitation periods in AMLD IV, the principle of effectiveness precluded national rules under which proceedings had to be brought within three years from the end of the offence and penalties had to be imposed within five years. The ECJ referred to its earlier case-law according to which reasonable time limits for bringing proceedings are compatible with EU law in the interests of legal certainty.¹¹⁴ Since limitation periods of two and three years had previously been held compatible with the principle of effectiveness, the Austrian limitation rules were likewise found not to be contrary to that principle.

The question of time limits for specific procedural steps also arose in the context of the ECN+ Directive in *Caronte & Tourist*. Strictly speaking, that judgment concerned a procedural time limit rather than a limitation period in the traditional sense. Nevertheless, the ECJ analysed the issue in close connection with its case-law on limitation periods and legal certainty. It is therefore appropriate to address it here, while recognising that the judgment also has implications for the procedural dimension discussed in the next section.

In *Caronte & Tourist*, the referring court asked, in substance, whether the ECN+ Directive precluded national legislation requiring the national competition authority to commence the *inter partes* investigation stage by notifying the

accompanying transfers of funds and repealing Regulation (EC) No 1781/2006. – OJ L 141, pp 1–18 and Art 92a – Regulation (EU) 2023/2842 of the European Parliament and of the Council of 22 November 2023 amending Council Regulation (EC) No 1224/2009, and amending Council Regulations (EC) No 1967/2006 and (EC) No 1005/2008 and Regulations (EU) 2016/1139, (EU) 2017/2403 and (EU) 2019/473 of the European Parliament and of the Council as regards fisheries control. – OJ L 2023/2842.

¹¹³ Member States differ in whether they classify limitation periods as matters of substantive law or procedural law.

¹¹⁴ ECJ C-500/16, *Caterpillar Financial Services sp. z o.o. v Dyrektor Izby Skarbowej w Warszawie*, ECLI:EU:C:2017:996, p 42.

statement of objections to the undertaking concerned within 90 days, where failure to comply with that time limit resulted in the annulment of the final decision and precluded any new proceedings.

In contrast to the relatively brief analysis in *Steiermärkische Bank und Sparkassen AG and Others*, the ECJ undertook a more detailed assessment. It emphasised, on the one hand, the importance of legal certainty and of ensuring proceedings within a reasonable time, and, on the other hand, the need to allow competition authorities sufficient time to carry out complex factual and economic assessments. The Court accepted that Member States may lay down not only general limitation periods but also, where appropriate, time limits governing specific stages of proceedings. Nevertheless, it held that national legislation of the kind described by the referring court was liable to undermine the operational independence of the competition authority and to create a systematic risk that competition infringements would go unpunished. Such legislation was therefore precluded by the ECN+ Directive and Art 102 TFEU.¹¹⁵

These cases show that limitation periods, along with procedural time limits, can fall within the scope of effectiveness review, even where EU legislation does not expressly regulate them. The ECJ will generally respect reasonable time limits adopted in the interests of legal certainty, but may preclude rules that create a systematic risk that EU-law infringements remain unsanctioned.

4.3. Procedural safeguards as implicit features

4.3.1. Procedural safeguards and effectiveness

Procedural rights may operate as implicit features of EU punitive administrative sanctions in two opposite directions. First, where Member States impose fines required by EU law, they are applying EU law and must comply with the Charter in providing the relevant procedural safeguards. By virtue of Art 52(3) of the Charter and Art 6(3) TEU, the level of protection must not fall below that guaranteed by the ECHR.

Second, the principle of effectiveness may set limits on the level of procedural protection afforded under national law. This is particularly important because greater effectiveness is often regarded as one of the central advantages of administrative sanctions. That gain in effectiveness may, however, often come at the cost of procedural safeguards. In this regard, it should be recalled that, according to *Melloni*, Art 53 of the Charter does not permit the application of a higher national standard of fundamental-rights protection where this would compromise the primacy, unity, and effectiveness of EU law.¹¹⁶ Put differently, EU legislation

¹¹⁵ ECJ C-511/23, *Caronte & Tourist SpA v Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2025:42, pp 35–81.

¹¹⁶ ECJ C-399/11, *Stefano Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107, pp 55–64. Likewise, the principle of procedural autonomy applies only subject to the principles of equivalence and effectiveness – ECJ C-86/20, *Vinařství U Kapličky s.r.o. v Státní zemědělská a potravinářská inspekce*, ECLI:EU:C:2022:320, p 75.

on administrative sanctions may, in certain circumstances, preclude the application of national procedural safeguards where those safeguards would undermine the effectiveness of the administrative sanctioning procedure. Thus, the transposition of EU rules on administrative fines through criminal or quasi-criminal proceedings, which typically provide for stricter procedural rules and broader procedural safeguards, may expose national legislation to scrutiny as to whether such a system remains sufficiently effective. *Caronte & Tourist* illustrates this point. Although discussed above in relation to limitation periods and procedural time limits, the judgment may also be read as an example of effectiveness limiting national rules designed to protect legal certainty and procedural fairness on the grounds of efficiency.

Against that background, brief mention should also be made of the express regulation of procedural safeguards in EU instruments providing for punitive administrative sanctions, since such references may serve as benchmarks for deriving, in relation to other instruments, either procedural guarantees or limitations on those guarantees. As discussed in Publication IV, such instruments contain few explicit requirements in this respect. There are occasional references to general procedural guarantees that must be ensured, but these are sometimes confined to the recitals. Nor is the legislative approach uniform; it varies from one instrument to another.¹¹⁷ Depending on how the *Balaž* case-law is applied in interpreting the scope of the Roadmap Directives, those directives may in some cases become applicable to the judicial phase of national proceedings concerning the imposition of EU punitive administrative sanctions, even though they were arguably not intended to govern proceedings relating to the imposition of such fines (Chapter 3.3.2).

Likewise, EU legislation in this field does not generally expressly exclude procedural guarantees associated with criminal proceedings. Nevertheless, a few examples may be identified. First, Art 8 of the ECN+ Directive, read together with Recital 35, precludes Member States from allowing legal persons to refuse to comply with requests for information or documents on the basis of the privilege against self-incrimination. Second, EU legislation may contain rules that can, at least in part, be understood as reversing or shifting the burden of proof. One example may be found in Art 9 MAR, which concerns the legitimate-behaviour exception in the context of the use of inside information.¹¹⁸ Although the administrative sanctioning system under the common agricultural policy does not

¹¹⁷ Publication IV referred to the following procedural guarantees that have occasionally been referred to: 1) general requirement to respect fundamental rights in the Charter, sometimes with reference to specific Articles; 2) right of appeal before a tribunal; 3) right to a reasoned judgment; 4) right to protection of personal data; 5) right of defence; 6) right to be heard before the adoption of a final decision; 7) right to a fair trial; 8) right to an effective remedy; 9) right to *ne bis in idem*; 10) requirement for prior authorisation of a national judicial authority in case of inspection of other than business premises; 11) right to reasonable length of proceedings; 12) right to information on the charges (a statement of objections).

¹¹⁸ ECJ C-773/24, *A.*, ECLI:EU:C:2026:39, opinion of AG M. Campos Sánchez-Bordona, p 50.

fall within the central scope of this research, similar burden-shifting mechanisms may also be found in that field.¹¹⁹

Publication IV examined in detail the procedural guarantees applicable, under the case-law of the ECtHR and in EU law, to punitive sanctions that are not formally classified as criminal. Its core findings are briefly revisited in this chapter, together with further observations connecting that analysis to the broader research questions.

4.3.2. The application of criminal-head guarantees and their reduced stringency

Starting with *Öztürk*, the ECtHR has applied the *Engel* criteria to administrative sanctions in order to determine whether they are criminal in nature for the purposes of the criminal-head guarantees under the ECHR.¹²⁰ Under those criteria, the criminal nature of a sanction is assessed by reference to three elements: the national classification of the offence, the nature of the offence, and the severity of the potential sanction.¹²¹ Since the present discussion concerns sanctions that are not formally classified as criminal, the second and third criteria are decisive. Administrative fines imposed for punitive and deterrent purposes, especially where they may reach substantial levels, will in many cases fall within the criminal head.

That classification is not entirely automatic. Publication IV examined examples of ECtHR case-law in which the application of criminal-head guarantees to punitive non-criminal fines was rejected on the basis of the limited scope of application of the relevant rules or the objective of ensuring compliance and protecting underlying regulatory interests. That reasoning is open to criticism. Traditional criminal law may also contain offences with a limited personal or sectoral scope. Moreover, even the aim of core criminal offences may be reduced to protecting specific legal or regulatory interests. The case-law therefore shows that, although punitive administrative fines of the kind approximated in EU law will in many cases fall within the criminal head, some uncertainty still remains, especially in relation to fines imposed in specialised regulatory fields.

The application of criminal-head guarantees to punitive administrative fines may also be limited by the *Jussila* exception and the related case-law. Under that approach, where an offence is criminal under the *Engel* criteria but falls outside the hard-core of criminal law, procedural guarantees do not necessarily apply with full stringency.¹²² The distinction between the hard-core of criminal law and its

¹¹⁹ Art 64(2)(d) Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008. – OJ L 347, pp 549–607. See also C-86/20 (n 116), pp 76–81.

¹²⁰ *Öztürk v. Germany* (n 12).

¹²¹ *Engel and Others v. the Netherlands* (n 11), p 82.

¹²² ECtHR 73053/01, *Jussila v. Finland*, pp 29–48.

“outskirts” remains underdeveloped. Moreover, the *Jussila* logic appears capable of extending beyond Art 6 ECHR and may not merely reduce the intensity of certain guarantees, but in some circumstances allow particular guarantees – such as the right to an oral hearing – to be dispensed with altogether.

The ECJ has followed a broadly similar path, although its earlier case-law was more reluctant to classify non-criminal sanctions as penal. The Court often avoided such a classification by referring to the limited scope of application of the relevant rule and to the primary aim of protecting aid schemes or EU funds, even where the measure went beyond mere reparation. This reluctance can be explained, at least in part, by the sensitivity of recognising a penal competence at EU level.¹²³

Notwithstanding that non-criminal classification, the ECJ still extended certain fundamental principles, such as *nullum crimen*, to such sanctions.¹²⁴ In addition, without expressly determining whether a sanction was criminal in nature, the Luxembourg courts derived a considerable body of procedural safeguards from the general principles of EU law, particularly in the field of competition fines.¹²⁵ In that sense, many procedural guarantees, traditionally associated with criminal proceedings, were interpreted in the context of proceedings that were punitive in substance, but not formally criminal.¹²⁶

The ECJ could not indefinitely disregard the ECtHR’s case-law in determining the criminal nature of a sanction, given the need to ensure a level of protection corresponding to that guaranteed by the ECHR. Moreover, some of the concerns associated with the explicit adoption of the *Engel* criteria, and with the implications this might have for Commission proceedings in competition cases, may have been mitigated by the *Jussila* line of case-law. The ECJ expressly adopted the *Engel* criteria in its 2012 judgment in *Bonda*.¹²⁷ In subsequent case-law, those criteria have been used to assess – and in several instances to affirm – the criminal nature of sanctions formally classified as non-criminal in relation to

¹²³ At least until the judgment in *Germany v Commission*, in which the Court did not rule out the competence to establish measures of a punitive nature – C-240/90 (n 31), pp 10–29.

¹²⁴ ECJ C-117/83, *Karl Könecke GmbH & Co. KG, Fleischwarenfabrik, v Bundesanstalt für landwirtschaftliche Marktordnung*, ECLI:EU:C:1984:288, p 11.

¹²⁵ Teleki, C. *Due Process and Fair Trial in EU Competition Law. The Impact of Article 6 of the European Convention on Human Rights*. Leiden: Brill 2021; de Moor–van Vugt in Jansen (n 15), pp 615–639. Weyembergh and Joncheray have characterised this approach as an unofficial borrowing from the *Engel* case-law – Weyembergh and Joncheray (n 16), p 199.

¹²⁶ Consequently, any comprehensive account of EU procedural rights in criminal matters must be presented as a combination of the Roadmap Directives and the case-law concerning both criminal and non-criminal sanctions – e.g. Klip. *European Criminal Law*. 4th edition (n 50), pp 302–376.

¹²⁷ ECJ C-489/10, *Lukasz Marcin Bonda*, ECLI:EU:C:2012:319, pp 28–41. The *Engel* case was also referred to in *Spector*, where the ECJ acknowledged that the offence in question may, for the purposes of the application of the ECHR, be classified as criminal. – C-45/08 (n 91), p 42.

a range of infringements, including tax surcharges¹²⁸, market manipulation¹²⁹, insider dealing¹³⁰ and traffic offences¹³¹.

In adopting the *Engel* criteria, the ECJ appears to have abandoned its earlier reliance on the objective of ensuring compliance as a basis for denying the criminal nature of a sanction. If the Court were nevertheless to classify a punitive fine as non-criminal, this would likely be on the basis of the limited scope of application of the relevant rule and the fact that the sanction is directed not at the general public, but only at a particular category of addressees. The ECJ has, for example, referred to this criterion in relation to measures forming part of the arrangements for the movement of products subject to excise duty under a suspension arrangement.¹³² This resembles a form of “contractual” or voluntary-entry reasoning: by choosing to operate in a regulated field, the person is treated as having accepted the sanctioning framework applicable to that field.¹³³ However, reliance on this criterion attracts the same criticism as the ECtHR’s inconsistent use of the limited-scope criterion. In contemporary regulatory law, infringements are frequently committed within specialised and highly regulated sectors. The mere fact that a sanction applies only to persons operating in such a sector should therefore not, in itself, exclude its criminal nature.

Even where a sanction is classified as criminal in nature, the *Jussila* exception has also entered the case-law of the General Court in competition matters, beginning with *Schindler*,¹³⁴ and has been relied on in the opinions of Advocates General¹³⁵. It is therefore likely that the ECJ, especially in light of the need to preserve the effectiveness of enforcement procedures, would make use of the possibility of applying the relevant guarantees with reduced stringency in the context of administrative sanctions. This is reinforced by the fact that the Luxembourg courts have repeatedly expressed concern that classifying competition infringements as criminal could seriously impair the effectiveness of EU competition

¹²⁸ ECJ C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105, pp 33–37.

¹²⁹ C-537/16 (n 48), pp 28–35.

¹³⁰ ECJ C-596/16 and C-597/16, *Enzo Di Puma v Commissione Nazionale per le Società e la Borsa (Consob)* and *Commissione Nazionale per le Società e la Borsa (Consob) v Antonio Zecca*, ECLI:EU:C:2018:192, pp 28–35.

¹³¹ ECJ C-338/20, *Prokuratura Rejonowa Łódź–Bałuty*, ECLI:EU:C:2021:805, p 29.

¹³² In this respect, see ECJ C-412/21, *Dual Prod SRL v Direcția Generală Regională a Finanțelor Publice Cluj-Napoca – Comisia regională pentru autorizarea operatorilor de produse supuse accizelor armonizate*, ECLI:EU:C:2023:234, pp 32–33 and ECJ C-820/21, *‘Vinal’ AD v Direktor na Agentsia ‘Mitnitsi’*, ECLI:EU:C:2023:667, pp 52–54.

¹³³ See also de Moor–van Vugt (n 15), p 14.

¹³⁴ EGC T-138/07, *Schindler Holding Ltd and Others v European Commission*, ECLI:EU:T:2011:362, p 52. This approach was not rebutted on appeal: ECJ C-501/11, *Schindler Holding Ltd and Others v European Commission*, ECLI:EU:C:2013:522.

¹³⁵ ECJ C-481/19, *DB v Commissione Nazionale per le Società e la Borsa (Consob)*, ECLI:EU:C:2021:84, opinion of AG P. Pikamäe, p 107.

enforcement,¹³⁶ even though such fines clearly fall within the criminal-head under the case-law of the ECtHR.¹³⁷ Classification under *Bonda* therefore determines whether criminal-head guarantees are triggered, but not the intensity with which they apply. That intensity remains shaped by the *Jussila/Schindler* logic and by considerations of effectiveness.

The punitive purpose and severity of the administrative fines at the centre of this research support their classification as criminal in nature by both the ECJ and the ECtHR. In some areas, however, the limited scope of application of the relevant rules may point in the opposite direction.¹³⁸ Since a cumulative assessment of the criteria is permissible where separate analysis does not yield a clear conclusion, the potentially severe character of such fines, coupled with their predominantly punitive purpose, should nevertheless weigh decisively in favour of a criminal classification.

In assessing the stringency with which procedural guarantees apply, the relevant criteria require further elaboration. The central consideration should be what is at stake for the addressee of the sanction. This requires an assessment not only of the severity of the fine, but also of the wider consequences flowing from its imposition, including the attribution of blame, reputational harm and the risk of social stigma. The assessment may also legitimately distinguish between natural and legal persons. On that view, where a natural person faces a substantial punitive administrative fine, the applicable criminal-head guarantees should not differ significantly from those applicable in traditional criminal proceedings. Nor should Member States be expected, on grounds of effectiveness, to significantly lower the level of procedural-rights protection afforded in such cases.

4.4. Interim conclusions and further implications

It follows that, even where EU legislation does not expressly regulate all substantive conditions of liability, the principle of effectiveness, together with the autonomous interpretation and uniform application of EU law, may significantly restrict the discretion of Member States when transposing or applying EU requirements on administrative fines. Member States remain free, in principle, to accommodate those requirements within their own legal systems. However, where they rely on criminal or quasi-criminal systems of administrative liability, those systems may be subject to more intensive scrutiny as regards their

¹³⁶ ECJ C-338/00, *Volkswagen AG v Commission of the European Communities*, ECLI:EU:C:2003:473, p 96 and ECFI T-276/04, *Compagnie maritime belge SA v Commission of the European Communities*, ECLI:EU:T:2008:237, p 66.

¹³⁷ ECommHR 11598/85, *Société Stenuit v. France*, pp 59–67; ECtHR 53892/00, *Lilly France S.A. v. France*, p 2 and ECtHR 43509/08, *A. Menarini Diagnostics S.R.L. v. Italy*, pp 39–44.

¹³⁸ On the criticism of *irrational flexibility* see Goss, R. The *Engel* criteria in the 21st century: irrational flexibility and deference in recent European Court of Human Rights jurisprudence. – Human Rights Law Review, 2025, Vol 25(4), pp 1–20.

effectiveness. At the same time, in accordance with the principle of procedural autonomy, the use of such systems should not in itself be precluded unless concrete features can be identified that render the imposition of EU administrative fines ineffective.

In addition to the issues examined in this chapter, EU legislation on administrative sanctions may raise numerous further questions concerning the substantive conditions for imposing fines. For example, unlike criminal-law directives, instruments on administrative sanctions rarely expressly require Member States to sanction attempted infringements.¹³⁹ It cannot be excluded that, in specific regulatory contexts, the ECJ would interpret the commission of an infringement as also encompassing an attempted infringement, where such an interpretation is necessary to ensure the effectiveness of the sanctioning regime.¹⁴⁰ Similarly, the Court might draw on its competition-law case-law to extend the scope of administrative liability to participation in infringements, even where the relevant instrument does not expressly regulate such forms of involvement.¹⁴¹

Regarding procedural safeguards, having regard to their punitive aim and severity, the high administrative fines at the centre of this research ought, in principle, to be classified as criminal by the *Engel/Bonda* criteria. However, the *Engel/Bonda* assessment still leaves some room for uncertainty. The classification of punitive administrative fines prescribed by EU law as criminal under the *Engel/Bonda* criteria means that, even where such requirements do not expressly follow from the relevant EU instrument itself, the criminal-head guarantees of the ECHR and the Charter must nevertheless be ensured when those fines are imposed at national level.

At the same time, national procedural safeguards are not immune from the limiting effects of EU law where the level of protection provided by national law is considered to compromise the effectiveness of EU enforcement. In such situations, the minimum requirements laid down by the ECHR and the Charter serve only as the baseline. Even where criminal-head guarantees are applicable, their intensity may still be limited by the *Jussila/Schindler* line of case-law. Given the underdeveloped nature of the *Jussila* exception, there is no clear indication as to where the ECJ would draw the line between national safeguards that merely go beyond what is required by the ECHR and the Charter, and national safeguards that hinder the effective application of EU law. *Caronte & Tourist* illustrates this problem: a system of procedural time limits aimed at ensuring legal certainty was nevertheless precluded by EU law because it created a systematic risk that EU-law infringements would remain unsanctioned.

¹³⁹ See Art 15 of MAR as an exception.

¹⁴⁰ E.g. C-177/95 (n 95), p 25.

¹⁴¹ E.g. ECJ C-609/13 P, *Duravit AG and Others v European Commission*, ECLI:EU:C:2017:46, p 117 and the case-law cited there.

One further possible example concerns the privilege against self-incrimination of legal persons. In light of the *Orkem* case-law¹⁴² and the express exclusion, in the ECN+ Directive, of any right of legal persons to refuse the production of information or documents on that basis, it cannot be excluded that this limited understanding may come to be treated as the relevant standard for non-criminal fines more generally. If so, national rules allowing legal persons to invoke a broader privilege against self-incrimination in administrative sanctioning proceedings outside competition law could be precluded on grounds of effectiveness.

It is also conceivable that a cumulative assessment of national procedural rules could lead to the conclusion that a particular procedural framework is ineffective. This may be so where a Member State imposes EU administrative fines through criminal or quasi-criminal proceedings characterised by strict evidentiary rules, broad requirements flowing from the principle of immediacy, and a rigid separation between supervisory and punitive proceedings. If that procedural model demonstrably results in delays in the imposition of fines or in a reduced number of established infringements, it could be precluded by the requirement of effectiveness, even though no single procedural element would necessarily be objectionable in isolation.

These conclusions provide the background for the following chapters and research questions. EU legislation on administrative fines is scattered across different areas of EU law and does not form a coherent system. Differences in scope and wording, often without clear justification, may result in divergent interpretations by the ECJ. This fragmented and evolving case-law may prove especially difficult to accommodate for Member States that employ a systematic approach to administrative sanctioning. The effects are even more pronounced where the relevant legal institute – for example, the model of liability of legal persons – applies across both criminal and administrative offences. The systemic effects of such fragmented EU punitive administrative sanctioning legislation are discussed further in Chapter 5. The resulting uncertainty as to what EU law precisely requires when such regimes are transposed or applied may also raise concerns from the perspective of *nullum crimen, nulla poena sine lege*, especially concerning directly applicable EU law. That issue is discussed further in Chapter 6.2.

¹⁴² ECJ C-374/87, *Orkem v Commission of the European Communities*, ECLI:EU:C:1989:387, pp 18–35.

5. SYSTEMIC EFFECTS OF EU PUNITIVE ADMINISTRATIVE SANCTIONS

5.1. Effects on EU criminal law

The objectives pursued by EU criminal law and punitive administrative sanctioning partly coincide: both seek to ensure the effective enforcement of EU policies through punitive means. The instruments used to achieve that objective are likewise similar. Both define punishable conduct and prescribe sanctions intended to punish and deter. In addition, where administrative sanctions are criminal in substance under the *Engel/Bonda* criteria, both fields require broadly comparable procedural safeguards. Given these similarities, the two fields can hardly fail to influence each other. The effects on EU criminal law can be divided into three related forms: first, the policy choice between criminal and administrative sanctions may affect the role of criminal law; second, administrative sanctioning regimes may create legislative benchmarks for criminal-law directives, producing convergence between the two fields; and third, interpretations developed by the ECJ in administrative sanctioning cases may spill over into EU criminal law.

First, the policy choice between criminal and administrative sanctions may influence the concept and role of criminal sanctions. If effectiveness becomes the dominant criterion, while the nature and gravity of the offence recede into the background, the result may be an incoherent understanding of what ought to be criminalised. Competition infringements, at least in the form of cartels, provide a clear example. Such conduct is undoubtedly regarded as serious wrongdoing. Its seriousness has led some Member States to classify it as criminal, and there has also been serious discussion as to the need for criminalisation at EU level.¹⁴³ Substantively, price-rigging may be comparable to market manipulation, fraud or even bribery. If, despite the need for dissuasive sanctions, criminal-law enforcement is displaced primarily on grounds of administrative efficiency, this may depreciate the role of criminal sanctions and create a structural imbalance in the development of EU criminal law under Art 83 TFEU. This imbalance is further reinforced where administrative fines reach levels that rival, or even exceed, the severity of criminal sanctions proper. Admittedly, the ECN+ Directive did not concern sanctions against natural persons. Nevertheless, on grounds of effectiveness, it shifted enforcement strongly towards an administrative rather than a criminal model. As will be discussed later, these systemic challenges contributed, in Estonia, to the decriminalisation of cartel offences for both natural and legal persons.

Second, increasingly detailed and onerous administrative sanctioning regimes set a benchmark against which the dissuasiveness and effectiveness of EU

¹⁴³ Günsberg, P. S. Exploring the case for criminalisation of business cartels in Europe. – in Banach-Gutierrez, J. B., Harding, C. (Eds.). *EU Criminal Law and Policy. Values, Principles and Methods*. London and New York: Routledge 2017, pp 212–232.

criminal-law directives are assessed. Member States remain particularly protective of national criminal law, which makes it difficult to secure agreement on extensive harmonisation of matters such as additional sanctions, penalty levels and related issues. Nevertheless, directives adopted under Art 83 TFEU have undergone a gradual process of expansion. The proliferation of administrative sanctions adds a further argument in favour of this gradual strengthening of criminal-law legislation: if certain sanction levels or additional penalties are accepted in relation to administrative infringements, this may create pressure to regard similar, or even more extensive, sanctions as equally acceptable in relation to criminal offences.

This development can be observed, *inter alia*, in the increase in additional sanctions applicable to both natural and legal persons and in the introduction of minimum-maximum fine levels for legal persons. It reflects a partial convergence between criminal-law directives and administrative sanctioning regimes, at least as regards the range of available measures and severity of fines.

Earlier criminal-law directives contained only limited examples of measures that could be described as additional sanctions, such as disqualification from activities involving children.¹⁴⁴ Later instruments have expanded this catalogue to include fines, exclusion from various types of public funding, temporary or permanent disqualification from commercial activities and positions within legal persons, withdrawal of permits and authorisations, temporary bans on running for elected or public office, publication of decisions and compensation or restoration obligations.¹⁴⁵ Although these additional sanctions and measures are often framed as illustrative lists rather than strict obligations, their expansion is noteworthy because the wider range of available measures has traditionally been presented as one of the advantages of administrative sanctioning. Many of these measures also overlap with those found in EU administrative sanctioning legislation. The publication of sanctioning decisions, often described as “naming and shaming”, is a clear example, since it has long been a prominent feature of financial-market administrative sanctioning regimes and its importance was already emphasised in the 2010 Communication on reinforcing sanctioning regimes in the financial services sector.¹⁴⁶

¹⁴⁴ Art 10 – Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. – OJ L 335, pp 1–14.

¹⁴⁵ Art 5(3) – Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. – OJ L 284, pp 22–30; Art 5(5) – (EU) 2024/1226 (n 73); Art 5(3) of (EU) 2024/1203 (n 51).

¹⁴⁶ On the constitutional concerns regarding this measure, see: Pfaltzer, J. J. W. Naming and Shaming in Financial Market Regulations: A Violation of the Presumption of Innocence? – Utrecht Law Review Vol. 10, Issue 1, 2014, pp 134–148.

The evolution of additional sanctions for legal persons has undergone a similar path of expansion.¹⁴⁷ The more significant development, however, concerns fine levels. Until recently, criminal-law directives did not specify the level of fines to be imposed on legal persons. This stood in marked contrast to the detailed fine thresholds found in administrative sanctioning legislation, as discussed in Publication III. In practice, Member States could therefore transpose criminal-law directives by providing for lower fines than those required under administrative sanctioning regimes.

The issue became particularly visible during the parallel negotiations of MAR and CSMAD, where it led the CLS to conclude that the requirements concerning sanctions against legal persons under CSMAD had to be transposed specifically through criminal law. As argued in Publication III, that interpretation is unpersuasive. Nevertheless, the coexistence of these parallel sanctioning regimes created uncertainty as to whether Member States could satisfy CSMAD merely by complying with MAR, without distinguishing between serious and less serious cases in relation to legal persons, or whether they could transpose CSMAD by providing for lower fines than those required under MAR while relying on the additional deterrent effect of a criminal conviction.

The previously cautious approach to sanctions imposed on legal persons was departed from in the 2024 directives on environmental crime and the violation of Union restrictive measures.¹⁴⁸ Both directives establish minimum requirements for maximum fine levels, including turnover-based thresholds. The highest fixed fine threshold in both directives is 40 000 000 EUR, which exceeds the fixed-amount maximum of 35 000 000 EUR laid down in Art 99(3) of the Artificial Intelligence Act. The hierarchy of sanction severity is not fully consistent as the highest turnover-based threshold in those directives is 5%, whereas Art 99(3) of the Artificial Intelligence Act provides for fines of up to 7% of total worldwide annual turnover. The comparison illustrates that recent criminal-law directives have begun to adopt fine structures and levels comparable to those found in EU administrative sanctioning regimes.

The possibility of imposing non-criminal fines, the expansion of additional sanctions and measures, and the gradual alignment of fine thresholds mean that more recent criminal-law directives increasingly resemble administrative fine regimes.

Third, because both bodies of regulation use similar concepts and terminology, interpretations developed by the ECJ in relation to administrative sanctioning

¹⁴⁷ The wording of Art 7(2)(i) of the Environmental Crime Directive (EU) 2024/1203 (n 51) is noteworthy in this respect. It refers to the [...] *publication of all or part of the judicial decision relating to the criminal offence committed and the penalties or measures imposed* [...]. This wording is at odds with the right of the Member State to sanction legal persons in non-criminal proceedings, where the offence committed by a legal person might not be considered a criminal offence and the decision might be adopted by an administrative authority, not by a judicial body. The same wording is used in Art 7(1)(h) of (EU) 2024/1226 (n 73).

¹⁴⁸ (EU) 2024/1203 (n 51) and (EU) 2024/1226 (n 73).

instruments may subsequently influence, and potentially be transposed to, the application of EU criminal law.

As discussed in Publication I, the Member States' protective approach towards the sovereignty of their criminal justice systems is reflected in a limited EU criminal-law competence based on minimum harmonisation. In addition to Art 4(2) TEU and Art 67(1) TFEU, fundamental aspects of national criminal justice systems are safeguarded by the emergency brake procedures laid down in Arts 82(3) and 83(3) TFEU.

Against that background, it is unsurprising that criminal-law instruments do not extensively harmonise the substantive rules governing the attribution of criminal liability. Although the Union's criminal-law competence is limited to minimum harmonisation, the requirement that sanctions be effective, proportionate and dissuasive may nevertheless influence the interpretation and application of core liability concepts. The criminal-law directives employ numerous concepts which, although recognised across the Member States, inevitably differ in their national content, such as intent, serious negligence, attempt, aiding and abetting, and incitement. The directives also harmonise certain modes of liability of legal persons. Each of these concepts may give rise to questions of interpretation.

Member States' concerns about the possible impact of EU criminal-law legislation on general concepts of criminal law are also reflected in the recitals of the 2024 directive on environmental crime. Recital 27 provides that "the notion of 'serious negligence' should be interpreted in accordance with national law, taking into account relevant case-law of the Court of Justice". Recital 29 states that inciting, aiding and abetting, and attempt should also be punishable. Among the explanations in that recital, however, appears a somewhat anomalous sentence stating that the notion of attempt – but not the notions of incitement, aiding or abetting – is to be interpreted in accordance with national law.

There also appears to be a degree of judicial restraint by national courts in referring questions concerning substantive criminal law to the ECJ, possibly because such references could invite interpretations capable of reshaping core concepts of national criminal law. While the ECJ would, in light of the special role of criminal law, likely afford Member States a considerable margin of discretion in transposing the criminal-law directives,¹⁴⁹ that discretion cannot be unlimited: otherwise, the effectiveness of those directives would be undermined.¹⁵⁰

In light of the greater number of EU instruments providing for administrative sanctions, coupled with the greater willingness of national courts to seek preliminary rulings in cases involving administrative rather than criminal liability, it is more likely that the ECJ will develop its case-law first, and in greater depth, in the field of administrative sanctions. Those judgments may in turn provide a

¹⁴⁹ In the context of a Framework Decision – ECJ C-634/18, *Criminal proceedings against JJ*, ECLI:EU:C:2020:455, pp 41–45, 52.

¹⁵⁰ See also Melander, S. Effectiveness in EU Criminal Law and its Effects on the General Part of Criminal Law. – *New Journal of European Criminal Law* Vol. 5, Issue 3, 2014, pp 274–300.

benchmark for the interpretation of criminal-law instruments and may also influence the drafting of future criminal-law legislation. The implicit features of administrative liability could therefore produce an unwelcome spillover into EU criminal law.

For example, *Deutsche Wohnen* and *Nacionalinis visuomenės sveikatos centras* concerned the notions of intent and negligence, which are also used in EU criminal-law directives. Most of those directives require Member States to criminalise intentional conduct without defining the concept of intent. This absence of definition can be explained by the fact that intent and negligence are core concepts of national criminal law, in respect of which Member States remain particularly protective. As a result, some heterogeneity is likely to exist between national legal systems as regards the lowest forms of intent, in particular whether *dolus eventualis* is treated as intent. From the perspective of *effet utile*, the ECJ, if given the opportunity, may be inclined to interpret intent as an autonomous concept of EU law. If so, the Court would at the very least have to consider its case-law on the definition of intent in other areas of EU law.¹⁵¹

As explained above, the directive on environmental crime also requires Member States to criminalise certain offences when committed with serious negligence. According to Recital 27, “the notion of ‘serious negligence’ should be interpreted in accordance with national law, taking into account relevant case-law of the Court of Justice.” Since the ECJ has addressed negligence in different contexts, it is not immediately clear which line of case-law should be regarded as relevant for this purpose. Teleological and systematic considerations would support reliance on the definition given in *Intertanko*¹⁵² in relation to the directive on ship-source pollution.¹⁵³ It cannot, however, be entirely excluded that the negligence standard developed in the case-law on competition infringements and adopted in *Deutsche Wohnen* could influence the concept of negligence in relation to criminal offences, despite Recital 46 of the ECN+ Directive suggesting that this standard is ill-suited to criminal law.

As regards the liability of legal persons, the models of liability in AMLD IV are identical to those established in EU criminal-law directives. It is therefore, at the very least, highly plausible that the interpretation adopted by the ECJ in the field of administrative sanctions would influence, and may even govern, the interpretation of identical provisions relating to criminal sanctions. To hold otherwise, the ECJ would have to expressly distinguish its earlier case-law on AMLD IV, or depart from it. This means that Member States that transposed the requirements of criminal-law directives by relying on derivative models of liability for legal persons may suddenly find themselves at odds with EU law.

¹⁵¹ ten Voorde, J. M. The Concept of Intent in Rulings of the Court of Justice of the European Union. – European Public Law Vol. 21, No. 3, 2015.

¹⁵² C-308/06 (n 101), p 77.

¹⁵³ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements. – OJ L 255, pp 11–21.

As regards limitation periods, until recently, EU criminal-law directives generally contained no explicit requirements concerning limitation periods. Nevertheless, Member States' discretion in establishing a system of limitation periods was constrained by the principle of effectiveness, as illustrated by *Taricco* and, subsequently, *Kolev*.¹⁵⁴ Although *Taricco* concerned the protection of the Union's financial interests and the application of Art 325 TFEU, its reasoning on the effectiveness of the sanctioning system may apply, *mutatis mutandis*, to areas of crime listed in Art 83 TFEU that do not involve the Union's financial interests. It is possible that case-law on limitation periods for administrative sanctions could influence the assessment of whether national measures transposing criminal-law directives satisfy the requirement of effectiveness.¹⁵⁵

These examples are by no means exhaustive. EU legislation on administrative offences may raise numerous questions concerning the substantive conditions for imposing penalties relevant also for criminal-law directives, including the definition of concepts such as participation and attempt. This interpretative spillover can also concern procedural safeguards and result in an erosion of procedural guarantees in criminal law proper, which will be dealt with separately in the next section.

The spillover concern is exacerbated by the fact that EU legislation on administrative fines lacks overall coherence. It remains sector-specific and, to a considerable extent, *ad hoc* in its development. By contrast, EU substantive criminal law has a comparatively higher degree of internal coherence, since it is treated as a distinct field of law in which draft instruments are generally prepared and negotiated within the same institutional frameworks and by the same specialised preparatory bodies.¹⁵⁶

In conclusion, the rapid expansion of EU punitive administrative sanctioning law may affect EU criminal law in several ways. It may influence the policy choice between criminal and administrative sanctions, set legislative benchmarks for future criminal-law directives, and produce interpretative spillover. That risk is heightened by the fact that EU administrative sanctioning legislation does not reflect the same systemic approach as EU criminal-law legislation. As a result, concepts and standards developed in the fragmented administrative-sanctioning

¹⁵⁴ ECJ C-105/14, *Criminal proceedings against Ivo Taricco and Others*, ECLI:EU:C:2015:555, pp 35–48 and C-612/15, *Criminal proceedings against Nikolay Kolev and Others*, ECLI:EU:C:2018:392, pp 49–76.

¹⁵⁵ It is also possible that where limitation periods have not been harmonised, the effectiveness of national transposing measures would be assessed against the limitation periods that have been harmonised in Art 12 of the PIF Directive (5 years), Art 11 of the Environmental Crimes Directive (5 years and 10 years), Art 11 of the Directive on violation of Union restrictive measures (5 years).

¹⁵⁶ Within the Council, the relevant preparatory body is the Working Party on Judicial Cooperation in Criminal Matters (COPEN), which was previously preceded by the Working Party on Substantive Criminal Law (DROIPEN). Within the European Parliament, such matters are generally dealt with by the Committee on Civil Liberties, Justice and Home Affairs (LIBE).

field may weaken the coherence of EU criminal law and produce effects that go beyond what the Member States contemplated when conferring criminal-law competence on the Union.

5.2. Effects on the level of protection of procedural safeguards

Chapter 4.3 discussed the application of criminal-law guarantees to punitive administrative sanctions and the minimum guarantees required by the ECHR and the Charter. This section addresses a different question: whether the expansion of EU administrative sanctioning law may influence the general level of procedural-rights protection, including in criminal proceedings proper. Since Art 52(3) of the Charter requires corresponding Charter rights to have at least the same meaning and scope as ECHR rights,¹⁵⁷ the interaction between the ECJ and ECtHR is central to that question.

The expansion of EU punitive administrative law is likely to increase the number of cases brought before the ECJ. An important distinction between the ECJ and the ECtHR is that, although both courts are entrusted with safeguarding procedural guarantees, the ECJ must also ensure that its rulings do not undermine the effective implementation of Union policies. Admittedly, the ECtHR cannot entirely disregard the impact of its judgments on the efficiency of national enforcement systems.¹⁵⁸ Nevertheless, given the ECJ's specific institutional role within the EU legal order, considerations of effectiveness are likely to carry greater weight in its case-law. It may therefore be expected that the ECJ will be more inclined than the ECtHR to shape procedural safeguards in light of effectiveness concerns.

The parallel application of broadly comparable procedural guarantees may lead to a particular procedural right being defined first in case-law concerning administrative offences and later relied upon as an interpretative benchmark in the criminal-law context.¹⁵⁹ Given that the procedural guarantees governing administrative liability are typically less stringent than those applicable within the hard-core of criminal law, such interpretative spillover may contribute to a gradual erosion of procedural safeguards in criminal proceedings proper.

Moreover, the ECJ has already delivered, and will continue to deliver, rulings on questions of procedural rights that have not yet been addressed by the ECtHR. The ability to address such issues first may itself shape subsequent Strasbourg case-law by establishing an initial benchmark. This is particularly so because the

¹⁵⁷ Art 6(3) TEU further confirms the role of ECHR rights as general principles of EU law.

¹⁵⁸ The ECtHR has also referred to the need to preserve procedural efficiency when determining the level of protection required in respect of administrative offences – ECtHR 5556/10, *SA-Capital OY v. Finland*, p 78.

¹⁵⁹ E.g. ECJ C-660/21, *Criminal proceedings against K.B. and F.S.*, ECLI:EU:C:2023:498, pp 31 and 41, where, in interpreting a Roadmap Directive, previous case-law on administrative offences was referred to.

ECtHR adopts a deferential position in relation to EU law or, more precisely, in relation to national measures implementing strict obligations arising from EU law.

According to the *Bosphorus* and *Michaud* doctrine, where a Member State merely complies with strict obligations flowing from EU law and enjoys no real discretion, the ECtHR presumes that fundamental rights receive equivalent protection within the EU legal order. That presumption may be rebutted only where the protection is manifestly deficient, and it applies only where the EU supervisory mechanism has been fully brought into play, in particular through the preliminary ruling procedure.¹⁶⁰ This doctrine may also apply where the relevant EU obligation arises from a directive or framework decision, provided that national discretion is effectively excluded, as illustrated by *Bivolaru and Moldovan* in the European Arrest Warrant¹⁶¹ context.¹⁶²

This means that the two European courts are, to an important extent, responsive to each other's positions, and that legislation on punitive administrative sanctions, together with the case-law subsequently developed by the ECJ, may significantly influence the level of procedural guarantees required by the ECtHR as well. That dynamic deepens the risk of gradual erosion of procedural safeguards. Since these judgments concern guarantees common to both non-criminal and criminal punitive proceedings, their effects may spill over into the field of criminal offences proper. This dynamic is illustrated by several examples from the case-law.

The first example shows the ECJ anticipating and later influencing the ECtHR. In *Orkem*, the ECJ curtailed the privilege of legal persons against self-incrimination before the ECtHR had even addressed that issue in relation to natural persons.¹⁶³ The subsequent Strasbourg case-law in *Funke*, *Saunders*, *J.B.* and *Chambaz* appeared to support the view that Art 6 ECHR precludes coercing natural persons to provide information capable of being used to establish their guilt.¹⁶⁴ Those developments did not, however, alter the position of the ECJ, which continued to adhere to the *Orkem* principle notwithstanding that new line of case-law.¹⁶⁵ In *Consob*, the ECJ acknowledged that the privilege against self-

¹⁶⁰ ECtHR 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, pp 149–166 and ECtHR 12323/11, *Michaud v. France*, pp 112–116.

¹⁶¹ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). – OJ L 190, pp 1–20.

¹⁶² ECtHR 40324/16 and 12623/17, *Bivolaru and Moldovan v. France*, p 114.

¹⁶³ C-374/87 (n 142), pp 18–35.

¹⁶⁴ ECtHR 10828/84, *Funke v. France*, p 44; ECtHR 19187/91, *Saunders v. The United Kingdom*, pp 68–76; ECtHR 31827/96, *J.B. v. Switzerland*, pp 63–71; ECtHR 11663/04, *Chambaz v. Switzerland*, pp 50–58.

¹⁶⁵ ECFI T-34/93, *Société Générale v Commission of the European Communities*, ECLI:EU:T:1995:46, pp 71–79; ECFI T-305/94, *Limburgse Vinyl Maatschappij and Others v Commission of the European Communities*, ECLI:EU:T:1999:80, p 429; ECFI T-112/98, *Mannesmannröhren-Werke AG v Commission of the European Communities*, ECLI:EU:T:2001:61, pp 63–67 and ECJ C-301/04, *Commission of the European Communities v SGL Carbon AG*, ECLI:EU:C:2006:432, pp 39–45.

incrimination enjoyed by natural persons is broader than that afforded to legal persons, thereby distinguishing the *Orkem* case-law from situations involving natural persons.¹⁶⁶

For a considerable period, the ECtHR did not express a clear view on whether legal persons should benefit from the privilege against self-incrimination to the same extent as natural persons under the *Funke*, *Saunders*, *J.B.* and *Chambaz* line of authority. Accordingly, it remained uncertain whether the position of the ECJ was fully aligned with the level of protection afforded by the ECtHR.¹⁶⁷ However, in *De Legé* (2022), the ECtHR clarified – or perhaps qualified – its earlier case-law by limiting the scope of the privilege against self-incrimination, even in relation to natural persons, where requests for documents are concerned. According to that judgment, the privilege does not preclude an order, backed by a penalty, to produce pre-existing documents whose existence is already known to the authorities. Although *De Legé* did not concern legal persons or the application of EU law in the field of competition law, the ECJ’s line of case-law beginning with *Orkem* was expressly referred to in the judgment.¹⁶⁸

A related example of Strasbourg drawing on Luxembourg case-law can be found in *Vegotex*. When addressing the retroactive restoration of liability in respect of an offence that had already become time-barred, the ECtHR referred to the case-law of the ECJ permitting retrospective interferences in the field of value added tax, notwithstanding that the ECJ case-law in question did not concern the imposition of a penalty.¹⁶⁹

The second example, also discussed in Publication IV, shows the two courts moving in dialogue. In *Åkerberg Fransson*, which concerned the cumulation of tax surcharges and a criminal penalty, AG Cruz Villalón acknowledged the ECtHR’s case-law under which tax surcharges were regarded as criminal in nature. He nevertheless proposed that the Court should take into account the lack of consensus among the Member States as to the permissibility of combining criminal and administrative sanctions, particularly where the earlier penalty is taken into consideration when the second sanction is imposed, and should therefore not rule out such cumulation.¹⁷⁰ The ECJ adopted a more cautious approach, holding that the cumulation of two penalties, both criminal in substance, in different proceedings for the same offence is precluded.¹⁷¹

Subsequently, in *Grande Stevens*, the ECtHR likewise treated the cumulation of administrative and criminal sanctions for the same conduct as incompatible with the *ne bis in idem* principle. In doing so, it rejected the respondent

¹⁶⁶ C-481/19 (n 135), pp 46 and 48.

¹⁶⁷ Lamberigts (n 77), pp 4–7.

¹⁶⁸ ECtHR 58342/15, *De Legé v. the Netherlands*, pp 40–42 and 60–88.

¹⁶⁹ ECtHR 49812/09, *Vegotex International S.A. v. Belgium* [GC], p 55 mainly referring to ECJ C-376/02, *Stichting “Goed Wonen” v Staatssecretaris van Financiën*, ECLI:EU:C:2005:251, p 33.

¹⁷⁰ C-617/10 (n 128), opinion of AG P. Cruz Villalón, pp 81–101.

¹⁷¹ C-617/10 (n 128), pp 32–37.

Government's argument, based on AG Cruz Villalón's opinion, that such cumulation was required by EU law, referring instead to the actual judgment of the ECJ in *Åkerberg Fransson*.¹⁷² However, when the ECtHR later reversed its earlier case-law on the cumulation of administrative and criminal penalties in *A and B v. Norway*, it conversely relied on AG Cruz Villalón's opinion in support of its more permissive approach.¹⁷³ That more permissive approach to dual-track enforcement was soon echoed in the subsequent case-law of the ECJ.¹⁷⁴

The third example shows the Luxembourg courts extending the logic of the ECtHR, before the ECtHR itself had done so. In the context of the retroactive application of harsher punitive rules, the General Court in *Sasol* had to determine whether the retrospective application of the guidelines on the method of setting fines infringed procedural guarantees, in particular Article 7 ECHR. The General Court answered that question in the negative. In its reasoning, it referred to the ECtHR's case-law in *Jussila* concerning Article 6 ECHR and held that the "scope of that case-law must be extended, by analogy, to Article 7 of the ECHR".¹⁷⁵ What is notable is that the ECtHR itself had not at that time ruled on that question.

Notwithstanding the absence of Strasbourg case-law directly on point, that conclusion is not implausible, given that the ECtHR had already extended the *Jussila* logic to Art 4 of Protocol No. 7. At the same time, the dissenting opinions in *Vegotex* were distinctly critical of the possibility of extending that approach to Art 7 ECHR.¹⁷⁶ *Sasol* therefore illustrates a clear instance of the Luxembourg courts advancing the logic of Strasbourg case-law before the ECtHR itself had expressly done so. Moreover, the General Court's choice of words – expressly referring to an extension of ECtHR case-law in the interpretation of the Convention – is itself striking.

To conclude, the relationship between the Luxembourg and Strasbourg courts may be described as a form of deferential dialogue. Although the ECHR provides the minimum baseline from which EU law may not deviate, the EU legislature and the interpretations given by the ECJ may nevertheless influence where that standard is drawn. The mutual deference shown by the two courts may result in effectiveness concerns that shape procedural safeguards in EU law being carried over into the case-law of the ECtHR. This may contribute to the erosion of procedural guarantees and may also spill over into criminal law proper, unless the less demanding standards applicable in the *Jussila/Schindler* context are expressly confined to punitive administrative sanctions and not transposed to the hard core of criminal law.

¹⁷² ECtHR 18640/10, *Grande Stevens and Others v. Italy*, pp 216 and 229.

¹⁷³ ECtHR 24130/11, *A and B v. Norway*, p 118.

¹⁷⁴ E.g. ECJ C-524/15, *Criminal proceedings against Luca Menci*, ECLI:EU:C:2018:197, pp 40–63.

¹⁷⁵ EGC T-541/08, *Sasol and Others v Commission*, ECLI:EU:T:2014:628, pp 209–215.

¹⁷⁶ ECtHR 49812/09, *Vegotex International S.A. v. Belgium* [GC]. Joint partly dissenting opinion of judges Spano, Kjølbrot, Turković, Yudkivska, Pejchal, Mourou-Vikström and Felici, p 38.

5.3. Effects on national sanctioning and criminal justice systems, illustrated by the Estonian misdemeanour model

5.3.1. General considerations and the relevance of the Estonian example

While some of the concerns identified in the previous sections may be transposed, *mutatis mutandis*, to the national level, EU punitive administrative sanctioning law does not affect all national legal systems in the same way. As discussed in Chapter 3.1, the administrative sanctioning systems of the Member States are far from homogeneous. Some Member States have developed distinct administrative sanctioning systems; others rely on criminal or quasi-criminal procedures for the imposition of punitive fines. The impact of EU legislation therefore depends not only on the content of the EU measure, but also on the nature of the national sanctioning system.

As shown in Chapters 3 and 4, the EU classification of a sanction as administrative in EU law does not necessarily preclude the use of criminal or quasi-criminal national systems, provided that such systems accommodate the explicit and implicit features of EU administrative sanctions. Nevertheless, Member States that rely on such systems may come under more pressure. This is illustrated by the ECN+ Directive, which attempts to limit purely criminal or quasi-criminal enforcement models in the field of competition law. The problem is further complicated by the absence of a common understanding of what makes a system quasi-criminal and what makes a fine “administrative” in the first place.

This section examines the effects of EU punitive administrative sanctioning law from two perspectives: first, the pressure it may place on quasi-criminal enforcement models; and second, the disruption it may cause to the internal coherence of national sanctioning systems.

Estonia is used as an illustrative example because its misdemeanour system shows particularly clearly how EU administrative sanctioning requirements may affect a national system in which punitive enforcement is non-criminal in the strict sense, but remains closely connected to criminal law. The relevance of the Estonian model is reinforced by the fact that it is expressly mentioned both in Recital 151 of the GDPR and in the impact assessment accompanying the proposal for the ECN+ Directive. The section first gives an overview of the Estonian misdemeanour model and then examines the effects of EU punitive administrative sanctioning law on that model and on the internal coherence of the Estonian sanctioning system. Although Estonia is the central example, many of the concerns identified are not unique to the Estonian model. Where appropriate, reference is also made to comparable challenges faced by other Member States.

5.3.2. The Estonian misdemeanour model as a quasi-criminal framework

The Estonian misdemeanour model is the result of the criminal-law reform that culminated in the adoption of the new *Karistusseadustik* (Penal Code) in 2001.¹⁷⁷ Before that reform, Estonian law had retained the Soviet-influenced distinction between criminal and administrative offences.¹⁷⁸ During the pre-reform period, administrative offences and the general provisions on administrative liability were codified in the *Haldusõiguserikkumiste seadustik* (Code of Administrative Offences). Although formally distinct from criminal law, the general part of that code regulated concepts such as intent, negligence, self-defence, necessity and culpability in a manner comparable to criminal law. The quasi-criminal nature of the legislation was also reflected in the fact that detention for up to thirty days could be imposed for certain infringements.

In 2002, the new Penal Code entered into force. Among many other significant reforms, the separate category of administrative offences was abolished. All punishable infringements of law were brought under the general concept of an offence within the Penal Code, which was divided into criminal offences and misdemeanours, with misdemeanours replacing the former administrative offences.¹⁷⁹ The reform was justified, *inter alia*, by the overlap between criminal law and administrative offence concepts and by the absence of a clear substantive boundary between criminal offences and administrative offences.¹⁸⁰

The system introduced by the new Penal Code remains in force today. The general part of the Penal Code applies to both criminal offences and misdemeanours, subject to certain exceptions. For example, misdemeanours are generally punishable also when committed negligently, whereas criminal offences are punishable only when committed intentionally unless liability for negligence is expressly provided. Participation is punishable only in the case of criminal

¹⁷⁷ *Karistusseadustik*. – RT I 2001, 61, 364.

¹⁷⁸ This was not a deliberate post-independence criminal policy choice; rather, after the restoration of independence in 1991, only the most urgent amendments were made to remove elements of Soviet-era law manifestly incompatible with a democratic state governed by the rule of law. More fundamental reforms were postponed to a later stage. – Sootak, J. *Karistusõiguse reform*. – in Sein, K., Ristikivi, M. (eds.). *Õigusriigi taastamine. Eesti seaduste ja institutsioonide reformid 1992–2002*. Tartu: Tartu Ülikooli Kirjastus 2022, pp 117–123.

¹⁷⁹ In a sense, this marked a return to the pre-occupation legal solution. Under the 1929 *Kriminaalseadustik* (RT 1929, 56, 396) – the general concept of an offence encompassed both crimes and contraventions, the latter covering minor infringements. Although contraventions formed part of formal criminal law, certain contraventions could also be punished by an administrative authority under § 959 of the *Kriminaalkohtupidamise seadustik* (RT 1934, 89, 720).

¹⁸⁰ Ernits, M., Pikamäe, P., Samson, E., Sootak, J. *Karistusseadustiku üldosa eelnõu. Eelnõu lähtealused ja põhjendus*. Tallinn, Tartu, Kiel: Juura 1999, p 15; Eesti Vabariigi Riigikogu. *Karistusseadustiku eelnõu 119 SE seletuskiri*, p 3. – <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/5c321fb1-dc00-3e2a-aef2-a88bef6d0f5c/karistusseadustik/> (10.05.2026). See also RKHK 25.04.1997, 3-3-1-12-97, p 5, where the Administrative Law Chamber of the Supreme Court relied on criminal-law concepts of perpetration and participation in an offence.

offences, and an attempt to commit a misdemeanour is punishable only where this is expressly provided by law. To the extent that criminal offences and misdemeanours are governed by the same provisions of the general part of the Penal Code, case-law concerning one category is also relevant to the other.¹⁸¹

Procedurally, however, misdemeanours differ from criminal offences. They are governed by a separate procedural code¹⁸² and are dealt with in simplified proceedings. Unlike in criminal proceedings, the prosecutor has no role in misdemeanour proceedings and, as a rule, an administrative authority has direct sanctioning powers for misdemeanours. Estonian misdemeanours can therefore be described as administrative in an institutional sense.

Their quasi-criminal character lies in their systemic and substantive features. From a systemic perspective, misdemeanours form part of Estonian penal law. Although misdemeanour proceedings are separate from criminal proceedings, they constitute a distinct offence procedure and must be distinguished from supervisory proceedings conducted by administrative authorities. Thus, even where the same administrative authority is competent both to impose a misdemeanour fine and to conduct supervision that may result in non-punitive supervisory measures, it must act under two separate procedural regimes. Moreover, appeals in misdemeanour matters are heard exclusively by courts having jurisdiction in criminal matters. The quasi-criminal character is also reflected in the substantive framework. The substantive conditions of liability are, subject to certain exceptions, the same as those applicable to criminal offences. Misdemeanours may also entail sanctions with a strong criminal-law connotation: detention for up to thirty days may be imposed for certain misdemeanours, and non-payment of a fine may result in its substitution by detention. Finally, misdemeanour convictions are entered in the criminal records database, albeit for a limited period.

5.3.3. The pressure of EU law on the Estonian quasi-criminal model

Estonia's attempt to fit EU administrative fines into its legal order has been lengthy and marked by several changes of direction. The central disagreement was whether such fines could be implemented within the existing misdemeanour system or whether a new system of administrative offences had to be created. The debate reflected a deeper tension between effectiveness and safeguards: supporters of a separate administrative-fine regime considered misdemeanour proceedings insufficiently effective for complex sector-specific infringements, and in some cases even regarded the misdemeanour model as precluded by EU law;

¹⁸¹ See, among numerous examples, RKKK 30.04.2026, 1-24-1748, p 34, where the Supreme Court relied on misdemeanour case-law when assessing the duty of care in relation to a negligent criminal offence; and RKKK 29.05.2020, 1-18-9594, p 18, where it relied on criminal-offence case-law when determining the limited personal scope of a misdemeanour.

¹⁸² Väärteomenetluse seadustik. – RT I 2002, 50, 313 (Estonia) for misdemeanour proceedings and Kriminaalmenetluse seadustik. – RT I 2003, 27, 166 (Estonia) for criminal proceedings.

supporters of the misdemeanour model, by contrast, warned that simplified administrative proceedings could weaken procedural safeguards in cases involving very severe fines.¹⁸³ The Chancellor of Justice has even described this issue as one of the most significant and complex challenges faced by the Estonian legal order in recent times.¹⁸⁴

The pressure was first felt in connection with post-Lisbon financial-services legislation. At that time, the maximum misdemeanour fine was 1200 EUR for natural persons and 32 000 EUR for legal persons, later increased to 400 000 EUR for legal persons in 2015. These levels remained far below the administrative fines required by EU law. Uncertainty as to the meaning of the “administrative” label, combined with the incompatibility of the required fine levels with those laid down in the general part of the Penal Code, initially led to the transposition of EU fine requirements through the non-compliance levy system of administrative law. That solution was conceptually flawed: a non-compliance levy is not punitive in nature, but presupposes a precept requiring the addressee to bring the infringement to an end, and may be imposed only if the addressee fails to comply. It was therefore incapable of punishing past infringements and incompatible with EU administrative fine requirements.

In a 2016 legislative drafting intention, two main options were identified: either to create a new institute of administrative offences or to amend misdemeanour law so as to allow higher fines.¹⁸⁵ In 2018 and again in 2019, the Government proposed amendments to the Penal Code that would have allowed higher misdemeanour fines where required by EU law. The legislative process stalled, however, partly because several supervisory authorities considered misdemeanour proceedings insufficiently effective and favoured the creation of a

¹⁸³ See for example Mäesalu, M., Tuus, M. ECN+ direktiivi Eesti õigusesse ülevõtmine: väärtemenetlus kui võimalik ning otstarbekaim lahendus. – *Juridica* 2023/8, pp 627–643; Tammiku, K., Laurand, A., Kalmet, T. Miks ei saa ECN+ direktiivi Eesti õigusesse üle võtta “täiesti praktiliste võimalustega (lühike vastus on: väärtemenetluse kaudu)? Konkurentsijärelevamenetlus. – *Juridica* 2023/2, pp 120–138; Pikamäe, P. Kuidas modelleerida karistamise õigust ehk veel kord halduskaristustest. – *Juridica* 9/2023, pp 706–720; Koolmeister, I. Krestomaatiline käsitus haldussunnist ja haldustrahvid. – *Juridica* 2020/4, pp 231–241; Kangur, A., Lott, A., Soo, A. Are EU Administrative Penalties Reshaping the Estonian System of Sanctions? – *The European Criminal Law Associations’ Forum* 2020/2; Soo, A., Lott, A., Kangur, A. Võimalused Euroopa Liidu halduskaristuste ülevõtmiseks Eestis. – *Juridica* 2020/4, pp 242–261; Kairjak, M. Karistus- ja haldusõiguse piiride hägustumine Euroopa Liidu finantsturgude õiguse uues sanktsioonisüsteemis. – *Juridica* 2015/5, pp 351–359.

¹⁸⁴ The Chancellor of Justice of the Republic of Estonia. Haldustrahviõiguse kontseptsioonist. 26.05.2020, nr 18-2/200821/2003057, p 1 – <https://www.oiguskantsler.ee/sites/default/files/2024-11/Haldustrahvi%C3%B5iguse%20kontseptsioonist.pdf> (12.05.2026).

¹⁸⁵ Karistusseadustiku ja sellega seonduvalt teiste seaduste muutmise seaduse (EL õiguses sätestatud haldustrahvide kohaldamine Eesti õiguses) väljatöötamiskavatsus – <https://eelnou.d.valitsus.ee/main/mount/docList/d640ee98-511c-4540-9d75-3cc7e3a6aa7f> (12.05.2026).

new administrative fine regime.¹⁸⁶ In order to resolve the impasse, a study on the feasibility of transposing EU administrative fines into Estonian law was commissioned from legal scholars and completed in 2020.¹⁸⁷ Although that study appeared to favour the misdemeanour model, the Government nevertheless proposed a separate administrative fine framework that would apply exclusively to fines mandated by EU law.¹⁸⁸

That proposal would have fragmented the Estonian sanctioning system by creating parallel regimes of misdemeanours and administrative fines, with the latter applying specifically to EU-derived offences. It received considerable criticism. The Chancellor of Justice observed that the explanatory memorandum did not persuasively justify the need for the new legal institute, apart from seeking to avoid disputes with the EU concerning competence and claims that EU law encroached excessively on the sovereignty of the Estonian legal system.¹⁸⁹ The bill was ultimately abandoned, and the Parliament adopted amendments to the Penal Code in 2023, thereby enabling EU administrative fines to be implemented through misdemeanour proceedings.¹⁹⁰

The national transposition of the ECN+ Directive created a second pressure point. The requirements of the Directive were considered even more difficult to reconcile with Estonian misdemeanour law and procedure.¹⁹¹ The initial Estonian draft therefore envisaged the reintroduction of administrative fines into the Estonian legal order only for the infringements covered by the Directive. Although this approach was supported by the competition authority, the creation of a new administrative-fine institute received considerable criticism, especially from the

¹⁸⁶ Karistusseadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seadus (Euroopa Liidu õigusest tulenevad rahatrahvid) 94 SE. – <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/1bfa1944-2de6-449d-a788-887bc84cfd0f/karistusseadustiku-muutmise-ja-sellega-seonduvalt-teiste-seaduste-muutmise-seadus-euroopa-liidu-oigusest-tulenevad-rahatrahvid/> (25.05.2026).

¹⁸⁷ Soo, A., Lott, A., Kangur, A. Euroopa Liidu õiguses sätestatud halduskaristuste kohaldamine Eesti õiguses. Aruanne. Tartu: Tartu Ülikool 2020. – <https://www.justdigi.ee/sites/default/files/documents/2022-04/Euroopa%20Liidu%20%C3%B5iguses%20s%C3%A4testatud%20halduskaristuste%20kohaldamine%20Eesti%20%C3%B5iguses.pdf> (12.05.2026).

¹⁸⁸ Haldustrahvimenetluse seaduse eelnõu. <https://eelnoud.valitsus.ee/main/mount/docList/e0350345-d819-4adc-bc56-37594d5f815f> (12.05.2026).

¹⁸⁹ The Chancellor of Justice of the Republic of Estonia. Arvamus haldustrahvimenetluse seaduse eelnõu kohta. 02.11.2020 nr 18-2/200821/2005884 – <https://www.oiguskantsler.ee/sites/default/files/2024-11/Arvamus%20haldustrahvimenetluse%20seaduse%20eeln%C3%B5u%20kohta.pdf> (12.05.2026).

¹⁹⁰ Karistusseadustiku muutmise ja sellega seonduvalt teiste seaduste muutmise seadus (Euroopa Liidu õigusest tulenevad rahatrahvid). – RT I, 11.03.2023, 1 (Estonia).

¹⁹¹ Tammiku, *et al* (n 183), pp 120–138.

perspective of procedural safeguards.¹⁹² Ultimately, the bill retained the misdemeanour model, but introduced significant carve-outs.¹⁹³

Although Estonia transposed the ECN+ Directive through the misdemeanour model, it is noteworthy that the Estonian misdemeanour system was identified, together with other quasi-criminal systems, as insufficient in the impact assessment accompanying the proposal for the ECN+ Directive.¹⁹⁴ During transposition, concerns were raised that the new legislation would confer excessively broad powers on the competition authority, particularly in light of the reduced scope of certain procedural safeguards, such as the privilege against self-incrimination. As a response, the Estonian legislation requires the competition authority to apply to a court for the imposition of a fine.¹⁹⁵ The legislature therefore appears to have treated this model as falling within the notion of “non-criminal judicial proceedings” under Art 13(1) of the Directive. That interpretation may be questioned, however. The EU legislature appears to have intended to move away from criminal or quasi-criminal enforcement models of this kind, and the Estonian model remains difficult to separate from such systems: the competent court also has jurisdiction in criminal matters, and misdemeanour law remains formally part of the Estonian penal-law framework.

The challenges faced by quasi-criminal systems are not unique to Estonia. In 2016, the Slovenian legislature introduced a separate administrative-sanctioning framework for violations in specific regulated fields, including financial services and competition law. That category was used to transpose the ECN+ Directive. It interacted with the previous dichotomy between criminal offences and misdemeanours (*prekrški*). Slovenian legal scholarship has raised concerns about the nature of the new proceedings, the distinction between administrative offences and misdemeanours, and the disruption of the existing legal system.¹⁹⁶ Moreover,

¹⁹² E.g. Mäesalu and Tuus (n 183), pp 627–643.

¹⁹³ Konkurentsiseaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu. – <https://eelroud.valitsus.ee/main/mount/docList/64caba97-5d18-4218-b596-21bbd1cf306f> (12.05.2026).

¹⁹⁴ European Commission. Commission Staff Working Document. Impact assessment accompanying the document Proposal for a directive of the European Parliament and of the council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Brussels 22.03.2017, SWD(2017) 114 final. – <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017SC0114> (10.11.2025), p 22.

¹⁹⁵ As a rule, Estonian misdemeanour law allows the competent administrative authority to impose a fine directly. In certain cases, however, the legislature requires the authority to apply to a court. This applies, inter alia, where detention is sought as a sanction.

¹⁹⁶ Tičar, B., Primec, A. Administrative Violations or Minor Offences: Where is the Boundary Between them? Administrativne kršitve ali prekrški: kje je meja med njimi? – Revija Poslovodno računovodstvo. Journal for Management Accounting 1/2019, pp 11–25 and Erbežnik, A. Prikaz sustava slovenskog prekršajnog prava i odluke Ustavnog suda Republike Slovenije koje su znatno utjecale na njegov razvoj. – Hrvatski ljetopis za kaznene znanosti i praksu Vol. 29 No. 1, 2022, pp 92–93.

in Denmark¹⁹⁷ and Ireland¹⁹⁸, where fines were traditionally imposed by courts in criminal proceedings, the transposition of the ECN+ Directive resulted in a fundamental shift through the introduction of civil or administrative fines.

The pressure created by the EU administrative fine regimes on the Estonian model is not merely technical. At the same time, there is nothing to suggest that the current Estonian model is constitutionally required. When the Constitution of the Republic of Estonia¹⁹⁹ was adopted in 1992, the Estonian legal system still distinguished between criminal and administrative offences.²⁰⁰ Accordingly, the establishment of a new administrative offence regime would not, as such, be constitutionally precluded. The difficulty lies instead in the systemic disruption that such a reform would entail.

From the perspective of criminal law, the division of offences into criminal offences and misdemeanours may be described as a fundamental structural feature of Estonian penal law and, at least in principle, as the kind of national choice that Arts 82(3) and 83(3) TFEU are designed to protect in the field of EU criminal law harmonisation, as argued in Publication I. This policy choice reflects the understanding that the difference between criminal offences and misdemeanours is not necessarily qualitative, but quantitative. The punishment of both criminal offences and misdemeanours is justified by the protection of the legal order against attacks on legally protected interests.²⁰¹ The difference lies primarily in considerations of *ultima ratio*.

The codification of the State's punitive functions within penal law has also significantly shaped Estonian administrative law. Administrative procedure and state supervision are not generally concerned with punishment and the regulatory framework is therefore not designed to accommodate punitive functions or criminal-head safeguards. The legislature has explicitly emphasised that state supervision is preventive, not punitive, in nature. Accordingly, administrative authorities must distinguish between offence proceedings and supervisory proceedings, and the appropriate measure must depend on its objective purpose: punishment or prevention.²⁰² Supervisory measures may not be used solely for punitive purposes, for example to collect evidence for misdemeanour

¹⁹⁷ Lovforslag nr. L 116. Forslag til Lov om ændring af konkurrenceloven1) og straffeloven (Indførelse af mulighed for civile bøder, strukturelle påbud, interviews, kontrolundersøgelser i private hjem m.v.). Bemærkninger til lovforslaget, pp 15–16 – https://www.ft.dk/samling/20201/lovforslag/L116/som_fremsat.htm (11.04.2026).

¹⁹⁸ Competition (Amendment) Act 2022. – No. 12 of 2022, p. 3.

¹⁹⁹ Eesti Vabariigi põhiseadus. – RT 1992, 26, 349 (Estonia).

²⁰⁰ That distinction also influenced the wording of the Constitution itself: § 20(3) permits deprivation of liberty, inter alia, to prevent a “criminal or administrative offence”.

²⁰¹ Sootak, J. Karistusõiguse revisjon kuriteo-, väärteo- ja haldusõiguse piirimail. – Juridica IV/2013, pp 245–246.

²⁰² Korrakaitseadus. – RT I, 22.03.2011, 4 (Estonia), see § 1(4) in particular. For more on the preventive model, see Ernits, M. Preventiivhaldus kui tulevikumudel. – Riigikogu Toimetised nr 17, 2008, pp 156–165 and Laaring, M. Eesti korrakaitseõigus ohuennetusõigusena. Tartu: Tartu Ülikooli kirjastus 2015, *passim*, but in particular, pp 86–91.

proceedings.²⁰³ The introduction of punitive fines imposed in administrative proceedings would therefore affect not only Estonian penal law, but also the existing structure of Estonian administrative law.

The Estonian model, and in particular the formal inclusion of misdemeanours within penal law, has raised the question whether EU law on administrative sanctions allows such a system to be used at all, or whether it must be regarded as criminal for the purposes of EU law. If the latter view were accepted, it could be argued that the Estonian model may be used only where EU law expressly allows implementation through criminal law, as is the case in several instruments in the financial-services sector, or where a specific misdemeanour exception is provided.

The rationale that the Estonian system does not “provide for” administrative fines also underlay the GDPR exception for Estonia, which, as argued in Publication III, was most likely the result of overly cautious negotiations by Estonia. However, the question which systems do not “provide for” administrative fines is less straightforward than it may first appear. Recital 151 GDPR refers only to Estonia and Denmark, yet it has also been disputed whether the Slovenian system provides for “administrative” fines within the meaning of the GDPR.²⁰⁴ Ireland provides another example: decisions imposing administrative fines issued by the competent authority must be confirmed by a court, which corresponds to the procedure envisaged for Member States whose legal systems do not provide for administrative fines.²⁰⁵

Although the GDPR exception may have ensured that the Estonian model was suitable for imposing fines under that Regulation, it may also give rise to an *a contrario* argument in relation to other EU instruments that contain no such exception. On the basis of the preceding analysis in this dissertation, however, the Estonian model should not be precluded as such, provided that the required fine levels are met and the role of the administrative authority is aligned with the requirements of the relevant EU legal act. Particular elements of the model may still raise problems from the perspective of effectiveness, but the mere fact that misdemeanours form part of Estonian penal law does not automatically make the system incompatible with EU administrative sanctioning legislation.

²⁰³ See, for example Kärner, M. Mõned korrakaitseadusega kaasnenud muudatused kriminaalmenetluses: järelevalve- ja süüteomenetluse piiritlemisprobleem. – *Juridica* 2014/6, pp 474–476 and Eljas, C., Kirsimägi, S., Kroonberg, R. Järelevalve- ja süüteomenetluse piiritlemine. Tallinn: Sisekaitseakadeemia 2018, pp 7–16.

²⁰⁴ VSRS Sodba IV Ips 2/2021, pp 12–17. See also ECJ C-383/23, *Criminal proceedings against ILVA A/S*, ECLI:EU:C:2025:84, opinion of AG L. Medina, p 64 and footnote 44.

²⁰⁵ Data Protection Act 2018. – No. 7 of 2018. According to the explanatory memorandum, this requirement was introduced to ensure that decisions imposing administrative fines have due regard to fair procedures and constitutional justice. – An Bille um Chosaint Sonraí, 2018 / Data Protection Bill 2018. Meabhrán Mínitheach agus Airgeadais Athbhreithnithe / Revised Explanatory and Financial Memorandum, p 17. – <https://data.oireachtas.ie/ie/oireachtas/bill/2018/10/eng/memo/dataprotectionmemo2018-revised.pdf> (12.04.2026).

This section has illustrated the significant strain that EU legislation on administrative fines may exert on a national sanctioning system built around a quasi-criminal model. The remodelling of such systems does not merely entail technical changes to fine levels or procedure. It may affect fundamental features of penal law and may also alter the structure of administrative law, particularly where administrative law has not traditionally served a punitive function. The following section examines the internal incoherence that may arise when such requirements are transposed into a system that otherwise seeks to preserve a coherent sanctioning framework.

5.3.4. Disruption of the internal coherence of the Estonian sanctioning system

Even where EU administrative-fine requirements can be accommodated within the existing structures of a national sanctioning system, their implementation may disrupt the internal coherence of that system. This is particularly so where the national system is built around a general part that seeks to provide common rules for punitive liability. EU punitive administrative sanctioning law is fragmented, sector-specific and not always uniform. Moreover, some of its requirements arise only implicitly from the case-law of the ECJ. The Estonian developments illustrate the resulting difficulty particularly clearly.

The 2023 amendments adopted to facilitate the imposition of EU administrative fines introduced several important changes to the Estonian sanctioning system. The amendments created an exception to the maximum fine levels for misdemeanours laid down in the general part of the Penal Code, which had previously been 1200 EUR for natural persons and 400 000 EUR for legal persons. The original bill sought to preserve the existing logic of the general part by summarising the relevant EU law fine requirements in the Penal Code itself. That approach was abandoned. Each new EU legal act exceeding the previous fine limits, or introducing a new basis for calculating fines, would have required another amendment to the general part. The legislature therefore opted for an exception clause allowing sector-specific legislation to provide for fines on a different basis and in a different amount from the general rule, taking into account the particular nature of the regulated field.

This solution preserved the misdemeanour model, but at the price of internal imbalance. Since the reform was primarily aimed at transposing EU law, the fine limits were raised almost exclusively for misdemeanours where this was required by EU legislation. Comparable infringements of purely national law may therefore be treated significantly less severely than infringements in EU-harmonised fields. This creates a kind of mirror image of the principle of equivalence: instead of national law treating EU-law infringements less favourably, EU-driven fine levels may place EU-based misdemeanours in a significantly harsher position than comparable domestic infringements. Over time, this imbalance will undoubtedly create pressure for a broader increase in fine levels across Estonian misdemeanour law.

The introduction of exceptionally high misdemeanour fines also disturbed the traditional gradation between misdemeanours and criminal offences. In order to preserve a logical hierarchy between the two categories, the previous 16 000 000 EUR maximum criminal fine for legal persons was increased to 40 000 000 EUR taking into account the highest fixed fine levels found in EU administrative-fine legislation.²⁰⁶ Even so, where EU legislation provides for fines calculated on the basis of profits gained, losses avoided or a percentage of turnover, the final misdemeanour fine may still exceed the maximum criminal fine applicable to legal persons. For natural persons, the imbalance is even clearer. Infringements in the financial-services sector that had previously been punishable by a misdemeanour fine of 1200 EUR are now punishable by fines of 5 000 000 EUR or more. By contrast, criminal fines for natural persons were not increased and remain limited to 500 daily rates. As a result, a natural person may in some cases face a substantially higher fine for a misdemeanour than for a criminal offence. Further adjustments were needed to accommodate these fine levels. Given the exceptionally high level of the new fines, their substitution by detention in the event of non-payment was excluded.

Limitation periods were also extended. Whereas the previous legislation provided for limitation periods of either two or three years for misdemeanours, the limitation period for these misdemeanours was extended to five years, thereby aligning it with the limitation period applicable to second-degree criminal offences. This disturbed the previously more coherent gradation of limitation periods: two or three years for misdemeanours, five years for second-degree criminal offences, ten years for first-degree criminal offences, and no limitation period for certain exceptionally serious criminal offences.

At a late stage of the legislative process, the reform also introduced a significant change to the grounds of liability of legal persons. In order to facilitate the more effective imposition of fines, the Estonian system moved towards a model of organisational liability. Because this amendment was made in the Penal Code, the new rules apply generally to both criminal offences and misdemeanours, irrespective of whether the offence derives from EU law.

The transposition of the ECN+ Directive created further disruption. Although Estonia ultimately retained the misdemeanour model, the Directive required so many exceptions from the general part of the Penal Code that the legislature abandoned the earlier piecemeal approach to allowing a limited number of exceptions from the general part. A general clause was introduced allowing the general part to be derogated from in misdemeanour matters where the specific nature of the regulated field so requires. According to the explanatory memorandum, this was necessary because EU administrative sanctioning law continues to expand and increasingly contains requirements that cannot easily be

²⁰⁶ It appears the EU legislator adopted the same approach with the latest criminal-law directives (see Chapter 3.3.1).

accommodated within the general part of the Penal Code.²⁰⁷ The result is significant: the general part no longer functions as a fully uniform framework for misdemeanour liability. The amendments to the Competition Act made use of this possibility by introducing exceptions concerning, for example, the liability of legal persons and mitigating circumstances. They also introduced derogations from the general procedural rules governing misdemeanour proceedings.²⁰⁸

The Supreme Court has previously emphasised that, unless the general part of the Penal Code itself permits derogation, sector-specific legislation may not displace its rules. The general part is therefore not a mere *lex generalis* that can automatically be overridden by a *lex specialis*. Rather, where sector-specific legislation regulates fine levels, liability requirements or other concepts governed by the general part in a manner inconsistent with the Penal Code, the general part must apply unless the deviation is expressly authorised by the general part.²⁰⁹

The erosion of the role of the general part is a fundamental change. A broad derogation clause allowing sector-specific legislation to depart from all the general rules of misdemeanour liability risks transforming the general part from a coherent framework of common principles into a residual regime, applicable only where no special exception has been created. It also weakens an important form of legislative self-discipline. Under the previous model, any ambition to depart from the general part required amendment of the general part itself. Such amendments necessarily attracted the attention of penal-law scholars, institutional actors and those responsible for safeguarding the coherence and principles of penal law. Under the new model, by contrast, deviations may be introduced through sector-specific legislation without comparable scrutiny. They may even arise incidentally, where the legislature regulates a specific field without fully appreciating the effect of the provision on the substantive conditions of liability governed by the Penal Code. Under the previous approach, such incidental displacement could not occur, since sector-specific legislation could not override the general part unless the general part itself authorised such derogation. The result is that a previously coherent misdemeanour-law system becomes vulnerable to the same patchwork logic that characterises the development of EU administrative sanctioning law. In addition to creating a systemic imbalance, such

²⁰⁷ Riigikogu menetluses oleva konkurentsiseaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu (609 SE) muutmise ettepanekud eelnõu algataja (Justiits- ja Digiministeeriumi) poolt, p 13. – <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/0c6b9566-1692-4776-a828-f9e54c559737/> (13.05.2026).

²⁰⁸ Konkurentsiseaduse muutmise ja sellega seonduvalt teiste seaduste muutmise seadus. – RT I, 05.07.2025, 1.

²⁰⁹ The Supreme Court has also had to address this issue in connection with EU administrative fines. Before the general fine limits in the Penal Code were amended, the legislature introduced higher fine limits required by EU law for certain sector-specific misdemeanours. The Supreme Court held that those higher limits could not be applied, since the General Part of the Penal Code did not, at that time, allow such fine levels. – RKKK 28.11.2024, 4-24-37/31, pp 11–15.

unsystematic development is difficult to reconcile with legal certainty, especially in a field concerned with punitive liability.

Another important consequence of the ECN+ transposition was the decriminalisation of conduct corresponding to Art 101 TFEU in the Penal Code, both for natural and legal persons. As regards legal persons, decriminalisation followed from the requirements of the Directive. Although Art 13(4) of the ECN+ Directive allows, in principle, for the coexistence of criminal and administrative sanctions, the Estonian system does not recognise a dual-track model in which the same conduct is pursued simultaneously as both a criminal offence and a misdemeanour. Retaining criminal liability for natural persons only would also have created significant systemic tensions, because the liability of legal and natural persons is closely connected in Estonian penal law. It would have resulted in parallel proceedings under different procedural regimes for the same conduct, including difficult questions concerning self-incrimination: a legal person may be required to hand over incriminating evidence, whereas a natural person enjoys stronger protection against self-incrimination.

From the perspective of systemic coherence, and given the seriousness of cartel infringements, the decriminalisation of conduct falling within Art 101 TFEU would not otherwise be easily justified by the principle of *ultima ratio*, which generally guides Estonian criminal policy. Decriminalisation can also weaken the deterrence of the sanctioning regime. Without criminal punishment, at least for natural persons, cartel infringements risk being perceived less as serious wrongdoing and more as a regulatory or business risk borne by the undertaking. The outcome is paradoxical from the perspective of effectiveness as well: while the EU preference for administrative sanctioning was justified by efficiency, the removal of cartel conduct from criminal law also meant that certain investigative measures previously available in criminal proceedings, including the interception of communications, could no longer be used.

The judgments in *Deutsche Wohnen* and *Nacionalinīs visuomenės sveikatos centras* also illustrate the uncertainty that a directly applicable sanctioning regime can create. As explained in Publication V, after *Deutsche Wohnen*, the Estonian Supreme Court acknowledged that, alongside the general rules on the liability of legal persons in the Penal Code, the GDPR entails its own liability scheme. This further illustrates how EU administrative fine regimes may require sector-specific departures from the general framework of national penal law.

In principle, a directly applicable administrative liability regime may establish a parallel set of rules as regards the substantive conditions of liability. This is particularly problematic where the content of those rules becomes clear only through subsequent interpretation by the ECJ. The Court's interpretation of the GDPR as containing directly applicable and exhaustive rules on liability appears to have taken several Member States by surprise. For example, the German Federal Data Protection Act provides for the *mutatis mutandis* application of the law on administrative offences to GDPR infringements, even though that body of

law itself lays down substantive conditions of liability.²¹⁰ Similarly, Austrian courts have taken the view that the general legislation on administrative penal liability applies to GDPR infringements.²¹¹

The Estonian Supreme Court, while recognising that the earlier framework governing the liability of legal persons did not comply with the requirements set out in *Deutsche Wohnen*, held that subsequent legislative amendments had remedied that deficiency and that the new attribution model now conforms to those requirements.²¹² However, given the direct applicability of the GDPR, national legislation should arguably not be applied even where it conforms to the requirements of the Regulation. Under the *Variola* principle, the duplication in national law of requirements already laid down in a directly applicable regulation may be regarded as obscuring the direct applicability of EU law.²¹³ This also raises questions about the legislation of Member States such as Estonia²¹⁴ and Portugal²¹⁵, which have reproduced the GDPR infringements and sanctions in national law.²¹⁶

These explicit and implicit carve-outs undermine the coherence of the national system. From the perspective of EU law, the central concern is effective implementation of EU legislation; the internal balance of national sanctioning law is not necessarily the Union's primary concern. From the perspective of the national legal order, however, every exception to the general framework requires justification. If one regulatory field receives special treatment because of EU administrative sanctioning requirements, it becomes necessary to explain why comparable fields remain subject to ordinary rules.

This can cause spillover effects into purely domestic law. The cost of maintaining a coherent sanctioning system may lead Member States to align their non-criminal punitive law with EU administrative sanctioning models even outside the scope of EU law, for example as regards attribution of liability to legal persons. According to the *Dzodzi* principle, this means that national courts might have to refer questions of interpretation of EU law to the ECJ even in purely

²¹⁰ Article 41 – Bundesdatenschutzgesetz. – BGBl. I S. 2097 (Germany).

²¹¹ VwGH Ro 2021/04/0024, p 5.2.

²¹² RKKK 20.06.2024, 4-23-742, pp 19–21.

²¹³ ECJ C-34/73, *Fratelli Variola S.p.A. v Amministrazione italiana delle Finanze*, ECLI:EU:C:1973:101, pp 9–11.

²¹⁴ §§ 62–71¹ – Isikuandmete kaitse seadus. – RT I, 04.01.2019, 11.

²¹⁵ Arts 37 and 38 of Lei n.º 58/2019 de 8 de agosto. Assegura a execução, na ordem jurídica nacional, do Regulamento (UE) 2016/679 do Parlamento e do Conselho, de 27 de abril de 2016, relativo à proteção das pessoas singulares no que diz respeito ao tratamento de dados pessoais e à livre circulação desses dados. – Diário da República n.º 151/2019, Série I de 2019-08-08.

²¹⁶ Latvian legislation on administrative sanctions, by contrast, contains a carve-out for directly applicable EU law within its administrative liability system. – Art 2(5) of Administratīvās atbildības likums. – 2018/225.1 (Latvia).

domestic situations.²¹⁷ In this way, EU administrative-sanctioning law may indirectly shape national law beyond its formal field of application.

Estonia's challenges are not unique. In Germany, it has been observed that regulatory offences are no longer limited to bagatelle delinquency and petty crime. Instead, the practical benefits of administrative sanctioning are increasingly being exploited in complex areas of law where ever higher fines are imposed, partly as a result of the influence of EU law.²¹⁸ It has also been argued that such fines may, in substance, be equivalent to systems of true corporate criminal liability, but without the corresponding procedural guarantees.²¹⁹

Coherence nevertheless has practical value. Different rules on liability and procedure may sometimes be justified by the specific features of a sector, but excessive fragmentation creates legal uncertainty and may reduce effectiveness. This is especially true in smaller Member States, where it is unrealistic to establish specialised courts or judges for every EU-regulated field. If judges are required to impose punitive sanctions under different legislative frameworks governing broadly similar issues, inconsistency and unpredictability may follow. A coherent sanctioning system therefore serves not only legal certainty, but also the predictability and effectiveness of enforcement.

In conclusion, the sporadic development of EU administrative sanctioning law, combined with implicit requirements emerging from the case-law of the ECJ, makes it difficult to maintain a coherent national sanctioning system and a justifiable balance between criminal and administrative offences or misdemeanours. Conversely, efforts to preserve coherence may lead Member States to align national sanctioning law, even in areas not governed by EU law, with the characteristics of EU administrative sanctioning legislation. Thus, despite its seemingly sectoral and ancillary character, EU administrative sanctioning competence can produce far-reaching systemic and structural consequences for national penal and administrative law beyond the specific regulatory fields in which the Union has legislated.

²¹⁷ ECJ C-297/88 and C-197/89, *Massam Dzodzi v Belgian State*, ECLI:EU:C:1990:360, pp 35–42; more recently C-634/18 (n 149), pp 41–42.

²¹⁸ Sieber (n 4), p 308.

²¹⁹ Brodowski, D. Quasi-criminal Enforcement Mechanisms in Germany: Past and Present. – in Franssen and Harding (n 20), p 53.

6. CONSTITUTIONAL LIMITS AND FUTURE DEVELOPMENT OF EU PUNITIVE ADMINISTRATIVE SANCTIONING LAW

6.1. Competence-based limits

6.1.1. The legitimacy of punitive administrative harmonisation after Lisbon

The continuing expansion of administrative sanctions prompts scrutiny of the boundaries of EU competence. As shown in Chapter 2.3, harmonisation of administrative sanctions pursues the same goal as the so-called functional criminalisation under Art 83(2) TFEU: ensuring the effective implementation of Union policy through punitive enforcement. Yet, unlike criminal sanctions governed by Art 83 TFEU, administrative sanctions are not governed by a specific Treaty legal basis.

Criminal law in the strict sense has traditionally been considered a core area of national sovereignty.²²⁰ Before the judgments in *Environmental Crime* and *Ship-Source Pollution*, it was widely assumed that the transfer of such an elementary component of national sovereignty required an explicit Treaty provision.²²¹ After the Treaty of Lisbon, Title V TFEU carefully delineates the Union's substantive criminal-law competence with due regard to the special character of criminal law. First, Art 67(1) TFEU emphasises respect for the different legal systems and traditions of the Member States as a core principle in the construction of an area of freedom, security and justice. Second, Art 83 TFEU permits only minimum harmonisation, and only in limited areas of particularly serious crime with a cross-border dimension or where criminal-law approximation is essential to ensure the effective implementation of a Union policy. Third, fundamental aspects of national criminal justice systems are protected by the emergency brake clause in Art 83(3) TFEU. The sensitivity of criminal law is further illustrated by the fact that, even with those safeguards in place, Ireland, Denmark and the United Kingdom negotiated opt-out arrangements.

As a matter of legislative practice, it is clear that the EU legislature has not treated Art 83 TFEU as exhausting the Union's punitive competence. This is demonstrated by the extensive post-Lisbon legislation requiring administrative fines and other non-criminal sanctions on legal bases outside Title V TFEU. Nor can the view that Art 83 TFEU exhausts the Union's punitive competence be upheld as a matter of law. As discussed in Chapter 2, the ECJ had already made clear, decades before Lisbon, that Member States are under an obligation to penalise infringements of Community law and that the Community itself may lay down sanctioning rules going beyond mere reparation. Furthermore, in *Environmental Crime* and *Ship-Source Pollution*, the Court accepted that the Community

²²⁰ For a thorough overview with further references see Kettunen (n 1), pp 47–53.

²²¹ Satzger, H. *Die Europäisierung des Strafrechts*. Cologne: Carl Heymanns Verlag 2001, p 135.

could, in certain circumstances, require criminal-law enforcement even in the absence of a specific Treaty basis devoted to criminal law.

It follows that competence to approximate rules in a given field normally entails an ancillary competence to require their effective enforcement, including through non-criminal sanctions. Sanctions for non-compliance form an integral part of a regulatory framework: without enforceable consequences, regulatory obligations lack practical effectiveness. Where the Union has competence to regulate a particular field, it must therefore also be able, in principle, to require punitive enforcement of the rules adopted in that field. This may be described as an ancillary punitive competence aimed at ensuring regulatory compliance.

The more difficult question concerns the depth and limits of that ancillary punitive competence. While the Union may require sanctions as an ancillary means of ensuring regulatory compliance, it does not follow that sectoral legal bases permit unlimited harmonisation of punitive liability, procedure, institutional models and sanction levels. It is doubtful whether, when conferring criminal-law and other regulatory competences on the Union, the Member States could reasonably have contemplated the emergence of punitive administrative sanctions as a distinct and increasingly autonomous field of EU punitive law, with exceptionally high fine levels and significant effects on EU criminal law and national sanctioning systems. These developments have brought punitive administrative sanctions closer to criminal sanctions in function and severity and produced significant systemic effects. They therefore require closer examination of the competence-based limits governing the harmonisation of such sanctions.

The following section examines the competence-based limits of EU punitive administrative sanctioning in two steps. First, it considers whether, and under what circumstances, Art 83 TFEU operates as a constitutional boundary to punitive administrative harmonisation. Where administrative sanctions closely resemble criminal sanctions in function and severity, the Union legislature must be able to justify why the measure falls outside Art 83 TFEU and why the safeguards attached to EU criminal-law harmonisation are not engaged. Second, the section examines whether, given the ancillary nature of EU competence in this field, the principles of conferral, subsidiarity and proportionality impose additional limits on the depth of EU harmonisation.

6.1.2. Art 83 TFEU as a boundary to punitive administrative harmonisation

6.1.2.1. Art 83 TFEU as the *lex specialis* for substantive criminal law

This section argues that Art 83 TFEU should be regarded as the *lex specialis* for defining criminal offences and determining the type and level of sanctions. This is relevant for the present research because the constitutional concern raised by punitive administrative sanctions depends, to a considerable extent, on the special position of criminal law in the post-Lisbon Treaty framework. If criminal offences in the strict sense could freely be harmonised on legal bases other than

Art 83 TFEU, the argument that Art 83 TFEU provides special safeguards against the circumvention of criminal-law competence would be considerably weakened.

The possibility of harmonising criminal law on legal bases other than Article 83 TFEU has been examined extensively in academic literature. Articles 33, 79, 114, 325(4) and 352 TFEU have received particular attention in this debate, although it has also been suggested that Art 67(3) could be the legal basis for harmonising criminal law regarding racism and xenophobia.²²² The most plausible alternative legal bases appear to be Arts 325(4) and 352 TFEU.²²³ Although some authors do not exclude the possibility that criminal law may be harmonised on a legal basis other than Art 83 TFEU,²²⁴ such an approach would sit uneasily with the rationale and structure of Art 83 TFEU. It would make little sense to include in the Treaty a detailed framework for approximating criminal offences and sanctions, while at the same time accepting that criminal-law rules may be approximated on other legal bases without any of those safeguards. This dissertation sides with the views of Kettunen,²²⁵ Wieczorek²²⁶ and Peers²²⁷ in treating Art 83 TFEU as the *lex specialis* for the harmonisation of criminal offences and sanctions, while not excluding a limited residual competence to require criminal-law enforcement under the principles of equivalence and effectiveness.

²²² Hecker, B. *Europäisches Strafrecht*. 5. Auflage. Heidelberg: Springer 2015, p 374; Turner and Asp have considered Art 67(3) to be too general in contrast to Art 83 TFEU: Turner, J. I. *The Expressive Dimension of EU Criminal Law*. – *The American Journal of Comparative Law* Vol. 60, No. 2, Spring 2012, p 575 and Asp, P. *The Substantive Criminal-law competence of the EU*. Stockholm: Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet 2012, p 92. Peers has not ruled out resorting to the residual powers clause if certain additional requirements are met – Peers, S. *The legal grounds for inclusive EU legislation against bias violence and hatred*. ILGA-Europe, 2011 – <https://www.ilga-europe.org/files/uploads/2022/04/legal-grounds-inclusive-EU-legislationagainst-bias-violence-hatred.pdf> (14.03.2026), pp 20–21. The position that Art 83 TFEU is the sole legal basis for criminalisation of hate speech is supported by the 2021 communication to extend the list of EU crimes in Art 83(1) TFEU to hate speech and hate crime along with the supporting study: COM/2021/777 final (n 39) and European Commission. *Study to support the preparation of the European Commission's initiative to extend the list of EU crimes in Article 83 of the Treaty on the Functioning of the EU to hate speech and hate crime*. Final Report. – <https://op.europa.eu/et/publication-detail/-/publication/f866de4e-57de-11ec-91ac-01aa75ed71a1/language-en> (14.03.2026), pp 28–29.

²²³ For an overview of different positions, see Miettinen, S. *Criminal Competence and the choice of legal basis: space in the margins?* – *European Criminal Law Review* Vol. 5, Issue 2, 2015, p 226.

²²⁴ E.g. Mitsilegas, V. *EU Criminal-law competence after Lisbon: From Securitised to Functional Criminalisation*. – in Arcarazo, D. A., Murphy, C. C. (eds). *EU Security and Justice Law After Lisbon and Stockholm*. Oxford: Hart Publishing 2014, pp 118–121 and Satzger, H. *International and European Criminal Law*. Second Edition. Munich: C. H. Beck 2018, pp 94–95.

²²⁵ Kettunen (n 1), pp 205–229.

²²⁶ Wieczorek, I. *The Legitimacy of EU Criminal Law*. Oxford: Hart Publishing 2020, pp 107–113.

²²⁷ Peers, S. *EU Justice and Home Affairs Law*. Volume II: *EU Criminal Law, Policing, and Civil Law*. Fourth Edition. Oxford: Oxford University Press 2016, pp 170–171.

To date, the Commission's proposal for the PIF Directive provides the clearest example of an alternative legal basis actually being put to the test. The proposal was based on Article 325(4) TFEU.²²⁸ The CLS opposed that choice and considered Art 83(2) TFEU to be the sole appropriate legal basis for such functional criminalisation.²²⁹ Ultimately, the Art 325(4) TFEU legal basis was rejected, and the Council and the Parliament adopted Art 83(2) TFEU as the legal basis for the PIF Directive.²³⁰

Klip examines whether, after Lisbon, a residual criminal-law competence survived from the judgments in *Environmental Crime* and *Ship-Source Pollution*. He challenges the view that Art 83 TFEU is exhaustive, arguing that such an interpretation would imply that the Treaty of Lisbon reduced the criminal-law competence previously recognised in sectoral policy areas – a conclusion he considers unlikely. In his view, any such residual competence would not extend to the type or level of criminal sanctions. It would be limited to requiring the criminalisation of certain conduct, while leaving the determination of sanctions to the discretion of the Member States, thereby preserving the fundamental characteristics of their criminal justice systems.²³¹

On the one hand, it should not be excluded that Art 83 TFEU was also intended to curtail the Community's prior competence in criminal matters. Art 83(2) TFEU clearly reflects the approach adopted by the ECJ in *Environmental Crime* and *Ship-Source Pollution*. It broadens that competence by allowing the Union also to harmonise the type and level of criminal sanctions, while at the same time subjecting such legislation to the conditions and safeguards laid down in Art 83 TFEU.

On the other hand, the principles of equivalence and effectiveness, stemming from *Amsterdam Bulb*²³² and *Greek Maize*²³³, require Member States to ensure the punitive enforcement of EU law regardless of whether EU legislation contains explicit sanctioning provisions. In *Greek Maize*, the Court emphasised the principle of equivalence – infringements of Community law must be penalised under

²²⁸ European Commission. Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law. COM/2012/0363 final – 2012/0193 (COD). – <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52012PC0363> (10.11.2025).

²²⁹ Council of the European Union. Opinion of the Legal Service. Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (12683/12 DROIPEN 107 JAI 535 GAF 15 FIN 547 CADREFIN 349 CODEC 1924) – Legal basis. 15309/12, 22.10.2012. – <https://data.consilium.europa.eu/doc/document/ST-15309-2012-INIT/en/pdf> (10.11.2025).

²³⁰ (EU) 2017/1371 (n 71).

²³¹ Klip. *European Criminal Law*. 4th edition (n 50), pp 234–238. When discussing the concept of “criminal” regarding the competence of the Union, Asp argues that a requirement for a Member State to introduce rules that according to their own law would be considered criminal in character, presupposes criminal-law competence. – Asp (n 222), p 67.

²³² C-50/76 (n 29), p 33.

²³³ C-68/88 (n 30), pp 23–24.

conditions analogous to those applicable to comparable infringements of national law – but also made clear that sanctions must in any event be effective, proportionate and dissuasive. The latter requirement means that, irrespective of how comparable national infringements are treated, the principle of effectiveness may still require the criminal-law enforcement of EU rules. The ECJ has confirmed this understanding in its post-Lisbon case-law concerning serious cases of VAT evasion.²³⁴

Against that background, it appears coherent to accept that EU legislation adopted on a legal basis other than Art 83 TFEU may, in certain circumstances, point towards the need for criminal law enforcement, while leaving the determination of the type and level of sanctions to national law. This corresponds to the residual competence suggested by Klip. However, an express obligation to criminalise conduct outside Art 83 TFEU, even without approximating the type or level of sanctions, would remain constitutionally sensitive and would likely meet resistance from Member States, since it could blur the *lex specialis* function of Art 83 TFEU and risk circumventing the safeguards attached to EU criminal-law harmonisation.

Regulation 269/2014 provides a useful example of this grey area. Its original sanctioning clause in Art 15(1) merely required Member States to lay down effective, proportionate and dissuasive penalties for infringements of the Regulation.²³⁵ Following the full-scale war of aggression launched by the Russian Federation, Art 15(1) was amended in 2022 by adding the words “including as appropriate criminal penalties.”²³⁶ The phrase is a clear example of constructive ambiguity. It stops short of mandating criminalisation, but moves the sanctioning clause into a grey area between an ordinary obligation to provide effective penalties and an implicit expectation that criminal-law enforcement is required. This ambiguity was particularly significant because, at the same time, the violation of Union restrictive measures was being added to the areas of crime listed in

²³⁴ “Although the Member States have freedom to choose the applicable penalties – which may take the form of administrative penalties, criminal penalties or a combination of the two – in order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected [...], criminal penalties may nevertheless be essential to combat certain serious cases of VAT evasion in an effective and dissuasive manner.” – ECJ C-105/14 (n 154), p 39; later repeated in ECJ C-42/17, *Criminal proceedings against M.A.S. and M.B.*, ECLI:EU:C:2017:936, p 34; C-524/15 (n 174), p 20; ECJ C-310/16, *Criminal proceedings against Petar Dzivev and Others*, ECLI:EU:C:2019:30, p 27.

²³⁵ Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. – OJ L 78, pp 6–15.

²³⁶ Council Regulation (EU) 2022/880 of 3 June 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. – OJ L 153, pp 75–76.

Art 83(1) TFEU,²³⁷ followed by the adoption of the 2024 criminal-law directive on restrictive measures.²³⁸

The Commission also acknowledged the significance of that wording. In its communication on adding the violation of Union restrictive measures to Art 83(1) TFEU, it stated that Arts 29 TEU and 215 TFEU provide a legal basis for requiring Member States to lay down penalties, including criminal penalties, but not for defining the type and level of criminal penalties.²³⁹ This suggests that, in the Commission's view, those legal bases may point towards criminal-law enforcement, while leaving the concrete sanctioning framework to national law. The General Court later adopted a narrower reading of Art 15(1), holding that it did not require criminal sanctions but left Member States free to choose between civil, administrative and criminal penalties.²⁴⁰

To conclude, Art 83 TFEU should be regarded as the *lex specialis* governing the harmonisation of criminal offences and sanctions. Alternative legal bases may, at most, require Member States to ensure the effective enforcement of EU law, which may in exceptional circumstances point towards the need for criminal law enforcement under the principles of equivalence and effectiveness. Such legal bases may not, however, be used to determine the type or level of criminal sanctions, or circumvent the safeguards embedded in Art 83 TFEU. Consequently, while EU legislation adopted on other legal bases may occasionally point towards the use of criminal law, Art 83 TFEU remains the constitutionally designated framework for criminal-law approximation after Lisbon.

6.1.2.2. The need for a competence-specific concept of “criminal”

If Art 83 TFEU is the *lex specialis* for the harmonisation of substantive criminal law, the Union's punitive competence outside Art 83 TFEU must remain confined to non-criminal sanctions. The question is therefore what makes an offence or sanction “criminal” for the purposes of EU competence. The concept of “criminal” may carry different meanings depending on the context in which it is used and the objectives pursued by the rules of which it is part.²⁴¹ The ECJ has not taken a clear position on the meaning of criminal offences and sanctions referred to in Art 83 TFEU. Earlier case-law on sanctioning competences tended to exclude the penal character of sanctions on the basis of a rather formalistic

²³⁷ (EU) 2022/2332 (n 39), pp 18–21.

²³⁸ (EU) 2024/1226 (n 73).

²³⁹ European Commission. Communication from the Commission to the European Parliament and the Council. Towards a Directive on criminal penalties for the violation of Union restrictive measures, Brussels, 25.05.2022, COM(2022) 249 final. – <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0249&qid=1771572894259> (14.03.2026).

²⁴⁰ EGC T-644/22, *Gennady Nikolayevich Timchenko and Elena Petrovna Timchenko v Council of the European Union*, ECLI:EU:T:2024:621, pp 67–85 and EGC T-635/22, *Mikhail Fridman and Others v Council of the European Union*, ECLI:EU:T:2024:620, pp 86–97.

²⁴¹ E.g. ECJ C-137/23, *X v Staatssecretaris van Financiën*, ECLI:EU:C:2025:179, p 52.

approach.²⁴² That case-law cannot, however, be directly transposed to the interpretation of Art 83 TFEU.

The underlying problem can be illustrated by a deliberately exaggerated example. Imagine a directive adopted on the basis of Art 114 TFEU that labelled shoplifting an “administrative” offence but required “administrative detention” of up to three years. The underlying offence is clearly treated as a criminal offence in the majority, if not all, of the Member States. Furthermore, deprivation of liberty remains the paradigmatic criminal sanction, and legislative labelling could not alter the constitutional character of such a measure. Although the example is deliberately extreme, it illustrates the underlying difficulty also raised by very severe administrative fines: criminal law is not defined by labels alone, but by the nature, severity and social meaning of the punitive response.

The hypothetical example shows why a strictly formal approach cannot be accepted. Under such an approach, an offence or sanction would qualify as criminal within the meaning of Art 83 TFEU only where the EU legislature expressly designated it as such.²⁴³ Although the ECJ appeared to favour a formal definition of criminal offences when interpreting the scope of Art 87 TFEU,²⁴⁴ allowing the safeguards of Art 83 TFEU to be circumvented through legislative mislabelling would deprive the protection afforded to national criminal justice systems of its practical effect. Thus, the definition of “criminal” must be a more substantive appraisal.

Conversely, a very broad substantive approach, such as the *Engel/Bonda* criteria, cannot be accepted either. Were that approach to be transposed directly to the question of EU competence, virtually the entire punitive competence of the EU would fall within Art 83 TFEU. That conclusion would be difficult to reconcile with the extensive body of post-Lisbon EU legislation harmonising punitive administrative sanctions outside Art 83 TFEU, and with the apparent acceptance of that practice by the Member States, the European Parliament and

²⁴² For an analytical overview see Klip. *European Criminal Law*. 4th edition (n 50), pp 238–243. For an overview of the opinions of AGs, see Rosanò, A. *The Concept of Criminal Law in the Opinions of the Advocates General: Justification of Punitive Powers and Human Rights*. – *New Journal of European Criminal Law* Vol. 7, Issue 1, 2016, pp 59–75.

²⁴³ Such an approach, although in the context of the Treaty of Amsterdam, has been proposed – Musil, A. *Umfang und Grenzen europäischer Rechtssetzungsbefugnisse im Bereich des Strafrechts nach dem Vertrag von Amsterdam*. – *Neue Zeitschrift für Strafrecht* 2000 Heft 2, p 68. Szwarc notes that a formal approach to the definition of criminal offence was commonly accepted before the Treaty of Lisbon, since it allowed for a dividing line to be drawn between the competences of the Communities in the first pillar concerning administrative sanctions and the cooperation of the Member States under the third pillar concerning crimes and criminal sanctions. Therefore, the criminal systems of Member States defined the scope of criminal law. – Szwarc, M. *The pillars of the European Union still exist?* *European Court of Justice (Grand Chamber), Judgment of 6 May 2014, Case C-43/12, Commission v European Parliament and Council*. – *European Constitutional Law Review* Volume 11, Issue 2, 2015, pp 362–363.

²⁴⁴ ECJ C-43/12, *European Commission v European Parliament and Council of the European Union*, ECLI:EU:C:2014:298, p 47. See also Szwarc (n 243), pp 362–363.

the Commission.²⁴⁵ Furthermore, there is nothing to suggest that the safeguards of Art 83 TFEU were meant to cover such a wide array of punitive measures and thus effectively curtail the Union's competence to legislate whenever a measure requires criminal-head guarantees. That further solidifies the understanding that the concept of "criminal" can carry different meanings based on its context.²⁴⁶

It also appears that the concept of a "criminal offence" or "criminal sanction" under Art 83 TFEU does not necessarily coincide with the concept of "criminal proceedings" used in instruments adopted under Art 82 TFEU. As discussed in Chapter 3.3.2, the scope of some Art 82 TFEU instruments appears to reflect a limited acceptance of the *Engel/Bonda* approach, subject to express carve-outs. Depending on the instrument, their scope may extend beyond proceedings formally classified as criminal under national law and include, for example, proceedings in which administrative authorities impose sanctions that may subsequently be appealed before a court having jurisdiction in criminal matters.

Although the present chapter focuses on the substantive criminal-law competence of the Union under Art 83 TFEU, this possible divergence between Arts 82 and 83 TFEU is not without difficulty. If certain administrative fine proceedings may fall within the scope of procedural-rights instruments adopted under Art 82 TFEU, questions may arise as to the appropriate legal basis for EU rules regulating procedural aspects of such proceedings. At the same time, the practical significance of this point should not be overstated. Art 82 TFEU instruments appear to cover administrative fine proceedings only where those proceedings may lead to judicial proceedings before a court having jurisdiction in criminal matters. EU legislation on administrative sanctions does not generally require such a model. On the contrary, Art 13(1) of the ECN+ Directive points in the opposite direction by requiring administrative fines to be available either without judicial involvement or in "non-criminal" judicial proceedings.

The concept of "criminal" for the purposes of Art 83 TFEU must therefore be narrower than the *Engel/Bonda* concept used in the context of criminal-head guarantees, but more substantive than a purely formal classification. With those

²⁴⁵ The Commission, when applying for the annulment of Directive 2011/82/EU, acknowledged the *Engel* criteria but argued for a stricter notion of *criminal* in the context of adopting Art 87 TFEU as the legal basis. – C-43/12 (n 244), p 18.

²⁴⁶ In this connection, according to Recital 11 of the Data Protection Law Enforcement Directive, a criminal offence within the meaning of that Directive should be an autonomous concept of Union law as interpreted by the Court of Justice of the European Union. The Commission has been of the opinion that the criminal nature of an offence should be assessed by the *Bonda* criteria. – Communication from the Commission to the European Parliament and the Council. First report on application and functioning of the Data Protection Law Enforcement Directive (EU) 2016/680 ('LED'). Brussels, 25.7.2022, COM(2022) 364 final, p 11 and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. – OJ L 119, pp 89–131.

extremes excluded, two further questions remain. The first concerns the relevance of national classifications and the reach of the Art 83(3) TFEU emergency brake where EU legislation affects national criminal-justice systems through formally non-criminal sanctions. The second concerns the criteria for an autonomous substantive approach to the concept of “criminal” under Art 83 TFEU.

6.1.2.3. National classifications and the limited reach of the emergency brake

The next question is whether national classifications of offences and sanctions may affect the scope of Art 83 TFEU, and whether the emergency brake in Art 83(3) TFEU can protect national criminal-justice systems where EU legislation operates through formally non-criminal sanctions. This issue is particularly relevant in respect of Member States that seek to transpose EU law on administrative fines through proceedings forming part of their criminal justice system, such as the Estonian example discussed in Chapter 5.3. At first glance, the answer appears straightforward. Although the ECJ, when interpreting Art 83 TFEU, is likely to take into account the legal traditions of the Member States,²⁴⁷ the notions of a “criminal offence” and a “criminal sanction” must ultimately be regarded as autonomous concepts of EU law. Consequently, Art 83 TFEU cannot be regarded as the applicable legal basis for harmonisation merely because a given offence or sanction is classified as criminal in one or more Member States.

Framed in these terms, the issue appears largely unproblematic. However, Art 83 TFEU itself contains a mechanism designed to safeguard national specificities in the field of criminal justice: the emergency brake procedure laid down in Art 83(3) TFEU. As argued in Publication I, the notion of fundamental aspects of a Member State’s criminal justice system is broad and, to a significant extent, left to the Member State itself to define. The protection afforded by Art 83(3) TFEU is not limited to core principles of criminal law, but may extend to structural or regulatory choices which, although not necessarily principles of law, are essential to the functioning or coherence of the national system.

From this perspective, a policy choice to treat all punitive sanctions as matters of criminal law may itself be regarded as a fundamental aspect of a Member State’s criminal justice system. On that view, the harmonisation of punitive administrative fines would not merely affect a peripheral regulatory field, but could impinge directly upon the structure of the national criminal justice system. Equally, even in legal systems that distinguish formally between criminal and administrative offences, the criteria governing that distinction may

²⁴⁷ Satzger considers that the demarcation of European criminal law should be based, among other factors, on a comparative evaluation of domestic criminal-law systems. – Satzger. *International and European Criminal Law*. Second Edition (n 224), pp 61–62.

themselves form part of the fundamental features of the national criminal justice system.²⁴⁸

This gives rise to a more nuanced issue: whether Art 83(3) TFEU can protect national criminal justice systems where an EU measure concerns offences and sanctions that a Member State treats as part of its criminal or quasi-criminal system, but which would not, according to autonomous EU concepts, be regarded as “criminal”. A related question is whether the emergency brake mechanism may be triggered in such circumstances.²⁴⁹

The issue becomes more complex where EU law does not merely affect national criminal justice systems incidentally, but seeks to limit the use of criminal law. As demonstrated in Chapter 3, EU legislation on administrative fines may, in certain circumstances, aim to limit criminal or quasi-criminal enforcement.²⁵⁰ The difficulty is compounded by the fact that the favouring of administrative enforcement is not always motivated by a concern to shield individuals from punitive overreach. On the contrary, the rationale can be one of effectiveness: to facilitate a broader and more efficient use of punitive powers. This raises the question whether an exclusion of national criminal-law enforcement may itself trigger the application of Art 83 TFEU. In practical terms, and in light of the Estonian example analysed in Chapter 5.3, could Estonia, or another Member State in a comparable position, argue that Art 83(2) TFEU should be used as the legal basis for EU punitive administrative harmonisation merely because it treats the underlying offence as part of criminal law, or because such harmonisation would affect fundamental aspects of its criminal justice system?

The answer is likely negative. Since *Casati*,²⁵¹ the ECJ has repeatedly recognised that EU law may impose limits on national criminal law, including where national criminal law disproportionately restricts the freedoms guaranteed by EU law or impairs the effectiveness of Union law.²⁵² Although the special

²⁴⁸ In German legal literature, it has been argued that the delimitation between criminal and administrative offences may constitute a fundamental aspect of the national criminal justice system – Hadding, M. *Strafrechtliche Aspekte des Unionsrechts. Eine kritisch-systematische Analyse*. Berlin: Logos Verlag Berlin 2017, pp 169–171.

²⁴⁹ Satzger, for example, has argued that if the Treaties were interpreted as conferring criminal-law competences outside Art 83 TFEU, notably under Arts 33 and 325(4) TFEU, the emergency brake mechanism should apply notwithstanding the fact that the measure is not formally based on Art 83 TFEU – Satzger, *International and European Criminal Law*. Second Edition (n 224), pp 95–96. For an analysis of Satzger’s position see Asp (n 222), pp 155–156.

²⁵⁰ Such effects have also been acknowledged by Wieczorek and Mitsilegas. – Wieczorek (n 226), p 47; Mitsilegas, V. *From Overcriminalisation to Decriminalisation. The Many Faces of Effectiveness in European Criminal Law*. – *New Journal of European Criminal Law* Vol. 5, Issue 3, 2014, pp 422–423 and Mitsilegas, *EU Criminal Law*. Second Edition (n 40), pp 63–65.

²⁵¹ ECJ C-203/80, *Criminal proceedings against Guerrino Casati*, ECLI:EU:C:1981:261, p 27.

²⁵² Klip, *European Criminal Law*. 4th edition (n 50), pp 224–225 and Mitsilegas, V. *Decriminalisation in the Law of the European Union*. – in Ouwerkerk, J., Altena, J., Öberg, J., Miettinen, S. (eds.). *The Future of EU Criminal Justice Policy and Practice. Legal and Criminological Perspectives*. Leiden, Boston: Brill Nijhoff 2019, pp 106–120.

protection afforded to national criminal justice systems means that national classifications of offences and sanctions cannot be disregarded, that special status does not automatically bring a measure within Art 83 TFEU where the offence or sanction is not criminal according to the autonomous EU-law concept applicable for competence purposes.²⁵³ In other words, the safeguards of Art 83 TFEU are not “always there” whenever EU law affects national criminal law. They apply only where the conditions for the application of Art 83 TFEU are met. Similarly, the safeguards associated with Title V TFEU, including the opt-out regimes, do not appear to determine the centre-of-gravity analysis applied by the ECJ when identifying the proper legal basis of a Union act.²⁵⁴ Although the legal traditions and classifications of the Member States should be considered in interpreting the autonomous concept of “criminal”, a single Member State or a small minority of Member States cannot determine the scope of the Union’s punitive competence.

It follows that incidental effects on the criminal justice systems of Member States that classify EU administrative offences, or the specific offence in question, as part of criminal law would not determine the applicable legal basis or justify applying the emergency brake mechanism by analogy. Thus, the safeguards afforded to national criminal justice systems by Title V TFEU, and especially by Art 83(3) TFEU, fall short of protecting those systems against all effects of EU harmonisation relating to offences that are not regarded as criminal under autonomous EU concepts. The compromise reflected in Art 83 TFEU provides important, but not absolute, protection for national criminal justice systems. Where EU punitive administrative sanctioning legislation affects national criminal or quasi-criminal systems without itself amounting to criminal-law harmonisation, the relevant limits must be sought primarily in conferral, subsidiarity, proportionality and respect for national legal traditions, rather than in the emergency brake mechanism itself.

6.1.2.4. The autonomous narrow substantive approach and severe administrative fines

As regards the meaning of “criminal offences and sanctions” for the purposes of EU competence under Art 83 TFEU, academic literature broadly supports an autonomous narrow substantive approach, even if the precise criteria differ. Asp²⁵⁵,

²⁵³ Asp has articulated arguments on both sides of the special character of criminal law – Asp (n 222), pp 73–78. On why criminal law is special, see also Wieczorek (n 226), pp 22–43.

²⁵⁴ ECJ C-656/11, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2014:97, p 49.

²⁵⁵ Asp (n 222), pp 61–69.

Öberg²⁵⁶, Hecker²⁵⁷, Satzger²⁵⁸, Wieczorek²⁵⁹ and Ambos²⁶⁰ all distinguish, in different ways, between criminal law in the strict sense and other punitive sanctions. The recurring elements in these accounts are the severity of the sanction, the possibility of deprivation of liberty, the judicial character of the procedure, the social or moral stigma attached to the sanction and the broader legal consequences of a finding of liability. Taken together, these elements support an autonomous narrow substantive approach. That approach is narrower than the *Engel/Bonda* test used for criminal-head guarantees, but it prevents the EU legislature from determining the scope of Art 83 TFEU solely through formal labelling. Formal criminal classification is therefore not decisive, but neither is it without significance: even where an administrative fine exceeds a criminal fine in financial terms, the fact of being convicted as a criminal offender may carry consequences that cannot be reduced to the pecuniary value of the sanction.

These criteria are useful, but they are not always clear-cut in their application. Social stigma, for example, is not exclusively attached to criminal sanctions. Public perception does not necessarily follow the formal distinction between criminal and administrative offences; factors such as the severity of the sanction, the nature of the proceedings and their publicity may be more influential.²⁶¹ The degree of stigma attached to a sanction is therefore highly context-dependent. For example, an administrative fine for petty shoplifting or work-related sexual harassment, although procedurally comparable to an administrative fine for exceeding the speed limit, may carry significantly greater stigma. In certain cases, the stigma attached to such infringements may even exceed that associated with some criminal offences, particularly negligent offences.

Moreover, several characteristics traditionally associated with criminal sanctions also appear in EU legislation prescribing administrative sanctions. These include, first, long-term legal or practical consequences similar to those following a criminal conviction, such as disqualification as a stand-alone administrative sanction, possible disqualification through fit-and-proper assessments, publication of sanctioning decisions, and the use of previous infringements as aggravating factors. Secondly, EU administrative sanctioning regimes occasionally refer to fault-based responsibility, including intent and negligence. Thirdly, such regimes may involve severe sanctions, including high fines, confiscation or the disgorgement of profits.

The difficulty of drawing the line between criminal and non-criminal enforcement is illustrated by attempts to create highly detailed non-criminal sanctioning regimes in fields where many Member States traditionally rely, at least in part, on

²⁵⁶ Öberg, J. The definition of criminal sanctions in the EU. – *European Criminal Law Review* Vol. 3, Issue 3, 2013, pp 275–279, 293–294, 297–298.

²⁵⁷ Hecker (n 222), pp 149–151.

²⁵⁸ Satzger. *International and European Criminal Law*. Second Edition (n 224), pp 61–62.

²⁵⁹ Wieczorek (n 226), p 27.

²⁶⁰ Ambos, K. *European Criminal Law*. Cambridge: Cambridge University Press 2018, p 18.

²⁶¹ Brodowski (n 219), pp 57 and 63.

criminal law. A clear example is the 2013 proposal for a directive on customs infringements, based on Art 33 TFEU.²⁶² Although the proposal left the formal nature of the sanctions to the Member States, it contained several criminal-law-like elements, including differentiation between strict liability, negligence and intent, approximation of fine levels, criteria for imposing sanctions, relevance of previous infringements and limitation periods. Since many Member States dealt with customs infringements under criminal law, Kettunen argued that the proposal would have significantly affected national criminal justice systems and should therefore have been based on Art 83 TFEU.²⁶³ Ultimately, such detailed quasi-criminal legislation did not find favour with the Member States.²⁶⁴ This does not necessarily show that the sanctioning regime ought to have been considered “criminal” for the purposes of Art 83 TFEU. It does, however, identify the elements that created the tension and demonstrates that detailed EU regulation of non-criminal punitive liability can come close to the border of criminal-law harmonisation.

Although the line is not always clear, the foregoing analysis supports the view that the concept of “criminal” for the purposes of Art 83 TFEU requires a narrow substantive assessment. That assessment entails considering the sanction in its legal and social context and determining whether it bears the hallmarks of criminal punishment in the stricter constitutional sense.

Against that background, the central question is whether punitive administrative fines prescribed by EU law may, despite their formal classification, cross the boundary into criminal-law harmonisation for the purposes of Art 83 TFEU. This question would acquire immediate practical relevance if the validity of provisions on severe administrative fines were challenged on the ground of an incorrect legal basis. Although the substantive approach is narrower than the *Engel/Bonda* case-law, the nature of the offence and of the proceedings, as well

²⁶² European Commission. Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions. Brussels 13.12.2013, COM/2013/0884 final – 2013/0432 (COD) – <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013PC0884> (15.03.2026).

²⁶³ Kettunen (n 1), p 216.

²⁶⁴ A similar development can be seen in the 2023 proposal for the Union Customs Code, which contained extensive provisions on non-criminal fines, while again leaving Member States free to prescribe criminal sanctions. The Council General Approach adopted in 2025 removed the detailed sanctioning regime and retained only general obligations to provide for effective, proportionate and dissuasive sanctions: European Commission. Proposal for a Regulation of the European Parliament and of the Council establishing the Union Customs Code and the European Union Customs Authority, and repealing Regulation (EU) No 952/2013. Brussels, 17.05.2023, COM(2023) 258 final, 2023/0156(COD) – <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0258> (19.03.2026); General Secretariat of the Council. Proposal for a Regulation of the European Parliament and of the Council establishing the Union Customs Code and the European Union Customs Authority, and repealing Regulation (EU) No 952/2013 – Partial mandate for negotiations with the European Parliament. Brussels 24.06.2025, 10462/25, 2023/0156 (COD). – <https://data.consilium.europa.eu/doc/document/ST-10462-2025-INIT/en/pdf> (19.03.2026).

as the severity of the sanction, should still be of central importance in this assessment. The legislative context of Art 83 TFEU, however, suggests that the threshold for qualifying an offence or sanction as criminal for competence purposes is relatively high. The ECJ is likely to attach significant weight to the formal classification of the sanction and to the need to preserve effective non-criminal punitive enforcement outside Title V TFEU.

The nature of the offence and of the proceedings in which the sanction is imposed are factors that also capture the degree of social stigma or moral blame associated with the sanction. In assessing the nature of the offence, account should be taken of the legal traditions of the Member States, including whether the offence in question, or comparable conduct, is generally treated as falling within criminal law. The earlier example of shoplifting may again be used to illustrate the point. If a directive required Member States to provide for a punitive administrative fine for shoplifting, an argument could be made that such a sanction is criminal in nature, given that theft has traditionally been treated as a criminal offence across the legal systems of the Member States. This assessment is not always clear-cut, especially for offences whose criminal connotation is less obvious. The MAR/CSMAD regime provides an illustrative example, since the same underlying conduct may be treated, depending on its seriousness, as either an administrative or a criminal offence.

The nature of the offence may also be relevant where EU law effectively requires decriminalisation on grounds of administrative efficiency. As argued earlier in this chapter, where EU legislation on administrative sanctions precludes the use of criminal penalties and thereby requires certain Member States to decriminalise the conduct in question, that effect may in principle be regarded as an incidental consequence of EU law on national criminal law and would not, as such, trigger Art 83 TFEU or its safeguards. The position may, however, be different where the conduct concerned is traditionally regarded as criminal and would, on that basis, qualify as criminal under the autonomous narrow substantive approach. Returning to the shoplifting example, if an EU act were to preclude Member States, on grounds of efficiency, from treating shoplifting as a criminal offence and instead require a punitive administrative response, it could be argued that such a measure would require recourse to Art 83(2) TFEU and, accordingly, would engage the emergency brake mechanism laid down in Art 83(3) TFEU.²⁶⁵

The nature of the proceedings would require a cumulative assessment of the substantive and procedural conditions governing the imposition of the sanction. The more closely those conditions resemble the attribution of criminal responsibility, the stronger the case for classifying the sanction as criminal. Relevant indicators might include substantive standards of fault comparable to those applied in criminal proceedings, the availability of intrusive investigative measures, and the central role of judicial authorities in the proceedings.

²⁶⁵ Öberg has argued against Art 83(2) TFEU allowing for decriminalisation – Öberg, J. *Limits to EU Powers. A Case Study of EU Regulatory Criminal Law*. Oxford: Hart Publishing 2017, p 113.

These criteria do not suggest that the EU legislation on punitive administrative fines examined in this dissertation would have to be regarded as “criminal” for the purposes of Art 83 TFEU. The more difficult issue, however, concerns the type and severity of sanctions, especially exceptionally severe fines imposed on natural persons.

As regards the type and severity of sanctions, punitive deprivation of liberty, as the paradigmatic criminal sanction, must be regarded as criminal. The same would apply to a pecuniary sanction that may, in the event of non-payment, be converted into deprivation of liberty.

Other sanctions or measures that have a criminal-administrative overlap, such as confiscation, should not be considered criminal as such. Where linked to a criminal offence, confiscation has been treated as a criminal sanction capable of being harmonised under Art 83(1) and (2) TFEU.²⁶⁶ Even though numerous instruments on administrative sanctions also require confiscation²⁶⁷ or the disgorgement of profits²⁶⁸, the CJEU has thus far distinguished between criminal and non-criminal confiscation primarily by reference to whether confiscation is linked to the commission of a criminal offence.²⁶⁹

A fine formally classified as non-criminal should not, viewed in isolation, be regarded as criminal merely because it is punitive or deterrent in nature. However, it remains questionable whether a fine may become criminal on account of its severity.²⁷⁰ It is noteworthy that criminal-law directives do not prescribe criminal fines as the principal form of punishment for natural persons. Admittedly, some instruments require Member States to provide for effective, proportionate and dissuasive criminal penalties without harmonising the type or level of those

²⁶⁶ Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation. – OJ L 2024/1260; Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. – OJ L 127, pp 39–50.

²⁶⁷ E.g. Art 15(2) of Regulation (EU) 2024/590 of the European Parliament and of the Council of 7 February 2024 on substances that deplete the ozone layer, and repealing Regulation (EC) No 1005/2009. – OJ L 2024/590; Art 31(3)(b) of Regulation (EU) 2024/573 of the European Parliament and of the Council of 7 February 2024 on fluorinated greenhouse gases, amending Directive (EU) 2019/1937 and repealing Regulation (EU) No 517/2014. – OJ L 2024/573; Art 88(5) of Regulation (EU) 2017/746 of the European Parliament and of the Council of 5 April 2017 on in vitro diagnostic medical devices and repealing Directive 98/79/EC and Commission Decision 2010/227/EU. – OJ L 117, pp 176–332.

²⁶⁸ E.g. Art 30(2) MAR and Art 42(2)(b) of Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014. – OJ L 171, pp 1–65.

²⁶⁹ T-644/22 (n 240), p 79 and ECJ C-234/18, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo v BP and Others*, ECLI:EU:C:2020:221, pp 60–61.

²⁷⁰ Öberg and Ambos have answered this question in the negative. – Öberg. The definition of criminal sanctions (n 256), pp 275–279, 293–294, 297–298 and Ambos (n 260), p 18.

penalties, with the result that such obligations could, in principle, be implemented by means of criminal fines. Nevertheless, the fact that the EU legislature has not itself envisaged criminal fines as the principal sanction for natural persons may indicate that such sanctions are generally not considered sufficiently dissuasive in relation to the seriousness of the offences concerned.²⁷¹

The position is more difficult, however, where EU law prescribes extraordinarily high fine levels for natural persons. For example, under Arts 53(4), 55(1) and 55(3)(b) AMLD VI,²⁷² even a relatively junior bank employee who negligently breaches customer due diligence requirements relating to the prevention of money laundering may face a pecuniary sanction of up to 5 000 000 EUR. The same is true, in principle, under the GDPR, where a controller liable to an administrative fine of up to 20 000 000 EUR may also be a natural person.

Such sanctions may significantly exceed the maximum levels of criminal fines provided for in many Member States. Admittedly, criminal fines are accompanied by features not ordinarily attached to administrative fines, such as social stigma and, in some systems, the possibility of conversion into imprisonment. However, where an administrative fine reaches a level such that it is, at least in principle, capable of bringing about the economic ruin of a natural person, the sanction can no longer be regarded as merely an ordinary instrument of administrative enforcement.²⁷³ A penalty of substantial severity, imposed in response to wrongful conduct and accompanied by an attribution of guilt, comes close in substance to the sovereign punitive functions traditionally associated with criminal law. In such circumstances, the issue is not merely one of effectiveness or deterrence, but also one of human dignity and of the constitutional limits of subjecting individuals to findings of guilt accompanied by sanctions that may threaten their economic existence. Such sanctions may result in various forms of deprivation and social exclusion, including the loss of housing, inability to support one's dependants, loss of reputation and the stigma attached thereto. Although the consequences of financial ruin differ in kind from imprisonment, they may nevertheless be comparable in their practical severity. It is not entirely inconceivable that many individuals would prefer a moderate prison sentence to a ruinous fine. In principle, punitive powers of that severity ought to be exercised only within the safeguards of Art 83 TFEU.

²⁷¹ Klip. *European Criminal Law*. 4th edition (n 50), p 424. AG Pikamäe considered financial penalties to be criminal sanctions when they may result in an alternative punishment of imprisonment in the event of default, or which are entered into a criminal record – C-481/19 (n 135), opinion of AG P. Pikamäe, p 57.

²⁷² Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849. – OJ L 2024/1640.

²⁷³ For insight into *ruinous fines* in the United States of America, see Resnik, J. (Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin". – *The Yale Journal Forum* Volume 129, January 3, 2020, pp 365–415.

This argument may be countered by the observation that EU legislation usually requires only that Member States provide for maximum fine levels of at least a certain amount, while national authorities remain obliged to ensure that the penalty actually imposed is proportionate in the individual case. That response is not, however, entirely persuasive. First, it remains unclear to what extent the amount of the sanction should depend on the gravity of the offence and the degree of guilt, and to what extent it should reflect the financial circumstances of the offender. Secondly, the mere possibility of a ruinous fine may itself support the view that the sanction should be regarded as criminal.²⁷⁴

In conclusion, as EU law currently stands, punitive administrative fines will generally not be regarded as criminal within the meaning of Art 83 TFEU. Strong arguments may nevertheless be made that punitive fines imposed on natural persons ought to fall within Art 83 TFEU where they are so severe as to risk forms of deprivation and social exclusion comparable in seriousness to criminal punishment. In practice, however, that argument is likely to remain difficult to sustain before the ECJ. The Court would probably preserve the administrative classification and rely instead on the obligation of Member States to ensure proportionality in the individual case, notwithstanding very high statutory ceilings. The more realistic limits to EU punitive administrative sanctioning law are therefore likely to be found in the principles of conferral, subsidiarity and proportionality, which govern the depth of the Union's ancillary sanctioning competence.

6.1.3. Conferral, subsidiarity and proportionality: the depth of ancillary sanctioning competence

As explained above, competence to legislate in a given field generally entails an ancillary competence to require effective enforcement, including through punitive non-criminal sanctions, provided that those sanctions do not qualify as criminal for the purposes of Art 83 TFEU. The existence of such ancillary competence is therefore hardly open to dispute. The more difficult question concerns its depth.²⁷⁵ Once EU legislation moves beyond requiring effective, proportionate and dissuasive sanctions and begins to regulate the type and level of sanctions,

²⁷⁴ In a comparable vein, when applying the *Engel/Bonda* criteria, the ECtHR and ECJ have attached weight to the potential penalty rather than to the penalty actually imposed. – ECtHR 25555/10, *Igor Pascari v. The Republic of Moldova*, p 22; ECJ C-590/24, *Criminal proceedings against AK Dlhopolec s.r.o. and Others*, ECLI:EU:C:2026:41, pp 64–70; ECJ C-544/23, *T.T. and BAJI Trans, s.r.o. v Národný inšpektorát práce*, ECLI:EU:C:2025:614, pp 62–71 and C-820/21 (n 132), pp 49–59. In this assessment the threshold of severity has not been particularly high – E.g. maximum fine of 1000 euros, whereas a 250 euro fine was actually imposed – ECJ C-97/21, *MV-98 v Nachalnik na otdel 'Operativni deynosti' – Sofia v Glavna direktsia 'Fiskalen kontrol' pri Tsentralno upravlenie na Natsionalna agentsia za prihodite*, ECLI:EU:C:2023:371, p 48.

²⁷⁵ The choice of words is a loan from AG Mazák in his opinion delivered in the Ship-Source Pollution case regarding the harmonisation of criminal law – C-440/05 (n 38), opinion of AG J. Mazák, pp 78 and 103.

liability conditions, procedural models or institutional structures, the issue is no longer merely whether ancillary competence exists, but how far that competence extends. In that assessment, the limits of the relevant sectoral legal basis, together with the principles of subsidiarity and proportionality set out in Art 5 TEU, become relevant.

Although non-criminal sanctioning regimes are less constitutionally sensitive than criminal law, they nevertheless constitute a distinct area of law in many Member States. This is particularly so in Member States with coherent systems of administrative sanctions, often structured around a general part applicable across sectors, as illustrated by the Estonian example in Chapter 5.3. Moreover, administrative fines imposed on natural persons may, despite their non-criminal classification, still involve the attribution of blame, carry significant stigma²⁷⁶ and have serious financial consequences for the person concerned. As argued above, a penalty of substantial severity, imposed in response to wrongful conduct and accompanied by an attribution of guilt, comes close in substance to the sovereign punitive functions traditionally associated with criminal law.

In some Member States, structural elements of the national sanctioning system – including the demarcation between administrative and criminal offences, the judicial imposition of fines, or the principle of guilt – may form part of the constitutional identity protected by Art 4(2) TEU. It is more likely, however, that Art 4(2) TEU would operate mainly as a supporting argument in the assessment of subsidiarity and proportionality, rather than as an independent and clearly defined limit on Union competence. Similarly, procedural autonomy should not be treated as an independent limit on EU competence.²⁷⁷ It operates as a default rule in the absence of EU procedural rules and remains subject to equivalence and effectiveness.²⁷⁸

Given the ancillary character of the EU's competence in the field of administrative sanctions, and the functional proximity of punitive administrative sanctions to criminal law, the pre-Lisbon case-law on Community criminal-law competence provides a useful analogy. Before Lisbon, the Community's criminal-law competence was likewise ancillary or implicit. Although the ECJ accepted that the Community could, in certain circumstances, require Member States to provide for criminal penalties, that competence to interfere with national sanctioning systems was not unlimited.

The judgment in *Environmental Crime* offered little clear guidance on the scope of the Community's criminal-law competence beyond stating that the relevant measures had to be “essential” for combating “serious” offences.²⁷⁹ The

²⁷⁶ *Grande Stevens and Others v. Italy* (n 172), pp 120–122.

²⁷⁷ The CLS derived the broad discretion of Member States to integrate administrative sanctions into their national legal systems from the principle of procedural autonomy, which, according to the CLS, finds expression in Art 4(2) TEU. – Contribution of the Legal Service. 12979/12 (n 56), p 18.

²⁷⁸ *E.g.* C-86/20 (n 116), p 75.

²⁷⁹ C-176/03 (n 38), p 48.

judgment in *Ship-Source Pollution* then drew an important, but rather abrupt, limitation: “the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence.”²⁸⁰ The Court did not elaborate on the basis for that limitation. The only indications that can be drawn from the judgment are its reiteration of the general proposition that neither criminal law nor the rules of criminal procedure fell, as a general rule, within Community competence, and its emphasis on the essential nature of the measures in question.

AG Mazák’s opinion provides a more explicit rationale for that limitation. While he accepted that the Community could, in certain circumstances, require Member States to provide for criminal penalties, he considered that the harmonisation of the type and level of those penalties went too far. In his view, the diversity of national criminal-law systems meant that such harmonisation risked fragmenting and undermining the coherence of domestic penal systems. He also connected this concern to subsidiarity, reasoning that Member States are generally better placed to determine how the requirements of effective, proportionate and dissuasive criminal penalties should be translated into their own legal orders and societal contexts.²⁸¹ Öberg, however, argued that the limitation was necessary in order to satisfy the principle of proportionality and to respect the diversity of Member States’ sanctioning systems.²⁸²

Although it is not entirely clear whether the issue of the type and level of criminal penalties was, in *Ship-Source Pollution*, a matter of subsidiarity, proportionality, or even conferral,²⁸³ the ECJ effectively placed limits on the Community’s implicit or ancillary criminal-law competence. While those limits were not expressly reasoned, they can be understood as reflecting the special nature of criminal law. Indeed, AG Mazák’s reasoning concerning the possible effects of Community legislation on the coherence of national criminal-law systems can be applied, *mutatis mutandis*, to the harmonisation of administrative sanctions. The difference lies mainly in the constitutional sensitivity of the arguments: the same concerns exist, but they are less pronounced where the sanctions are classified as non-criminal.

While the EU’s post-Lisbon competence to approximate the types and levels of non-criminal sanctions has not been seriously questioned, the detailed sanctioning regime envisaged in the 2013 proposal for a directive on customs infringements²⁸⁴ nevertheless triggered objections in reasoned opinions delivered by national parliaments under Article 6 of Protocol No 2.²⁸⁵

²⁸⁰ C-440/05 (n 38), p 70.

²⁸¹ *Ibid*, opinion of AG J. Mazák, pp 100–113.

²⁸² Öberg. Limits to EU Powers (n 265), p 81.

²⁸³ The intervening Member States, with varying arguments, relied on all of those principles – C-440/05 (n 38), opinion of AG J. Mazák, p 42.

²⁸⁴ COM/2013/0884 (n 262).

²⁸⁵ Protocol (No 2) on the application of the principles of subsidiarity and proportionality. – OJ C 326, pp 206–209.

The Lithuanian Parliament questioned whether Art 33 TFEU authorised the establishment of a framework of infringements and sanctions, whether the Commission had adequately justified action at EU level and expressed concern about strict liability, sanction levels and fundamental rights.²⁸⁶ The Danish Parliament considered the proposal more far-reaching than necessary to address divergences in customs enforcement.²⁸⁷ The Swedish Parliament likewise questioned the legal basis and the necessity of harmonising sanctions to enhance customs cooperation, and regarded the criminal-law-like elements of the proposal as problematic in an instrument not based on Art 83 TFEU.²⁸⁸ Accordingly, those opinions contain a mixture of arguments relating to conferral, subsidiarity and proportionality. The limited separation between these principles may partly be explained by the procedural framework of Protocol No 2: although the Protocol concerns both subsidiarity and proportionality, Article 6 provides specifically for reasoned opinions on compliance with the principle of subsidiarity, not on conferral or proportionality as such.²⁸⁹

The customs-infringements example shows that subsidiarity concerns may arise where EU legislation creates an extensively detailed sanctioning framework. Such concerns may also arise where the legislation itself is not exceptionally detailed, but its effect is to displace central elements of national sanctioning systems. The GDPR provides an example: had Member States fully appreciated that the Regulation would be interpreted as establishing a directly applicable supranational sanctioning regime leaving no room for additional substantive conditions of liability under national law, subsidiarity concerns could plausibly have been raised. More generally, where proposed EU legislation effectively precludes a particular national enforcement model, compliance with the principles of subsidiarity and proportionality requires careful justification, irrespective of whether the legislative framework is itself highly detailed.

The ECN+ Directive illustrates this point: although its impact assessment identified concerns regarding criminal and quasi-criminal enforcement models, the evidential basis for singling out Estonia is not entirely convincing. The impact assessment stated that the low number of enforcement decisions in Estonia means “that there is virtually no enforcement of the EU competition rules”. That

²⁸⁶ Seimas of the Republic of Lithuania. Resolution Regarding a Reasoned Opinion on Breach of the Principle of Subsidiarity by the Proposal of the European Commission for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, COM (2013) 884. 15. July 2014. No XII-1031.

²⁸⁷ Folketinget. Begrundet udtalelse om forslag om toldovertrædelser – KOM (2013) 884. 4. juli 2014. Ref. 14-000706-3.

²⁸⁸ Sveriges Riksdag. Subsidiaritetstest av kommissionens förslag om en unionsrättslig ram för tullrättsliga övertrædelser och sanktioner. Skatteutskottets utlåtande 2013/14:SkU35.

²⁸⁹ Öberg, J. National Parliaments and Political Control of EU Competences. *European Public Law*, 2018, 24(4), pp 695–731. There have been suggestions on a Treaty change in that regard – European Union. Report of the Task Force on Subsidiarity, Proportionality and “Doing Less More Efficiently”. – https://commission.europa.eu/system/files/2018-09/report-task-force-subsidiarity-proportionality-and-doing-less-more-efficiently_en.pdf (22.04.2026), p 13.

conclusion is not fully convincing if based primarily on absolute numbers. Estonia is one of the smallest Member States by population and appears less exceptional when enforcement decisions are assessed per capita. On the figures referred to in the impact assessment, Estonia's four decisions in 2004–2015 amount to approximately 2.92 decisions per million inhabitants, whereas France's 119 decisions amount to approximately 1.73 decisions per million inhabitants.²⁹⁰ Admittedly, this does not prove the effectiveness of the Estonian model, but neither does it support the conclusion of “virtually no enforcement” based on absolute numbers alone.

If a Member State could convincingly demonstrate that the national implementation of an EU administrative sanctioning regime would entail significant systemic effects, while also showing that its existing national sanctioning system is not manifestly ineffective, serious subsidiarity and proportionality concerns would arise. This would be particularly so in light of both the special character of punitive legislation and the ancillary nature of the Union's competence in this field. The argument would be that, where a national model is capable of ensuring effective enforcement, EU legislation should not lightly require structural changes to that model without a clear and specific justification.

At the same time, the force of such an argument may be weakened by the prior development of a substantial body of EU legislation on punitive administrative sanctions. It could be argued that, through the adoption of numerous legal acts, the Union has already created a model of punitive administrative enforcement that national legal systems have had to accommodate. The broader and more consistent that previous legislative practice becomes, the more difficult it may be for Member States to rely on subsidiarity or proportionality at a later stage.

A further difficulty is political and institutional. As argued in Publication I in relation to the emergency brake mechanism, Member States may be reluctant to use politically sensitive constitutional safeguards. The same may be true of reasoned opinions on subsidiarity. National parliaments may prefer to address concerns during the legislative negotiations rather than formally challenge the proposal on subsidiarity grounds, even where the measure may have far-reaching effects on national sanctioning systems.

This problem is compounded by the fact that, as the dissertation has shown, the obligations that stem from the legislation on punitive administrative sanctions are often ambiguous, making the full impact of a proposed measure difficult to assess. Moreover, many of the far-reaching effects of EU punitive administrative sanctioning law emerge only implicitly through case-law. When interpreting the scope and requirements of such legal acts, the ECJ should therefore be mindful of subsidiarity and proportionality concerns and should take into account the systemic effects that its case-law may have on national sanctioning systems.

To conclude, the pre-Lisbon case-law on limited ancillary criminal-law competence, together with the reasoned opinions of national parliaments, does not establish a clear doctrinal boundary for the limits arising from subsidiarity or

²⁹⁰ European Commission. SWD(2017) 114 final (n 194), pp 13 and 22.

proportionality in the field of EU administrative sanctioning competence. It does, however, illustrate that detailed harmonisation of administrative sanctions, or other forms of significant interference with national sanctioning systems, may raise concerns similar to those that shaped the pre-Lisbon limits on Community criminal-law competence. The absence of a specific Treaty competence for punitive administrative sanctions, the ancillary character of the EU's competence in this field and the particular nature of punitive legislation all weigh against an interpretation of that competence that would permit deep structural interference with Member States' sanctioning systems without clear justification. This is especially true where the EU legislature seeks to preclude a specific enforcement model employed by Member States. The more EU legislation moves beyond requiring effective sanctions and begins to regulate liability conditions, procedural models or institutional structures, the stronger the justification required under subsidiarity and proportionality for why such matters cannot be left to the Member States.

6.2. Fundamental rights-based limits

6.2.1. The function of fundamental rights-based limits

Fundamental rights-based limits operate differently from competence-based limits. They do not determine whether the EU may legislate in the field of punitive administrative sanctions; rather, they constrain how far such legislation may interfere with the rights of the persons subject to those sanctions.

As discussed in Chapter 4.3, legislation on punitive administrative sanctions must comply with the criminal-head guarantees under the ECHR and the Charter where such sanctions would be classified as criminal under the *Engel/Bonda* criteria. Even where such legislation would not be regarded as criminal in substance, it may not depart from certain procedural safeguards derived from the general principles of EU law. These requirements establish the minimum standards of procedural protection below which EU law cannot require Member States to go merely on grounds of effectiveness.

In most instruments on punitive administrative sanctions, the procedural aspects relevant to the protection of fundamental rights are left to the discretion of the Member States. In such cases, the validity of the EU legislation itself is not called into question. The few exceptions that expressly limit procedural safeguards appear to do so in compliance with the case-law of the ECJ. For example, the ECN+ Directive appears to follow that case-law closely in relation to the limitations placed on the privilege against self-incrimination.²⁹¹ Likewise, the ECJ has accepted the use of rebuttable presumptions of liability, as reflected, for example, in Art 9 MAR.²⁹²

²⁹¹ C-374/87 (n 142), pp 18–35.

²⁹² In the context of previous legislation – C-45/08 (n 91), p 44.

The following sections therefore focus on a different set of fundamental-rights concerns: the foreseeability of substantive conditions of liability and the foreseeability and proportionality of severe administrative fines.

6.2.2. Foreseeability in directly applicable EU administrative fine regimes

Chapter 4.2 demonstrated that EU legislation on punitive administrative sanctions may contain implicit features of administrative liability. Where such conditions are implicit rather than expressly laid down, concerns may arise under the principles of legal certainty, foreseeability and non-retroactivity. These principles form part of the constitutional traditions of the Member States and are protected by Art 49(1) of the Charter. They apply not only to criminal penalties in the strict sense, but also to punitive administrative fines.²⁹³

In this regard, directly applicable legislation on punitive sanctions must be distinguished from legislation which requires transposition. Where punitive administrative sanctions are harmonised by directive, liability depends on national transposition. A directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability of persons who act in contravention of the provisions of that directive.²⁹⁴ Even when national law proves incompatible with a directive, that incompatibility cannot operate to the detriment of the offender. It is therefore for the national legislature, when transposing the directive, to ensure compliance with the requirements of legal certainty and foreseeability.²⁹⁵

Although it has been suggested that the ECJ extended to regulations the limits applicable to directives in criminal matters,²⁹⁶ this does not appear to be the case. The ECJ reached a similar result only where the regulation in question required national implementing measures for the imposition of penalties and was therefore not directly applicable in that respect.²⁹⁷ A regulation that is directly applicable as

²⁹³ C-42/17 (n 234), pp 53–57 with further references and ECJ C-521/15, *Kingdom of Spain v Council of the European Union*, ECLI:EU:C:2017:982, pp 144–145.

²⁹⁴ ECJ C-7/11, *Fabio Caronna*, ECLI:EU:C:2012:396, p 52. The ECJ has extended the same principle to offences and penalties of a non-criminal nature. – ECJ C-555/23 and C-556/23, *Makeleio EPE and Zougla G.R. AE v Ethniko Symvoulío Radiotileorasis (ESR)*, ECLI:EU:C:2025:484, p 91.

²⁹⁵ See also C-308/06 (n 101), p 78.

²⁹⁶ Klip. *European Criminal Law*. 4th edition (n 50), pp 246–247 with reference to ECJ C-60/02, *Criminal proceedings against X*, ECLI:EU:C:2004:10, p 62 (the same principle has been reiterated in ECJ C-102/16, *Vaditrans BVBA v Belgische Staat*, ECLI:EU:C:2017:1012, p 57).

²⁹⁷ For similar opinions see: Miettinen. *Criminal Law and Policy* (n 35); Marin, L. C-80/86 – *Kolpinghuis Nijmegen*. The General Principles of European (Criminal) Law as Limitation to the Enforcement of EU Law: The Kolpinghuis Nijmegen Rule. – in Mitsilegas, V., Di Martino, A., Mancano, L. (eds.). *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis*. Oxford: Hart Publishing 2019, p 17; Mitsilegas, V. *EU Criminal Law*. Second Edition. Oxford: Hart Publishing 2022, p 95 and Asp (n 222), pp 107–108.

regards administrative liability may therefore determine or aggravate the liability of an offender. Moreover, Member States are generally required to disapply national legislation – including criminal law – that is contrary to a provision of EU law having direct effect. By way of exception, however, the principles of foreseeability, precision and non-retroactivity of criminal law, as general principles of EU law, may preclude such disapplication. That exception was established in *Taricco II*.²⁹⁸

Most regulations laying down rules on administrative sanctions require Member States to adopt implementing measures for the application of those sanctions. The problem arises with regulations that lay down directly applicable rules on administrative sanctions.

The hard case is the GDPR. In *Deutsche Wohnen* and *Nacionalinis visuomenės sveikatos centras*, the ECJ, in the context of the GDPR, held that the substantive conditions for imposing GDPR administrative fines are governed solely by EU law, since those conditions are laid down “in detail” in Art 83(1) to (6) GDPR without leaving discretion to the Member States. That conclusion is problematic because Art 83 GDPR is far from detailed. It primarily regulates the types and maximum levels of sanctions and the criteria for deciding whether to impose a fine and determining its amount. Even the basic question whether liability requires intent or negligence had to be clarified by the Court. The Regulation contains no express rules addressing several fundamental questions of punitive liability, including the temporal, territorial and personal scope of administrative offences, the age of responsibility, participation, attempt, defences or limitation periods. For many Member States, these questions are resolved either in the general part of administrative liability law,²⁹⁹ in sectoral legislation or in case-law.

Where recourse to national substantive conditions is precluded, many basic conditions of liability would have to be recognised by the ECJ, either as part of the constitutional traditions of the Member States, inferred from the case-law on competition infringements, or derived from the Charter. For example, the absence of limitation periods, although sometimes regarded as a matter of procedural law, would run counter to the interests of legal certainty (see Chapter 4.2.3). Similarly, imposing an administrative fine on a nine-year-old, or on a person of unsound mind, would probably be incompatible with human dignity under Art 1 of the Charter, the principle of *nulla poena sine culpa* under Art 49(1) of the Charter, and proportionality under Art 49(3) of the Charter. In the absence of permissible national substantive conditions, questions such as the age of responsibility for the GDPR infringements would ultimately have to be resolved by the ECJ. The same applies to defences such as necessity: precluding such defences altogether would

²⁹⁸ ECJ C-107/23 PPU, *Criminal proceedings against C.I. and Others*, ECLI:EU:C:2023:606, pp 95–125; and C-42/17 (n 234), pp 29–62.

²⁹⁹ E.g. Gesetz über Ordnungswidrigkeiten. – BGBl. I S. 602 (Germany); Verwaltungsstrafgesetz. – BGBl. Nr. 52/1991 (Austria); Administratīvās atbildības likums. – 2018/225.1 (Latvia); Väärteomenetluse seadustik. – RT I 2002, 50, 313 (Estonia).

probably be disproportionate, but their precise limits would likewise have to be determined by the ECJ.

Recognising universally accepted principles that mitigate responsibility is the simpler side of the problem. As discussed in Chapter 4.2, the GDPR may also entail implicit substantive conditions of liability that broaden the scope of administrative offences. Where such conditions are developed only through later case-law, the *Taricco II* principle may allow Member States to apply more favourable national rules on substantive conditions of liability, at least in cases where the infringement was committed before the judgment in *Deutsche Wohnen*. It may be argued that, after that judgment, the exhaustive and directly applicable nature of the substantive conditions of administrative liability under the GDPR became, or should have become, clear.³⁰⁰ This does not, however, resolve the foreseeability problem as regards future implicit conditions that might arise from the case-law.

The direct applicability of Art 83 GDPR, combined with its exhaustive character as regards the substantive grounds of liability, renders Art 83 GDPR vulnerable to the argument that it may itself be incompatible with the principles of foreseeability and precision protected by Art 49(1) of the Charter.³⁰¹ The ECJ has held that the principle of legality requires the law clearly to define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him or her criminally liable.³⁰² It may be difficult to reconcile the extremely general, yet exhaustive, provisions of Art 83 GDPR with this principle.

Should the validity of Art 83 GDPR be challenged on these grounds, the ECJ would likely refer to the Court's extensive case-law on competition fines. In that field too, EU legislation is relatively sparse on the substantive conditions of liability, but the Court has developed and interpreted various concepts that form the substantive conditions for imposing sanctions. The ECJ would therefore have to establish that the body of case-law pertaining to administrative liability is sufficiently developed to compensate for the lack of specific provisions in the GDPR.

The lack of specific substantive conditions of liability, coupled with the prohibition on reverting to national law, may from one perspective be seen as enhancing effectiveness, since it ensures the uniform application of EU law. On the other hand, it may significantly increase the need for preliminary references

³⁰⁰ The Estonian Supreme Court held that the legal framework governing the liability of legal persons in Estonia prior to 01.11.2023 did not comply with the requirements of the GDPR. It further instructed national courts to seek a preliminary ruling where they consider that the general principles of criminal law, read together with the Estonian exception recognised in Recital 151 GDPR, might permit them not to disapply national law in cases concerning infringements committed before 01.11.2023. – RKKK 20.06.2024, 4-23-742, p 18.

³⁰¹ E.g. C-308/06 (n 101), pp 67–80.

³⁰² C-107/23 (n 298), p 105.

to the ECJ. This, in turn, may delay proceedings considerably. Furthermore, even where the ECJ provides an interpretation, that interpretation cannot necessarily be applied to the case at hand if it produces a result that was not reasonably foreseeable at the time when the infringement was committed. The effects of such developments in case-law are also constrained by the principle of *nullum crimen, nulla poena sine lege*.³⁰³

In conclusion, where EU law is treated as exhaustively determining substantive liability while leaving core conditions undefined, the ECJ is required to construct important elements of punitive liability through case-law. That may enhance uniformity, but it also increases legal uncertainty and raises concerns from the perspective of fundamental rights, particularly foreseeability and legal certainty. This uncertainty, together with the frequent need for preliminary references, may also undermine the very effectiveness that the autonomous EU-law approach is intended to secure.

6.2.3. Foreseeability and proportionality of sanctions

Exceptionally high maximum fine levels raise questions concerning both foreseeability and proportionality. Wide penalty ranges make it difficult to predict the sanction that a given infringement may attract. Although proportionality must be ensured in each individual case, the statutory threat of very severe fines may itself have implications for the proportionality of the sanctioning regime.

According to the case-law of the ECtHR and the ECJ, the principle of foreseeability enshrined in Art 7(1) ECHR and Art 49(1) of the Charter requires not only that individuals be able to foresee which acts or omissions may render them liable, but also the penalties to which such conduct may give rise.³⁰⁴ The EU legislature provides for extremely high maximum penalties for infringements that may, depending on the circumstances, range from relatively minor to very serious. Admittedly, such legislation usually lays down criteria to be taken into account when determining the fine and thus, in principle, enables the competent authority to impose a sanction proportionate to the specific breach concerned.³⁰⁵ Likewise, the ECJ has held that Art 49(3) of the Charter does not preclude national legislation providing for the imposition of a fine within a range between minimum and maximum amounts, provided that the competent authority takes

³⁰³ ECJ C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S and Others v Commission of the European Communities*, ECLI:EU:C:2005:408, pp 215–218.

³⁰⁴ E.g. ECtHR 42750/09, *Del Río Prada v. Spain*, p 79 and C-42/17 (n 234), p 56.

³⁰⁵ For example, even if the maximum fine limit is based on the total worldwide annual turnover of an undertaking, the actual material economic capacity of the recipient of the fine must also be taken into account to ensure that the fine is effective, proportionate and dissuasive – ECJ C-383/23, *Criminal proceedings against ILVA A/S*, ECLI:EU:C:2025:84, pp 17–36.

into account, in particular, the nature, seriousness, circumstances and consequences of the breach of the obligation in question.³⁰⁶

However, where statutory maximum fines are set at very high levels, it becomes increasingly difficult to predict with reasonable precision the penalty that a given infringement may attract. This concern is even more pronounced where the relevant offences have a broad scope of application. It is conceivable, for example, that breaches of the AMLD or the GDPR carrying significant fines may be committed not only by members of management bodies, but also by ordinary employees. Although it is ultimately for national authorities and courts to ensure that the sanction imposed is proportionate, from the perspective of the addressee it may nevertheless be difficult to predict even the approximate level of the fine where the statutory limits are so broad. Since Member States are bound by the definitions of offences and the fine limits laid down in EU law, their ability to remedy these concerns at the stage of transposition is limited.

Portugal provides an interesting example of national resistance. Portuguese law classified GDPR infringements into domestic categories of seriousness and, in doing so, has reduced the applicable fine levels for natural persons compared with Art 83 GDPR.³⁰⁷ The Portuguese data protection authority has taken the view that aggravating and mitigating factors must be assessed in the individual case and may not be determined in the abstract by national legislation through categories not envisaged by the GDPR. On that basis, it has considered the relevant provisions of Portuguese law to be incompatible with the GDPR and has decided to disapply the conflicting parts.³⁰⁸ This illustrates the difficulty faced by Member States when attempting to accommodate EU fine ranges within national frameworks while preserving proportionality and foreseeability.

The foreseeability of sanctions is further undermined by the inconsistent drafting of EU sanctioning legislation. Even within financial markets law, terms such as “benefit derived”³⁰⁹ and “profits gained”³¹⁰ are used inconsistently in provisions determining fine limits by reference to the economic advantage obtained from the infringement. EU legislation also differs in how it formulates alternative fine ceilings, for example where a fixed amount is combined with a ceiling linked to profits gained, losses avoided or turnover. Some acts expressly require the higher threshold to be applied;³¹¹ others refer to profits gained or losses avoided

³⁰⁶ C-590/24 (n 274), p 119. See also T-541/08 (n 175), pp 199–214.

³⁰⁷ Arts 37 and 38 – Lei n.º 58/2019 (n 215).

³⁰⁸ Comissão Nacional de Proteção de Dados. Deliberação/2019/494, pp 7–8. – https://www.cnpd.pt/bin/decisooes/Delib/DEL_2019_494.pdf (11.04.2026).

³⁰⁹ E.g. Art 32(2)(g) of (EU) 2017/2402 (n 66).

³¹⁰ E.g. Art 22(4)(e) of Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012. – OJ L 337, pp 1–34.

³¹¹ Art 28b(1)(c) of 2013/50/EU (n 65) and Art 70(6)(f) of 2014/65/EU (n 45).

“where these can be determined”,³¹² which could be read as meaning that the profits-based threshold takes priority where ascertainable. Such ambiguity is problematic, especially because the ECtHR has treated the absence of clear legal criteria governing the applicable sanctioning regime as capable of violating Art 7 ECHR.³¹³ These divergences appear to reflect not a deliberate substantive choice, but the broader incoherence of EU sanctioning law.

As regards proportionality, EU legislation on administrative fines has, save for a few exceptions,³¹⁴ not laid down mandatory minimum levels of sanctions, thereby leaving room for the competent authority to take account of the circumstances of the individual case when determining the amount of the fine. The limited number of instruments that do provide for mandatory minimum fines may, however, sit uneasily with the ECJ’s 2026 case-law. In that judgment, the Court held that Article 49(3) of the Charter precludes national legislation that automatically imposes on an undertaking a fine corresponding to the amount of the economic benefit obtained from the infringement, without the competent authority being able to take into account, for the purposes of determining the amount of that fine, any circumstances relating to the breach of the obligation in question.³¹⁵

As noted above, the ECJ has accepted, from the standpoint of proportionality, sanctioning regimes based on a wide range between minimum and maximum amounts, so long as the competent authority remains able to take account of all relevant circumstances of the particular case. The principal difficulty posed by such regimes therefore lies less in proportionality in the strict sense than in the foreseeability of the penalty. Exceptionally high maximum fines, especially where their practical application is difficult to anticipate with any precision, may generate a level of dissuasiveness that extends beyond the prevention of infringements and discourages economic actors from operating in the regulated field altogether. Thus, the prospect of an administrative fine of up to 20 000 000 EUR may function not only as a deterrent against unlawful processing of personal data, but also as a counter-incentive to engage in data-related activities or to provide services connected with such processing at all.

The legislature itself appears to have recognised this risk of over-deterrence. In 2024, the MAR administrative fine levels were restructured for certain disclosure-related infringements, in light of concerns that the existing regime could be disproportionate for small and medium-sized issuers and could discourage

³¹² E.g. Art 24(2)(e) of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs). – OJ L 352, pp 1–23.

³¹³ ECtHR 42931/10, *Camilleri v. Malta*, pp 39–45.

³¹⁴ E.g. Amended Art 91a(3) and (4) of (EU) 2023/2842 (n 112); Art 12(2)–(6) (*not less than*) of Regulation (EU) 2023/2405 of the European Parliament and of the Council of 18 October 2023 on ensuring a level playing field for sustainable air transport (ReFuelEU Aviation). – OJ L 2023/2405 and the amended Art 18(3) and (4) of Regulation (EU) 2024/1106 (n 63) (although in substance it is similar to a mandatory value confiscation).

³¹⁵ C-590/24 (n 274), p 119.

them from seeking or maintaining a listing on public markets.³¹⁶ A similar concern is reflected in Art 99(1) of the Artificial Intelligence Act, which expressly requires that, when penalties are imposed, regard be had to the interests of SMEs, including start-ups, and to their economic viability.

In conclusion, the combination of wide penalty ranges, unclear alternative fine ceilings and the application of very high maximum fines to infringements of varying seriousness significantly impairs the foreseeability of the applicable sanction. Although proportionality must be ensured in each individual case, the statutory threat of a severe sanction may itself become problematic where its dissuasive effect extends beyond preventing infringements and discourages lawful activity in the regulated field. The current incoherence of EU sanctioning legislation therefore raises concerns not only from the perspective of legal certainty, but also from that of proportionate punitive enforcement.

6.3. Future development: towards a more coherent framework

The preceding analysis has revealed a number of problems inherent in the harmonisation of punitive administrative sanctions in EU law. It has also shown the ways this parallel punitive regime interacts with criminal law and creates systemic effects. Against that background, this section sets out several suggestions for rethinking the future development of such harmonisation with a view to establishing a more coherent framework for non-criminal punitive sanctioning. These suggestions concern terminology and scope, the meaning of the administrative label, sanctions against natural persons, foreseeability and proportionality of fine levels, directly applicable punitive regimes, and procedural safeguards.

The difficulties identified above arise from the combination of exceptionally high fine levels, a fragmented and incoherent legislative framework across different regulatory fields, and uncertainty concerning both the concept of an administrative sanction and the implicit features of administrative liability.³¹⁷ One apparent solution would be to pursue further harmonisation. If the EU were to establish more detailed and specific requirements governing administrative

³¹⁶ European Commission. Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises. Brussels 07.12.2022, COM(2022) 762 final, 2022/0411(COD). – <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0762> (21.03.2026). The Regulation was adopted in 2024 – Regulation (EU) 2024/2809 of the European Parliament and of the Council of 23 October 2024 amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises. – OJ L 2024/2809.

³¹⁷ On the need for a general policy approach, see also – Vervaele, J. A. E. Towards a European Reassessment of Punitive Law Enforcement? – *European Criminal Law Review* Vol. 13, Issue 3, 2023, pp 236–239.

sanctions, whether on a sector-specific or cross-sectoral basis, a considerable part of the present uncertainty could be alleviated.

More extensive harmonisation would, however, inevitably come at the cost of greater intrusion into the procedural autonomy of the Member States. Although non-criminal sanctioning law may not carry the same constitutional significance as criminal law, more detailed harmonisation would undoubtedly raise issues of conferral, subsidiarity and proportionality. Given the considerable divergence among the Member States' systems of non-criminal punitive law, agreement on a cross-sectoral general part of administrative sanctions law appears unlikely. Such an initiative would also raise serious legal-basis concerns, since no Treaty provision confers a general competence to approximate non-criminal punitive liability across regulatory fields. From a dogmatic perspective, the clearest route to the adoption of general legislation on administrative sanctions would be an amendment of the Treaties providing a distinct legal basis for the approximation of non-criminal offences and sanctions, comparable to Art 83(2) TFEU. Here too, however, it appears unlikely that the Member States would reach consensus either on the necessity of such an express conferral of powers or on its permissible limits.

Furthermore, the more detailed the regulation of the attribution of liability and procedural standards becomes, the more closely such systems may come to resemble systems of criminal liability. This was illustrated by the controversy surrounding the detailed administrative sanctioning regime contained in the 2013 proposal for a directive on customs infringements. Paradoxically, an effort to delineate the limits of administrative punishment with greater precision may therefore lead to an even more pronounced blurring of the boundary between administrative and criminal law.

In principle, a more coherent framework for non-criminal punitive sanctions could emerge through a revision of existing EU administrative sanctioning law. Such a revision would presuppose prior agreement on the underlying general principles. From a technical perspective, it could be implemented through a combination of soft-law instruments, such as communications, recommendations or guidelines,³¹⁸ and targeted legislative amendments.

In particular, the following aspects of EU administrative sanctioning law would benefit from greater coherence and greater legislative discipline.

First, the terminology and scope of regulation should be standardised. The same concept should not be described by different terms, such as *administrative fines* and *administrative pecuniary sanctions*, unless a substantive distinction is intended. Likewise, divergences in regulatory scope should be deliberate and justified rather than incidental. In its current form, the legislation appears fragmented and, in several respects, arbitrary. Unexplained differences arise, for example, as regards whether the models of liability of legal persons are regulated,

³¹⁸ Vervaele has criticised the ReNEUAL Model Rules for European Administrative Procedures for not addressing administrative offences and sanctions – Vervaele (n 317), p 239. For the rules, see Craig, P. *et al* (eds.). *ReNEUAL Model Rules on EU Administrative Procedure*. Oxford: Oxford University Press 2017.

whether reference is made to intent and negligence, whether rules are laid down concerning the involvement of an administrative authority in the imposition of the sanction, whether and under what conditions Member States may opt for criminal sanctions, and whether specific carve-outs are provided for Member States whose legal systems *do not provide for* administrative fines.

Such divergences not only generate confusion and impede the systematic transposition of EU administrative sanctioning law into national legal systems, but also complicate the interpretation of EU legislation. Even unintended differences in wording may invite *a contrario* reasoning, whereby the inclusion of a particular regulatory option in one legislative act is taken to imply its exclusion from another. These concerns could be addressed by first identifying the existing divergences, at least within a given sector, and then aligning the relevant legislative frameworks accordingly.

Second, the EU legislature should expressly articulate the requirements it intends to impose on the sanctioning systems of the Member States through the use of the *administrative* label. The co-legislators should make clear whether the label merely indicates that the measure does not harmonise criminal law, or whether it entails specific obligations for the Member States. If the intention is to confer specific powers on an administrative authority in relation to the imposition of such sanctions, this should be stated expressly in the relevant legal act. Here, as elsewhere, consistency would be desirable. If one instrument allows fines to be imposed either directly by an administrative authority or by a court upon application by such an authority, other instruments should not adopt a more restrictive approach without due justification.

Negative harmonisation of criminal or quasi-criminal law should be approached with particular caution. Due regard should be paid to the principles of subsidiarity, proportionality and the procedural autonomy of the Member States. Unless the EU legislature is able to identify a concrete obstacle to the effectiveness of a given sanctioning system, Member States should be afforded as much discretion as possible to accommodate sanctioning rules within their domestic legal frameworks. If the legislature intends, in the interests of effectiveness, to exclude the application of particular elements of a sanctioning system commonly associated with criminal procedure, those elements should be identified and made explicit, rather than left to be inferred from a vague reference to the administrative nature of the sanctions. The fewer implicit features an administrative sanctioning regime contains, the clearer it will be to Member States what they are accepting when negotiating new legislation. In order to reduce the risk of future limitations being derived from the principle of effectiveness in the case-law of the ECJ, the discretion accorded to Member States should also be expressly reflected in the legislation itself.

Third, the legislation governing fines imposed on natural persons should be reassessed, both as regards the scope of such liability and the severity of the sanctions.

As regards scope, EU legislation requiring Member States to provide for sanctions against natural persons is often unclear as to the circumstances in which

such sanctions are actually to be imposed. Some instruments in the field of financial services provide that, where the obligations infringed apply to legal persons, Member States must ensure that penalties may be applied, *subject to the conditions laid down in national law*, to members of the management body and to other natural persons who, *under national law*, are responsible for the breach.³¹⁹ The double reference to national law is noteworthy. As regards the first reference, it is unclear whether making the imposition of penalties subject to conditions laid down in national law differs in any meaningful way from the general position applicable to sanctions imposed on legal persons. In the case of directives lacking direct applicability, sanctions imposed on legal persons must, in principle, likewise be applied subject to the conditions laid down in national law. The second reference is also ambiguous as regards the obligations imposed on Member States. It is unclear whether it requires a Member State to determine in national law which natural persons are to be held liable for the breach, even where the directive itself remains silent on that issue.

By contrast, some instruments prescribe administrative fines against natural persons without including a comparable clause, notwithstanding the fact that the underlying obligations clearly relate to legal persons, such as financial institutions.³²⁰ The personal scope of the GDPR could also benefit from clarification. While the GDPR does not expressly state that fines must also be imposed on natural persons, it is clear that, where the controller is a natural person, that individual is responsible for the infringement and may incur liability for the fine. More uncertain, however, are the limits of the responsibility of a natural person who infringes GDPR rules while acting on behalf of a controller, and whether the personal liability of such individuals, even for intentional infringements, is thereby excluded.³²¹

As regards the severity of sanctions against natural persons, the dissertation argued that very high fines imposed for culpable conduct and capable of leading to the financial ruin of the person concerned are difficult to distinguish from true criminal sanctions. It is therefore questionable whether, in light of the principle of subsidiarity and the ambiguities surrounding the personal scope of such sanctions, the EU should legislate in detail on the levels of fines imposed on natural persons. Fines against natural persons appear to be a relatively ancillary

³¹⁹ E.g. Art 65(2) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC. – OJ L 176, pp 338–436.

³²⁰ E.g. Art 67 of (EU) 2019/1238 (n 103) and Art 24 of (EU) No 1286/2014 (n 312).

³²¹ See, in this regard, also the European Data Protection Board's guidelines on the circumstances under which a natural person qualifies as a controller – European Data Protection Board. Guidelines 07/2020 on the concepts of controller and processor in the GDPR. Version 2.1, pp 10–11. – https://www.edpb.europa.eu/system/files_en?file=2023-10/EDPB_guidelines_202007_controllerprocessor_final_en.pdf (12.04.2026).

feature of the EU's administrative sanctioning regime, and the specifics of such liability should, as far as possible, be left to the discretion of the Member States.

Fourth, the principles of foreseeability and proportionality should be more carefully safeguarded in relation to the choice and severity of sanctions. The legislature should assess, with due regard to subsidiarity, whether detailed harmonisation of fine levels is indispensable for the particular infringements at issue. Where legislation provides for alternative fine ceilings, the criteria governing the choice between them should be determined at EU level. In order to ensure the foreseeability of the applicable sanction, the use of very high fixed fine ceilings that are not calibrated by reference to the offender's economic capacity, the benefit obtained or the loss avoided, should require particular justification and careful consideration from the perspective of foreseeability and proportionality. Excessive fines may not only deter infringements, they may also discourage participation in the regulated sector and inhibit innovation.

Fifth, where the EU adopts directly applicable regulations providing for administrative fines and leaving no room for national substantive conditions of liability, particular attention should be paid to whether those rules adequately safeguard the principles of foreseeability and legal certainty. This concern could be addressed by more detailed regulation of the substantive conditions of liability. However, such an approach would itself raise questions of subsidiarity and proportionality, given the additional intrusion into national sanctioning systems. It would therefore be preferable not to exclude entirely the application of national substantive conditions of liability that are not expressly regulated in the directly applicable instrument, provided that such conditions do not undermine the effectiveness of EU law.

Sixth, greater attention should be paid to the procedural guarantees that must accompany the imposition of punitive administrative fines. If EU law increasingly relies on punitive administrative fines of significant severity as an alternative to criminal sanctions, it should also ensure the foreseeability and coherence of the procedural guarantees applicable to such sanctions. At a minimum, the legislation should identify whether particular safeguards are to be guaranteed, limited, or left to national law. Any limitation of procedural safeguards should be approached with particular caution and preceded by a thorough proportionality assessment. Member States should likewise remain attentive to the possible spillover effects of such limitations, including their potential influence on other areas of administrative sanctioning law or even on criminal law proper. Procedural safeguards are especially important where severe fines are imposed on natural persons and accompanied by an attribution of guilt. A more coherent approach would reduce uncertainty for Member States, addressees of sanctions, and national courts alike.

To conclude, these suggestions do not call for the wholesale harmonisation or codification of EU administrative sanctioning law. Such an approach would risk adversely affecting national sanctioning systems and would itself raise concerns under the principles of conferral, subsidiarity and proportionality. The aim should be more modest: EU legislation on punitive administrative sanctions should become clearer, more consistent and more transparent as to the obligations it

imposes on Member States. The legislature should refrain from relying on ambiguous labels, implicit conditions of liability, unexplained divergences between instruments and excessively broad fine levels.

The more the EU legislature relies on punitive administrative fines of significant severity as an alternative to criminal sanctions, especially on grounds of effectiveness, the stronger the need for legislative precision, procedural safeguards and respect for the autonomy of national sanctioning regimes. The legislature should also remain attentive to the delicate balance between deterring infringements and creating a counter-incentive to operate in the regulated sector for fear of potential sanctions. A coherent sanctioning framework that pays due regard to procedural safeguards is therefore necessary not only to protect the rights of persons affected by punitive administrative proceedings, but also to serve the EU's own interest in the proper functioning of the internal market.

7. CONCLUSIONS

The research objective of this dissertation was to examine the legal and systemic consequences that follow from the post-Lisbon emergence of EU punitive administrative sanctions as a parallel punitive enforcement regime alongside EU criminal law, and to identify the EU-constitutional limits that should govern that development.

The central conclusion is that EU punitive administrative sanctioning law is not internally coherent, either conceptually or as a system. It is characterised by fragmentation, unexplained divergences between instruments and terminological inconsistency, but has nevertheless become a distinct and increasingly autonomous field of EU punitive law. It plays a significant role in shaping the contours of punishment in EU law by creating extensive explicit and implicit obligations for national implementation and by producing systemic effects on EU criminal law, procedural-rights protection and national sanctioning systems. Such sanctions are therefore not merely ordinary administrative enforcement measures. Rather, they occupy an intermediate position between ordinary regulatory enforcement, based on the Union's general sectoral competences, and EU criminal-law harmonisation. Their far-reaching effects, together with the ancillary nature of the Union's administrative sanctioning competence, call for greater legislative discipline, clearer delimitation of the boundary between punitive administrative sanctions and criminal law, and greater respect for subsidiarity, proportionality and procedural safeguards.

This conclusion can be unpacked through the dissertation's three research questions, which correspond to the three dimensions of the analysis: obligations, effects and limits.

The first research question concerned the obligations imposed on Member States:

- 1) What explicit and implicit obligations does EU law impose on Member States for the national implementation of punitive sanctions that the EU legislature classifies or structures as administrative?

The dissertation has shown that the EU legislature has not used the "administrative" label coherently enough for its effects on national implementation to be determined by the label alone. The administrative classification indicates that the Union legislature is not exercising criminal-law competence. In institutional terms, however, it may also point to the role of administrative authorities in imposing the sanction. In this sense, it functions as an antonym of both "criminal" and "judicial". Although the role of an administrative authority could be regarded as one of the key constituent elements of EU punitive administrative sanctions, this requirement is applied with significant inconsistency. Some EU legal acts differentiate between, or even juxtapose, administrative and judicial fines, whereas others treat judicial proceedings as one modality for imposing administrative fines. Since EU law contains no uniform concept of what "administrative" denotes in

the context of punitive sanctions, the obligations imposed on Member States must be determined primarily by reference to the specific legal act in question, rather than inferred from the administrative label itself.

As regards explicit obligations, Member States must lay down rules on the types and levels of sanctions prescribed by the relevant instrument and ensure that competent administrative authorities possess the powers envisaged for their imposition. These prescriptions vary considerably in scope and terminology, often without clear justification. In most cases, however, EU legislation does not expressly regulate the substantive or procedural rules governing the imposition of administrative sanctions. Nor does it generally exclude the use of quasi-criminal or even criminal procedures, provided that the substantive requirements of the EU act are satisfied. Particular features of individual instruments, such as a requirement that administrative authorities possess direct sanctioning powers, may nevertheless make implementation through criminal law difficult or unlikely.

The relationship between administrative, criminal and quasi-criminal enforcement is further blurred by occasional express clauses on the relationship between administrative and criminal sanctions. These clauses differ in scope and wording, often for no apparent reason, and are affected by the underlying absence of a clear distinction between what is criminal and what is administrative. The ECN+ Directive is the clearest example of EU legislation seeking more directly to require an administrative, rather than criminal or quasi-criminal, enforcement model for the imposition of competition fines on grounds of effectiveness. Even there, however, EU law does not clearly define which features of criminal or quasi-criminal proceedings must be avoided.

The same uncertainty is visible from the opposite direction. EU criminal-law instruments adopted under Arts 82 and 83 TFEU do not provide a clear counterpoint to punitive administrative sanctions. Instead, they reveal growing convergence between criminal and administrative sanctioning law, especially as regards additional sanctions, sanctioning regimes for legal persons and the uncertain scope of procedural instruments based on Art 82 TFEU. Those instruments may, in some circumstances, extend to administrative fine proceedings that can lead to a judicial phase before a court having jurisdiction in criminal matters. The criteria for identifying such a court remain underdeveloped, but may have significant implications for the application of Art 82 TFEU instruments to national administrative sanctioning procedures.

The dissertation has further shown that the most significant obligations are not always express. Even where EU legislation contains little or no explicit regulation of substantive liability conditions, the principles of effectiveness and uniform application may restrict Member State discretion. The autonomy that appears to follow from sparse legislative drafting is therefore partly deceptive. As *Deutsche Wohnen* and *Nacionalinis visuomenės sveikatos centras* illustrate, the ECJ may treat the substantive conditions for imposing administrative fines under directly applicable regimes such as the GDPR as governed exclusively by EU law. The GDPR example also shows that, through regulations, EU law may create a directly applicable punitive administrative regime that operates alongside national

sanctioning systems and displaces national substantive conditions of liability. The same effectiveness-based logic may also affect directive-based regimes, as shown by the Court's interpretation of AMLD IV. This means that core concepts of punitive liability, such as intent, negligence and models of liability for legal persons, may be significantly predetermined by implicit EU-law requirements even where they appear to have been left to national discretion. The scope of such implicit requirements may, however, depend heavily on the precise wording of the relevant EU legislation, which often differs across instruments without apparent justification.

While quasi-criminal, and in some cases even criminal-law, enforcement is not precluded as such, the dissertation has shown that implicit features of EU punitive administrative sanctioning law may become decisive. Effectiveness-based scrutiny may focus not only on whether a Member State has formally provided for the required administrative fines, but also on whether the procedural and institutional features of its enforcement model make those fines practically enforceable. This may concern specific procedural elements, as illustrated by *Caronte & Tourist*, such as strict time limits, formalistic evidentiary rules or a rigid separation between supervisory and punitive proceedings. In principle, a cumulative assessment of national procedural rules could also lead to the conclusion that a particular procedural framework makes the enforcement of EU law practically impossible or excessively difficult.

Procedural safeguards also operate as implicit features of EU punitive administrative sanctioning law in two directions. First, they set the minimum level of protection that Member States must ensure. Secondly, where national procedural safeguards go beyond what is minimally required by the ECHR and the Charter, the principle of effectiveness may limit their application if they make the enforcement of EU administrative fines practically impossible or excessively difficult.

Administrative fines that are criminal in substance must comply with the criminal-head guarantees of the ECHR and the Charter under the *Engel/Bonda* case-law. The dissertation argues that punitive fines of significant severity should, in principle, be regarded as criminal under those criteria, while also showing that their application may still produce unexpected and difficult-to-justify results. At the same time, even where administrative fines are criminal in substance, the *Jussila/Schindler* line of case-law allows procedural guarantees to apply with reduced stringency outside the hard core of criminal law. Defining the applicable level of protection is therefore often more difficult than determining whether the sanction is criminal in substance. The dissertation argues that the reduced-stringency approach should not be applied too broadly, especially in relation to administrative fines of significant severity imposed on natural persons.

The answer to the first research question is therefore that the obligations imposed on Member States by EU administrative-sanctioning legislation are not uniform, but can be more intrusive than the express legislation suggests. They are not uniform because EU law does not contain a coherent concept of an administrative sanction and the express requirements vary considerably between instruments. They are more intrusive because the principles of effectiveness and

uniform application may generate implicit requirements concerning substantive liability, procedural safeguards and, potentially, enforcement models. The use of quasi-criminal enforcement models is not precluded as such, but such models are likely to face increasing scrutiny where their features are perceived as undermining the effective and uniform imposition of EU administrative fines.

Having mapped the explicit and implicit features of punitive administrative sanctions, the dissertation then turned to their systemic effects. The second research question asked:

- 2) What systemic effects does EU punitive administrative sanctioning law have on EU criminal law, procedural-rights protection and national sanctioning systems?

The systemic effects on EU criminal law appear mainly in three respects: the influence on criminal-policy choices, the setting of legislative benchmarks, and interpretative spillover.

First, the growing reliance on administrative sanctioning may significantly shape the choice between criminal and administrative enforcement. Where effectiveness and procedural efficiency are prioritised, the role of criminal law may be diminished. This is especially so where administrative fines are justified by reference to greater effectiveness, but reach or even exceed the severity of criminal fines and thus pursue a level of deterrence comparable to criminal sanctions.

Secondly, administrative sanctioning legislation can set punitive benchmarks for EU criminal-law directives and may thereby broaden their scope and requirements. Since criminal-law enforcement is generally expected to carry a stronger deterrent effect, severe sanctions in legislation on punitive administrative sanctions may create a threshold that criminal-law instruments are then expected to exceed. This is particularly visible in relation to sanctions imposed on legal persons and additional measures, where criminal-law instruments increasingly resemble administrative sanctioning regimes.

Thirdly, since criminal and punitive administrative sanctions often rely on similar concepts, ECJ case-law developed in administrative sanctioning contexts may spill over into criminal law. One example discussed in the dissertation was the Court's interpretation of the liability models for legal persons under AMLD IV, which correspond to formulations also used in EU criminal-law instruments. The risk of spillover is heightened by the fact that concepts developed in fragmented administrative sanctioning legislation do not undergo the same degree of legislative and constitutional scrutiny as criminal-law instruments adopted under Art 83 TFEU. Furthermore, because administrative offences attract less constitutional sensitivity, questions concerning core concepts of liability are more likely to reach the ECJ in the administrative-sanctioning context than in criminal law, where national courts may show greater restraint in making references.

The systemic effects on procedural-rights protection may appear in the gradual erosion of procedural guarantees on grounds of effectiveness, with possible spill-over into the case-law of the ECtHR and into criminal law proper.

Although the Charter and the ECHR provide the minimum baseline of procedural-rights protection from which EU law may not deviate, the EU legislature and the case-law of the ECJ may influence where that standard is drawn. This is especially important in light of the blurred boundaries of the *Jussila/Schindler* reduced-stringency approach. In its case-law, the ECJ must balance procedural-rights protection with the effectiveness of EU law, which may influence the level of protection afforded in punitive administrative proceedings. The interaction between the ECJ and the ECtHR may, in turn, result in effectiveness-based limitations on procedural rights developed in EU administrative sanctioning law being carried over into the broader case-law on procedural safeguards. This may contribute to the gradual erosion of procedural guarantees and may also spill over into criminal law proper. The dissertation demonstrated this through several examples of judicial interaction between the two courts that resulted in limitations on procedural guarantees.

The systemic effects on national sanctioning systems may differ depending on the structure of the national system concerned. More generally, they arise from the difficulty of accommodating fragmented and unsystematic EU punitive administrative sanctioning requirements within coherent national sanctioning frameworks, and from the pressure that such requirements place on quasi-criminal enforcement models. The dissertation illustrated these concerns through the Estonian example.

The analysis of the effects of EU legislation on punitive administrative sanctions on the Estonian misdemeanour model shows that EU punitive administrative sanctioning law may affect Member States not only at the level of individual transposition choices, but also at the structural level. Where punitive sanctions are deliberately integrated into a coherent quasi-criminal framework, accommodating EU administrative sanctioning requirements is not merely a technical exercise.

The misdemeanour model forms part of penal law and is therefore deeply embedded in the Estonian criminal justice system. For the purposes of Arts 82(3) and 83(3) TFEU, the division of punishable offences into criminal offences and misdemeanours may itself constitute a fundamental aspect of the Estonian criminal justice system. The broader legal-policy choice to encompass punitive sanctions within penal law has also shaped the surrounding legal order. Consequently, a departure from this model through the creation of a separate administrative sanctioning framework would significantly alter not only the structure of punitive enforcement, but also the core features of administrative and criminal law. Although Estonia has ultimately maintained the misdemeanour model despite several changes in legislative direction, accommodating various EU-law requirements has created significant internal imbalances, including in the relationship between criminal offences and misdemeanours. It has moved the Estonian model away from a coherent and generalised framework towards a more fragmented

structure resembling the sector-specific patchwork of EU law itself. The general part of the Penal Code has thereby lost a significant part of its coordinating and limiting function, as the legislature has been required to introduce sector-specific derogations and carve-outs. Such fragmentation and incoherence may, in turn, negatively affect the effectiveness of the system. Conversely, efforts to preserve coherence may lead Member States to align their national sanctioning systems, even in areas not governed by Union law, with the characteristics of EU administrative sanctioning legislation. In this way, EU punitive administrative sanctioning law may produce effects on national law that are considerably more far-reaching than its sectoral and ancillary character would suggest.

The answer to the second research question is therefore that EU punitive administrative sanctioning law produces significant systemic effects on EU criminal law, procedural-rights protection and national sanctioning systems. These effects arise from a combination of exceptionally high fine levels, a fragmented and incoherent legislative framework across different regulatory fields, and uncertainty concerning both the concept of an administrative sanction and the implicit features of administrative liability. They demonstrate that EU punitive administrative sanctions are not merely regulatory tools for ensuring compliance with Union law. Rather, they form part of the broader punitive architecture of EU law alongside criminal sanctions: they partly overlap with criminal law in function and may compete with it in severity. They are therefore capable of producing significant systemic effects on the broader punitive framework at both EU and national level.

These systemic effects explain why the EU constitutional limits of punitive administrative harmonisation require separate examination. The third research question therefore asked:

- 3) What EU-constitutional limits, including fundamental-rights limits, should govern EU punitive administrative sanctioning law?

First, Art 83 TFEU precludes the adoption of legislation on punitive administrative sanctions, irrespective of its formal classification, where the measure is “criminal” according to the autonomous EU-law meaning of that concept. The meaning of “criminal” is context-dependent and not uniform across all areas of EU law. For the purposes of Art 83 TFEU, a narrow autonomous substantive approach should be applied. This means, on the one hand, that Art 83 TFEU and the safeguards of Title V TFEU cannot be circumvented by legislative mislabelling. On the other hand, although the assessment is substantive, the concept of “criminal” for competence purposes is not as broad as the *Engel/Bonda* criteria. In exceptional cases, the nature and severity of the sanction, the criminal connotation of the underlying conduct and the structure of the proceedings may require a formally administrative sanction to be treated as criminal for the purposes of Union competence. Negative harmonisation of criminal law should likewise fall within

Art 83 TFEU where the underlying conduct is criminal according to that autonomous substantive assessment.

Although the systemic effects identified in the dissertation may affect fundamental aspects of national criminal justice systems, Art 83 TFEU and the safeguards of Title V TFEU cannot protect those systems from every such effect. The concepts of “criminal offence” and “criminal sanction” for the purposes of Art 83 TFEU are autonomous concepts of EU law. National classifications and legal traditions may inform their interpretation, but they cannot determine the scope of the Union’s criminal-law competence. It follows that Estonia, or another Member State in a comparable position, cannot require Art 83 TFEU to be used as the legal basis, or trigger the emergency brake mechanism, merely because EU administrative sanctioning legislation concerns offences that it classifies as criminal, or because such legislation may affect fundamental aspects of its criminal justice system.

As EU law currently stands, punitive administrative fines will generally not qualify as criminal within the meaning of Art 83 TFEU merely because they are severe or because some Member States implement them through quasi-criminal or criminal-law frameworks. Nevertheless, this conclusion becomes more difficult where very substantial fines are imposed on natural persons. A financial penalty capable of bringing about the economic ruin of an individual, imposed in response to wrongful conduct and accompanied by an attribution of guilt, comes close to the sovereign punitive functions traditionally associated with criminal law. In principle, punitive powers of that severity ought to be exercised only within the safeguards of Art 83 TFEU.

Secondly, even where EU punitive administrative sanctioning law does not fall within Art 83 TFEU, its development remains subject to the principles of conferral, subsidiarity and proportionality. The Union’s competence to provide for punitive administrative sanctions is ancillary to its competence in the relevant regulatory field. The absence of a designated legal basis for punitive administrative sanctioning, the ancillary character of this competence, and the functional proximity of punitive administrative sanctions to criminal law all weigh against an interpretation that would permit deep structural interference with Member States’ sanctioning systems. Subsidiarity and proportionality concerns arise especially where the EU legislature seeks to preclude a specific enforcement model used by Member States or to require a distinct sanctioning model. The more EU legislation moves beyond requiring effective sanctions and begins to regulate liability conditions, procedural models or institutional structures, the stronger the justification required under subsidiarity and proportionality for why such matters cannot be left to the Member States. At the same time, ambiguous wording, fragmented and unsystematic EU punitive administrative sanctioning legislation, and the possibility that important implicit features may emerge only later through case-law make it difficult for Member States to assess the full impact of a proposed measure on their sanctioning systems. At the legislative stage, it may therefore be unclear whether EU law merely requires effective

sanctions or will in practice restructure core elements of national sanctioning systems.

Thirdly, EU punitive administrative sanctioning law is constrained by fundamental-rights limits. As shown in the answer to the second research question, where such sanctions are criminal in substance under the *Engel/Bonda* criteria, the applicable criminal-law guarantees of the Charter and the ECHR must be respected. The analysis also showed that EU punitive administrative sanctioning law raises specific concerns of foreseeability and proportionality. These concerns are especially acute where EU law lays down directly applicable administrative fine regimes that are treated as exhaustively governing liability while leaving substantive conditions underdeveloped, as in the GDPR, or where exceptionally broad fine ranges make it difficult to foresee the penalty to which a given infringement may give rise. In such cases, severe administrative fines may work against the Union's own regulatory objectives by discouraging lawful participation in the regulated field.

The answer to the third research question is therefore that EU punitive administrative sanctioning law is subject to a combination of competence-based and fundamental-rights-based limits. Art 83 TFEU protects the boundary of criminal-law harmonisation; conferral, subsidiarity and proportionality limit the depth of ancillary punitive interference with national sanctioning systems; and fundamental rights require adequate procedural safeguards, foreseeable liability rules and proportionate sanctions.

The analysis of the research questions shows that the post-Lisbon development of EU punitive administrative sanctions is not a merely technical extension of regulatory enforcement with no significance for EU criminal law. Although the administrative label may justify a different legal route compared with criminal-law harmonisation, the Union legislature must remain attentive to the function, severity and systemic consequences of such sanctions.

The Member States have not conferred a competence on the Union to replace national sanctioning models with a uniform EU approach. The challenge for the Union legislature is therefore to maintain a clear distinction between criminal and administrative harmonisation, while ensuring that the pursuit of effectiveness does not come at undue cost to procedural safeguards, legal certainty or respect for different legal traditions. This requires coherent and foreseeable legislation, with due regard to subsidiarity and proportionality. EU prescriptions likely to significantly alter national sanctioning systems should be preceded by a thorough analysis identifying the precise causes of inefficiency in existing national models and explaining why less intrusive alternatives would be insufficient.

Further codification of EU administrative sanctioning law would not necessarily solve these concerns and could itself create new competence and subsidiarity problems. The more realistic objective should be a clearer, more consistent and more transparent EU framework that avoids ambiguous labels, unexplained divergences between instruments, implicit conditions of liability and excessively broad fine levels.

The broader value of the dissertation lies in showing how this parallel punitive regime has shaped, and may continue to shape, the contours of punishment in EU law. The future of EU punishment will not be determined only within EU criminal law. Much of it has been, and will continue to be, shaped through administrative sanctions. If this development continues without greater conceptual clarity, legislative coherence and constitutional discipline, the distinction between criminal and administrative sanctions will become increasingly difficult to justify. The dissertation argues not for the abandonment of punitive administrative sanctions, but for their recognition as a constitutionally significant field of EU punitive law requiring clearer limits, more coherent design and greater respect for national sanctioning autonomy.

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ABBREVIATIONS

[GC]	Grand Chamber
AG	Advocate General
AMLD	Anti-Money Laundering Directive. The latest is AMLD VI: Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937, and amending and repealing Directive (EU) 2015/849. – OJ L 2024/1640.
Art	Article
BGBI	Bundesgesetzblatt (German for <i>Federal Gazette</i>)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (German for <i>Decisions of the Federal Constitutional Court</i>)
Charter	Charter of Fundamental Rights of the European Union
CJEU	The Court of Justice of the European Union
CLS	The Legal Service of the Council of the European Union
COPEN	Working Party on Judicial Cooperation in Criminal Matters
CSMAD	Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).
DROIPEN	Working Party on Substantive Criminal Law
<i>e.g.</i>	<i>exempli gratia</i> (for <i>example</i> in Latin)
ECFI	Court of First Instance of the European Communities
ECHR	European Convention on Human Rights
ECJ	Court of Justice
ECN+ Directive	Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
Ed/Eds	Editor/Editors
EEC	The European Economic Community

EGC	General Court
EIK	Euroopa Inimõiguste Kohus (Estonian for <i>European Court of Human Rights</i>)
EIO	European Investigation Order
EIÕK	Inimõiguste ja põhivabaduste kaitse konventsioon (Estonian for <i>European Convention on Human Rights</i>)
EK	Euroopa Kohus (Estonian for <i>Court of Justice</i>)
EL	Euroopa Liit (Estonian for <i>European Union</i>)
EMÜ	Euroopa Majandusühendus (Estonian for <i>The European Economic Community</i>)
ENSV	Eesti Nõukogude Sotsialistlik Vabariik (Estonian for <i>Estonian Soviet Socialist Republic</i>)
ELTL	Euroopa Liidu toimimise leping (Estonian for <i>Treaty on the Functioning of the European Union</i>)
EPPO	European Public Prosecutor's Office
<i>et al</i>	<i>et alii</i> (and other people in Latin)
<i>etc</i>	<i>et cetera</i> (and so forth in Latin)
EU	European Union
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
Hrsg	Herausgeber (German for <i>editor</i>)
<i>i.e.</i>	<i>id est</i> (<i>that is</i> in Latin)
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.
NIS2 Directive	Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive)

No	Number
NSV	Nõukogude Sotsialistlik Vabariik (Estonian for <i>Soviet Socialist Republic</i>)
OJ	Official Journal
PIF	Protection of the EU's Financial Interests
pp	Pages/paragraphs
RKKK	Riigikohtu kriminaalkolleegium (Estonian for <i>Criminal Chamber of the Supreme Court</i>)
Ro	ordentliche Revision (German for <i>ordinary appeal</i>)
RT	Riigi Teataja (Estonian for <i>State Gazette</i>)
S	Seite (German for <i>page</i>)
SME	Small and medium-sized enterprise
TFEU	Treaty on the Functioning of the European Union
Toim	Toimetaja (Estonian for <i>editor</i>)
v	Versus
Vol	Volume
VSRS	Vrhovno sodišče Republike Slovenije (Slovenian for <i>Supreme Court of the Republic of Slovenia</i>)
VwGH	Verwaltungsgerichtshof (German for <i>The Supreme Administrative Court</i>)

SUMMARY IN ESTONIAN

Karistamise muutuvad piirjooned Euroopa Liidu õiguses: karistusõiguse ja halduskaristuste vastasmõju pärast Lissaboni lepingut

1. Probleemid, eesmärgid ja uurimisküsimused

Euroopa Majandusühenduse (EMÜ) loomise järel sai peagi selgeks, et ühenduse õigus saab olla tõhus üksnes siis, kui liikmesriigid seda ka jõustavad. Muuhulgas tähendas see vajadust karistuslike jõustamismehhanismide järele. Karistusõigust, vähemasti selle kitsas tähenduses, peeti aga selle erilise iseloomu tõttu valdkonnaks, milles ühendusel pädevus puudus. Euroopa Kohus (EK) jõudis sellegipoolest seisukohale, et ka sõnaselge aluslepingu sätte puudumisel võis ühendus teatud piiratud juhtudel ning piiratud ulatuses nõuda liidu õiguse jõustamist karistusõiguse abil. Lissaboni lepinguga püüti liidu karistusõigusliku pädevuse ulatus kindlaks määrata Euroopa Liidu toimimise lepingu (ELTL) art-s 83. Ühelt poolt annab see artikkel liidule sõnaselge pädevuse kehtestada direktiivide abil miinimumeeskirju kuriteokoosseisude ja karistuste määratlemise kohta. Samal ajal näevad ELTL V jaotis ning ELTL art 83 liikmesriikide karistusõiguse süsteemidele ette eritagatised. Niisiis on tegemist hoolikalt ja ettevaatlikult delegeeritud pädevusega.

ELTL art 83 ei hõlma aga tervet liidu karistuslikku pädevust selle laias mõttes. Nii enne kui ka pärast Lissaboni lepingut on liidu (või ühenduse) õigus nõudnud liidu õiguse jõustamist ka selliste karistuslike meetmete abil, mida liidu õigus ise karistusõiguslikuks ei liigita.

Enne Lissaboni lepingut tugines ühendus (ja hiljem liit) mittekaristusõiguslikele sanktsioonidele eeskätt seetõttu, et arvati, et karistusõiguslike meetmete ühtlustamine ei ole liidu pädevuses. Lissaboni lepingu järgne olukord on teistsugune. Karistusõigusliku pädevuse selge piiritlemise järel ei sõltu valik kriminaal- ja mitte-karistusõiguslike karistuste vahel niivõrd pädevuse puudumisest, vaid erinevatest poliitikaeesmärkidest. Kriminaalkaristuste kasuks räägib nende suurem heidutav mõju, mittekaristusõiguslike karistuste kasuks aga nende kohaldamise kiirus ja lihtsus ehk nende tõhusus. See tõhusus tuleb aga osaliselt ka menetlusõiguslike tagatiste arvelt.

Liidu õiguse mahu kasv, reguleerimisvaldkondade suurenev keerukus ning finantskriisi õppetunnid on kaasa toonud arvukate direktiivide ja määruste vastuvõtmise, mis kohustavad liikmesriike sätestama EL õiguse rikkumise eest äärmiselt kõrgeid, kümnetesse miljonitesse ulatuvaid rahatrahve nii füüsilistele kui ka juriidilistele isikutele. Liidu õigus on asunud neid ettekirjutusi süsteemselt „haldustrahvideks“ kutsuma. Lisaks on liidu halduskaristusliku iseloomuga ettekirjutused muutunud ka üha detailsemaks. Sealjuures on esiplaanile kerkinud ka arusaam, et karistusmodeli „halduslik“ määratlus tagab liidu õiguse tõhusama jõustamise kui kriminaal- või kvaasi-kriminaalmenetlusel põhinev karistusmudel. Liidu karistus- ja halduskaristusõiguse paralleelne areng tõstatab aga mitmeid põhimõttelisi küsimusi. Probleem ei seisne mitte üksnes liidu õiguses

sätestatud halduskaristuste raskuses, vaid ka haldus- ja kriminaalkaristuste piiritlemises ning selles, milliseid kohustusi „haldus-“ silt liikmesriikidele asetab. Liikmesriikide õigussüsteemid on mittekaristusõiguslike karistuste kohaldamise osas äärmiselt erinevad. Seega on erinev ka mõju, mida liidu halduskaristusõigus liikmesriikide õigussüsteemidele omab.

Kuigi karistuse formaalne liigitus on oluline, ei ole see ainumäärav. Nii näiteks on Euroopa Inimõiguste Kohtu (EIK) praktika järgi inimõiguste ja põhivabaduste kaitse konventsioonis (EIÕK) sätestatud kriminaalmenetluslike põhiõiguste kohaldamisel määrav meetme objektiivne karistuslik iseloom, mitte selle formaalne liigitus. Mida lähemale selline halduskaristuste ühtlustamine karistusõigusele liigub, seda nii oma funktsiooni, raskuse kui ka mõjude osas, seda enam vajab põhjendamist, mis eristab halduskaristusi kriminaalkaristustest ning miks liidu õigus neid erinevalt kohtleb.

Varasem õiguskirjandus on täheldanud liidu haldus- ja karistusõiguse piiride hägustumist ning rõhutanud vajadust tagada põhiõiguste kaitse tase. Käesolev doktoritöö püüab täita uurimislünka, mis seisneb Lissaboni järgse halduskaristusõiguse arengu uurimises kolmest omavahel seotud aspektist: riigisisene rakendamine; süsteemsed mõjud ja EL-konstitutsioonilised piirid. Doktoritöö lisandväärtus ja iseseisev panus seisneb selles, et töö selgitab esiteks, millised tagajärjed kaasnevad liikmesriikidele, kui liidu seadusandja liigitab või kujundab karistuse „halduslikuks“; teiseks, millised on liidu halduskaristusõiguse süsteemsed mõjud EL karistusõigusele, põhiõiguste kaitse tasemele ja liikmesriikide karistussüsteemidele; kolmandaks, millised EL-i konstitutsioonilised piirid halduskaristusõiguse arengut raamistavad.

Doktoritöö keskendub eeskätt neile karistustele, mida liidu seadusandja ise „halduskaristusteks“ nimetab. Keskne fookus on kõrge ülemmääraga haldustrahvidel, mis on oma mõjult kõige sarnasemad kriminaalkaristustele. Liidu institutsioonide vahetu karistamispädevus doktoritöö esemesse ei kuulu.

Doktoritöö uurimiseesmärgiks on välja selgitada õiguslikud ja süsteemsed tagajärjed, mis tulenevad Lissaboni lepingu järgsest EL halduskaristusõiguse ühtlustamisest, ning määratleda liidu halduskaristusõiguse EL-konstitutsioonilised piirid.

Uurimiseesmärgi saavutamiseks lähtub doktoritöö kolmikjaotusest: kohustused, mõjud ja piirid. Esiteks uuritakse liidu halduskaristuste otseseid ja kaudseid tunnuseid, mida liikmesriigid peavad liidu õiguse rakendamisel arvesse võtma (kohustused). Teiseks analüüsitakse liidu halduskaristusõiguse süsteemset mõju EL-i karistusõigusele, menetlusõiguste kaitse tasemele ning liikmesriikide karistussüsteemidele (mõjud). Kolmandaks käsitletakse halduskaristuste ühtlustamise EL-i konstitutsioonilisi piire, sealhulgas piire, mis tulenevad ELTL art-st 83, pädevuse andmise põhimõttest, subsidiaarsusest, proportsionaalsusest ja põhiõigustest (piirid).

Seega vastatakse üldisele uurimisküsimusele järgmiste alaküsimuste kaudu:

- 1) Milliseid otseseid ja kaudseid kohustusi asetab EL-i õigus liikmesriikidele liidu halduskaristusõiguse rakendamisel?

- 2) Milline süsteemne mõju on liidu halduskaristusõigusel EL-i karistusõigusele, menetlusõiguste kaitse tasemele ja liikmesriikide sanktsioonisüsteemidele?
- 3) Millised on halduskaristuste ühtlustamise EL-i konstitutsioonilised, sealhulgas põhiõigustest tulenevad piirid?

Doktoritöö koosneb viiest teaduspublikatsioonist ja katuspeatükist.

Publikatsioon I analüüsib EL-i karistusõigusliku ühtlustamise piire ELTL art 82 lg-s 3 ja art 83 lg-s 3 sätestatud hädapiduri mehhanismi kaudu ning tõlgendab liikmesriikide kriminaalõigussüsteemi aluspõhimõtete mõistet. Sealsed järeldused on doktoritöö jaoks olulised, sest need seonduvad karistusõiguse erilise EL-konstitutsioonilise taustaga ning näitavad, et ELTL art 82 lg-s 3 ja 83 lg-s 3 sätestatud hädapiduri mehhanism kaitseb ka liikmesriikide kriminaalõigussüsteemide põhimõttelisi struktuurseid valikuid, sealhulgas ka karistusõiguse jagunemist kuritegudeks ja väärtegudeks.

Publikatsioon II käsitleb EL-i karistusõigusliku pädevuse ajalugu ning halduskaristuste Lissaboni lepingu järgset kujunemist osaks liidu laiemast kriminaalpoliitikast. Publikatsioon analüüsib, kas EL-i õiguses on selge „halduskaristuse” mõiste ning seda, millised õiguslikud tagajärjed on halduslikul sildil riigisisese rakendamise jaoks, eelkõige arvestades eesmärgi, mida liit selliste karistustega taotleb. See on oluline määratlemaks, milliseid kohustusi liidu halduskaristusõigus liikmesriikidele asetab.

Publikatsioon III arendab publikatsiooni II järeldusi edasi ning analüüsib, millised otsesed kohustused tulenevad EL-i õigusaktidest liidu halduskaristusõiguse riigisiselisel rakendamisel. Publikatsiooni eesmärk on tuvastada, kas liidu halduskaristusõigusest joonistuvad välja nn halduskaristuse konstitutiivsed tunnused. Publikatsioonil on oluline panus uurimiseesmärgi saavutamisesse, sest selles uuritakse, kas EL-i õigus pakub ühtset tunnuste kogumit, mida liikmesriigid peavad halduskaristuste rakendamisel üle võtma, kas see silt võimaldab eristada halduskaristusi kriminaalkaristustest, ning kas halduslik silt võib ka piirata karistusõiguse kasutamist. Neist järeldustest sõltub suuresti ka halduskaristuste süsteemne mõju.

Publikatsioon IV käsitleb kriminaalmenetlusele omaste põhiõiguste kohaldamist EL-i halduskaristustele EIÕK ja EL-i õiguse alusel. Selle panus doktoritöösse on kahesugune. Esiteks näitab see, et halduskaristuse silt ei vabasta EL-i ega liikmesriike kohustusest tagada kriminaalmenetluslikud garantiid siis, kui sanktsioon on sisult karistuslik. Teiseks näitab see, milline ebakindlus püsib põhiõiguste kaitse miinimumtasemes, kui karistusliku mõjuga halduskaristus jääb väljapoole karistusõiguse tuuma. Publikatsiooni järeldused on doktoritöö jaoks olulised, sest põhiõiguste kaitse miinimumtasemest sõltub see, milliseid põhiõigusi peavad liikmesriigid tagama, kuid teiselt poolt ka see, kuhu maani võib EL-i õigus põhiõiguste kaitse taseme tõhususe kaalutlusel langetada. Samuti sõltub artikli järeldustest halduskaristusõiguse süsteemne mõju põhiõiguste kaitse tasemele.

Publikatsioon V analüüsib EL-i õiguse mõju juriidiliste isikute vastutusele Eesti kriminaal- ja väärteomenetluses. Publikatsioon keskendub *Deutsche Wohnen* kohtuotsusele. See annab aluse doktoritöö laiemale väitele, et EL-i halduskaristusõigus võib endas sisaldada kaugeleulatuvaid kaudseid kohustusi, mida liikmesriigid liidu õiguse rakendamisel arvesse võtma peavad. Sellised nõuded võivad aga omada olulist mõju liikmesriikide sanktsioonisüsteemidele.

Katuspeatükk on raamtekst, mis ühendab doktoritöö üksikud publikatsioonid sidusaks tervikuks. Selle eesmärk ei ole publikatsioonides esitatud analüüsi ja järeldusi tervikuna korrata ega asendada. Katuspeatükk võtab publikatsioonides tehtud järeldused kokku, sünteesib neid ja arendab neid edasi, et vastata uurimisküsimustele. Samuti paigutab see varasema uurimistöö loogilisse järjestusse ning juhatab lugeja läbi doktoritöö tervikliku argumentatsiooni.

Pärast sissejuhatust koosneb katuspeatükk viiest sisulisest peatükist ja järeldustest. Iga peatükk käsitleb ühte või mitut uurimisküsimust. Töö ülesehitus on selline, et eelnevate peatükkide järeldused on olulised järgnevate peatükkide analüüsi ja järelduste jaoks.

2. peatükk käsitleb EL-i karistusliku pädevuse arengut ning halduskaristuste kujunemist eraldiseisvaks ja üha üksikasjalikumalt ühtlustatavaks EL-i õiguse valdkonnaks. Selles uuritakse, mis tingis halduskaristusõiguse Lissaboni järgse arengu ning seda, millised poliitilised kaalutlused määravad liidu seadusandja valiku kriminaalkaristuste ja halduskaristuste vahel.

3. peatükk uurib EL-i halduskaristusõigusest tulenevaid otseseid tunnuseid, et selgitada, millised vahetud kohustused lasuvad liikmesriikidel EL-i õiguses sätestatud halduskaristuste riigisiselisel rakendamisel, samuti seda, kuidas sellised sanktsioonid suhestuvad ELTL art-te 82 ja 83 alusel vastu võetud EL-i karistusõiguse instrumentidega. See on vajalik hindamaks, kas liidu seadusandja kasutab „halduslikku“ silti järjekindlalt ning millisel määral piirab see liigitus liikmesriikide diskretsiooni liidu halduskaristusõiguse riigisiselisel rakendamisel.

4. peatükk uurib, kas ja millises ulatuses loovad liidu õiguse tõhususe ja ühetaolise kohaldamise põhimõtted halduskaristuste kaudseid tunnuseid ning kuidas seovad need liikmesriiki halduskaristuste riigisiselisel rakendamisel. Peatükk käsitleb ka menetluspõhiõigusi kui halduskaristusõiguse kaudseid tunnuseid. Seda funktsiooni täidavad menetluspõhiõigused kahte pidi: esiteks, miinimumtagatistena, mis tuleb nii liidu kui liikmesriigi tasandil tagada ning teiseks, standarditena, millele esitatavad leebemad nõuded võivad tõhususe kaalutlustel piirata ka riigisisest menetlusõiguste kaitse taset. Peatükk tugineb seega 3. peatükis tuvastatud sõnaselgetele tunnustele ja näitab, kuidas EL-i halduskaristusõiguse mõju liikmesriikide õigussüsteemidele võib olla ulatuslikum kui õigusakti enda sõnastusest eeldada võiks.

5. peatükk tugineb 3. ja 4. peatüki tulemustele ning analüüsib nende põhjal EL-i halduskaristusõiguse süsteemset mõju EL-i karistusõigusele, menetlusõiguste kaitse tasemele ja liikmesriikide sanktsioonisüsteemidele. Mõjusid liikmesriikide sanktsioonisüsteemidele analüüsitakse Eesti väärteovastutuse mudeli põhjal.

6. peatükk käsitleb seda, millised on halduskaristuste ühtlustamise EL-i konstitutsioonilised piirid. Esmalt analüüsitakse ELTL art-t 83, et piiritleda liidu karistus- ja halduskaristusõiguslik pädevus. Sealjuures hinnatakse, kas ja millises ulatuses kaitsevad ELTL V jaotise garantiid liikmesriikide karistusõigussüsteeme liidu halduskaristusõiguse mõjude eest. Seejärel käsitletakse halduskaristusõiguse täiendavaid piire, mis tulenevad EL-i esmasest õigusest, sealhulgas pädevuse andmise põhimõttest, subsidiaarsusest, proportsionaalsusest ja põhiõigustest. Eelnevale analüüsile tuginedes tehakse peatükis ka ettepanekuid EL-i karistuslike haldussanktsioonide õiguse sidusama raamistiku arendamiseks.

7. peatükk esitab järeldused ja vastab uurimisküsimustele.

2. Meetodid ja allikad

Doktoritöö on õigusdogmaatiline uurimus. Töö tugineb kohtupraktikale ja õiguskirjandusele.

Kirjeldavat õiguslikku uurimismeetodit kasutatakse selleks, et tuvastada ja kaardistada Euroopa Liidu õigusaktides sisalduvad halduskaristusõiguse otsesed tunnused. Seejärel kasutatakse dogmaatilist ja analüütilist meetodit nende normide tõlgendamiseks, nende omavahelise suhte hindamiseks ning doktoritöös püstitatud uurimisküsimustele vastamiseks. Esmasteks allikateks on Euroopa Liidu esmane õigus, Euroopa Liidu teisene õigus ning Euroopa Kohtu ja Euroopa Inimõiguste Kohtu praktika. Teisest allikatena kasutatakse õiguskirjandust, institutsioonide dokumente ja ettevalmistavaid materjale.

Doktoritöö teatavates osades viidatakse ka valitud liikmesriikide riigisisesele õigusele. Need viited ei kujuta endast kõikehõlmavat võrdlevat uurimust. Põhjalikumalt keskendutakse Eesti väärtusmudelile. See ei esinda küll kõikide liikmesriikide õigussüsteeme, kuid selle põhjal on võimalik hinnata liidu õiguse mõju koherentsele kvaasi-karistusõiguslikule süsteemile.

Tehisintellekti tööriistu (Microsoft Copilot ja ChatGPT) kasutati autori koostatud teksti keeleliseks ja stilistiliseks toimetamiseks.

3. Järeldused

Doktoritöö uurimiseesmärgiks oli selgitada välja õiguslikud ja süsteemsed tagajärjed, mis tulenevad Lissaboni lepingu järgsest EL halduskaristusõiguse ühtlustamisest, ning määratleda liidu halduskaristusõiguse EL-konstitutsioonilised piirid.

Doktoritöö keskne järeldus on, et EL halduskaristusõigus ei ole süsteemne ega sisemiselt sidus. Seda iseloomustab killustatus, põhjendamatud erisused ning terminoloogiline ebaühtlus. Sellest hoolimata on halduskaristusõigusest kujunenud eraldiseisev ja üha autonoomsem liidu õiguse valdkond, millel on oluline roll liidu karistusliku pädevuse piirjoonte kujundamisel. Liidu halduskaristusõigus sisaldab erinevaid ning sageli ka ebajärjepidevaid otseseid ja kaudseid nõudeid, millega liikmesriigid liidu õiguse rakendamisel arvestama peavad.

Halduskaristusõigusega kaasnevad olulised süsteemsed mõjud liidu karistusõigusele, põhiõiguste kaitse tasemele ja liikmesriikide sanktsioonisüsteemidele. Halduskaristuste iseloomu, haldustrahvide raskuse ja eelpool kirjeldatud mõjude tõttu ei saa neid käsitada tavapäraste haldusmeetmetena. Liidu halduskaristusõigus asetub liidu üldise ja karistusõigusliku pädevuse vahepealsele alale. Halduskaristuste kaugeleulatuvad süsteemsed mõjud ning asjaolu, et halduskaristuste ühtlustamine on osa liidu kõrvalpädevusest, nõuavad rangemat seadusandlikku distsipliini, selgemat vahetegu haldus- ja kriminaalkaristuste vahel, menetluspõhiõiguste kaitse tagamist ning ulatuslikumat kinnipidamist subsidiaarsuse ja proportsionaalsuse põhimõttest.

Need järeldused väljenduvad uurimisküsimustele antud vastustes.

Esimene uurimisküsimus käsitles liikmesriikidele asetatud kohustusi:

- 1) Milliseid otseseid ja kaudseid kohustusi asetab EL-i õigus liikmesriikidele liidu halduskaristusõiguse rakendamisel?

Doktoritöö näitas, et EL õigus ei kasuta „halduskaristuse“ silti ühetaoliselt ega süsteemselt.

Halduslik liigitus tähistab ennekõike seda, et liit ei teosta karistusõiguslikku pädevust. Selles mõttes on tegemist vastandiga mõistele „kriminaal-“. Institutsionaalses mõttes tähistab see aga haldusorgani rolli karistuse mõistmisel ning vastandub mõistele „kohtulik“. Ehkki haldusorgani rolli võib lugeda peamiseks liidu halduskaristusõiguse konstitutiivseks tunnuseks, käsitab liidu õigus seda küsimust siiski vastandlikult. Näiteks eristatakse mõnel juhul kohtulikku karistamist halduskaristusest, teinekord loetakse aga kohtulik karistusmenetlus üheks halduskaristuse kohaldamise viisiks.

Reeglina ei sätesta õigusaktid vahetult menetluse liigile ulatuslikke nõudeid, vaid reguleeritakse karistuste määrasid ning haldusorgani rolli. Eeldusel, et need nõuded on täidetud, ei ole karistusõiguse ega kvaasi-karistusõiguslike mudelite kasutamine tingimata välistatud, ehkki nt ECN+ Direktiiviga püüti selliste mudelite kasutamist tõhususe argumendil piirata. Üldisemalt iseloomustavad aga õigusaktidest tulenevaid vahetuid nõudeid põhjendamatud erisused, kontseptuaalne segadus haldus- ja karistusõiguse vahekorra ning sellest, kas ja mil määral tohib halduskaristusi rakendada karistusõiguse kaudu (selle kitsas mõttes). Ka ei määratle seda vahekorda selgemini liidu karistusõiguse valdkonnas vastu võetud õigusaktid.

Doktoritöö tuvastas, et õigusaktidest vahetult tulenevate kohustuste vähesus on aga petlik, sest Euroopa Kohus võib efektiivsuse ning liidu õiguse ühetaolise kohaldamise põhimõttest tulenevalt tuletada ka kaudseid nõudeid. Need võivad seonduda nii materiaali- kui menetlusõiguslike küsimustega ning seeläbi oluliselt piirata liikmesriigi võimalust rakendada EL õigust läbi olemasoleva sanktsioonisüsteemi. Sealjuures ilmestab *Deutsche Wohnen* otsus, et liit võib määruste abil luua ka ammendava ja vahetult kohaldatava sanktsioonirežiimi riigisisese sanktsioonisüsteemi kõrvale. Kuna liidu seadusandja tugineb halduskaristustele

ka tõhususe põhimõtet silmas pidades, võivad teatud karistusõiguslike või kvaasi-karistusõiguslike sanktsioonimudelite tunnused selle põhimõttega vastuollu sattuda.

Kaudsete nõuetena on käsitatavad ka halduskaristuste kohaldamisel tagatavad menetluspõhiõigused. Doktoritöö analüüsis EIK ja EK praktikat ning järeldas, et liidu halduskaristustele tuleb üldjuhul kohaldada kriminaalõiguslikke garantiisid. Samas on *Jussila* kohtupraktika valguses vaieldav nende garantiide kohaldumise „rangus“. Kuna halduskaristuste efektiivsus tuleb sageli menetlusõiguste arvelt, ei ole välistatud, et EK või liidu seadusandja võib piirata liikmesriikide õigust säilitada teatud menetlusgarantiide kõrgem riigisisese kaitse tase. Doktoritöös leiti, et vähemasti füüsilisi isikuid puudutavas osas ei tohiks kõrgete halduskaristuste korral põhiõiguste kaitse tase olla oluliselt madalam sellest, mis on nõutav kriminaalmenetluses.

Teisisõnu tuleb esimesele uurimisküsimusele vastata, et liikmesriikidele pandud kohustused ei ole ühetaolised, kuid need võivad olla oluliselt ulatuslikumad, kui õigusaktist esmapilgul nähtub. Need kohustused ei ole ühetaolised, sest EL õiguses puudub sidus halduskaristuse mõiste ning sõnaselged nõuded erinevad õigusaktide vahel märkimisväärselt. Samas võivad need kohustused olla ulatuslikumad seetõttu, et tõhususe ja ühetaolise kohaldamise põhimõtted võivad kaasa tuua arvukalt kaudseid nõudeid, mis võivad avalduda alles EK praktikas. Kvaasi-karistusõiguslike süsteemide kasutamine ei ole iseenesest välistatud, kuid need ei pruugi, vähemasti igas aspektis, vastata liidu õiguse tõhususe nõudele.

Võimalike otseste ja kaudsete kohustuste kaardistamise järel uuris doktoritöö EL-i halduskaristusõiguse süsteemseid mõjusid:

- 2) Milline süsteemne mõju on liidu halduskaristusõigusel EL-i karistusõigusele, menetlusõiguste kaitse tasemele ja liikmesriikide sanktsionisüsteemidele?

Doktoritöö järeldab, et halduskaristusõigusel on oluline süsteemne mõju kõigile uurimisküsimuses nimetatud valdkondadele.

EL-i karistusõigust mõjutab halduskaristusõigus esiteks läbi kriminaalpoliitika kujundamise. Kui esiplaanile seatakse tõhusus ja menetluslik efektiivsus, nõrgeneb kriminaalõiguse roll. See on eriti ilmne olukordades, kus halduskaristuste vajadust põhjendatakse nende suurema tõhususega, ent trahvide raskusega taotletakse samaaegselt kriminaalkaristustega võrreldavat heidutavat mõju. Suurema tõhususe ja samaväärse heidutuse samaaegne taotlemine seab aga küsimuse alla need põhimõtted, mille alusel liidu õigus raskemaid rikkumisi kuritegudena käsitlema peaks.

Halduskaristusõigus mõjutab ka vahetult EL karistusõiguse sisu, sest see seab karistusõiguslike direktiivide jaoks „karistusliku miinimumlävendi“. See on juba väljendunud juriidilistele isikute karistusrežiimis, kus karistusõiguslikud direktiivid sarnanevad üha enam halduskaristusõigusega.

Mõju liidu karistusõigusele kaasneb ka EK praktikaga. Kuna liidu karistus- ja halduskaristusõigus tugineb samalaadsetele mõistetele, võib EK halduskaristus-

õigust puudutav tõlgenduspraktika üle kanduda ka karistusõigusele. Ühe sellise näitena analüüsis doktoritöö AMLD IV-s sätestatud juriidilise isiku vastutuse mudelile antud tõlgendust. Ehkki see tõlgendus anti halduskaristusi silmas pidades, tugineb liidu karistusõigus identselt juriidilise isiku vastutuse mudelile, mistõttu kohaldub kohtu tõlgendus eelduslikult ka liidu karistusõiguses.

Menetluspõhiõiguste kaitse taset mõjutab halduskaristusõiguse areng eeskätt läbi tõhususel põhinevate menetlusõiguste piirangute ning Luksemburgi ja Strasbourgis kohtute omavahelise dialoogi. EIÕK sätestab küll miinimumtaseme, millest EL õigus ei tohi kõrvale kalduda, kuid EL õigus ja EK praktika võivad mõjutada seda, kuhu see miinimumtase kohtupraktikas täpselt paigutatakse. EK ja EIK praktika vastasmõju võib viia selleni, et EL halduskaristusõiguses välja kujunenud ning menetluse tõhususele tuginevad menetlusõiguste piirangud viivad menetlusõiguste järkjärgulisele nõrgenemisele ning mõjutavad ka kriminaalmenetluses kohalduvaid õigusi. Doktoritöö tugineb selles väites mitmele näitele kohtute praktikast, kus Luksemburgi kohtus sätestatud madalam põhiõiguste kaitse tase on üle kandunud ka EIK praktikasse.

Viimaks on halduskaristustel ka märkimisväärne süsteemne mõju vähemalt nende liikmesriikide sanktsioonisüsteemidele, kes püüavad säilitada koherentset karistussüsteemi. Eesti väärtusmudel ilmestab, et EL halduskaristusõigus võib mõjutada liikmesriike mitte üksnes üksikute ülevõtmisvalikute tasandil, vaid ka struktuurset. Eesti mudeli puhul ei ole EL halduskaristusõiguse rakendamine pelgalt tehniline küsimus. Ehkki Eesti on säilitanud senise väärtusmudeli, on liidu õiguse paigutamine senisesse koherentsesse mudelisse kaasa toonud ulatuslikke süsteemseid muudatusi ning oluliselt muutnud nii karistusõiguse üldosa põhimõtteid kui ka kuritegude ja väärtegude omavahelist suhestumist. Püüd tagada koherentne karistussüsteem peab paratamatult sellega, et ka riigisisene õigus tuleb kujundada sarnaseks liidu halduskaristusõigusele. Alternatiivselt tuleb koherentse süsteemi taotlemisest sootuks loobuda, mis võib omakorda negatiivselt mõjutada karistusõigussüsteemi efektiivsust. Niisiis võivad liidu halduskaristusõiguse mõjud liikmesriikide sanktsioonisüsteemidele olla märkimisväärsed.

Vastus teisele uurimisküsimusele on seega, et EL halduskaristusõigus avaldab olulist süsteemset mõju EL kriminaalõigusele, menetlusõiguste kaitsele ja riigisisestele sanktsioonisüsteemidele. Need mõjud tulenevad eeskätt erakordselt kõrgetest trahvimääradest, eri reguleerimisvaldkondades kujunenud killustunud ja ebajärjekindlast õigusraamistikust ning halduskaristuse mõiste ning sellega kaasnevate otseste ja kaudsete mõjude ebaselgusest.

Need mõjud näitavad, et EL halduskaristused moodustavad koos kriminaalkaristustega osa EL õiguse laiemast karistuslikust arhitektuurist: halduskaristused kattuvad kriminaalkaristustega oma funktsioonilt ning võivad raskuselt kriminaalkaristustega konkureerida. Seetõttu võib liidu halduskaristusõiguse areng avaldada märkimisväärset süsteemset mõju nii ELi kui ka liikmesriikide karistuslikule raamistikule tervikuna.

3) Millised on halduskaristuste ühtlustamise EL-i konstitutsioonilised, sealhulgas põhiõigustest tulenevad piirid?

Doktoritöös leitakse, et ELTL art 83 piirab halduskaristuste ühtlustamist üksnes siis, kui ühtlustatav halduskaristus on käsitatav kuriteo eest mõistetava karistusena ELTL art 83 mõttes. See hinnang ei sõltu meetme formaalsest liigitusest. Kuriteo ja karistuse mõisted ELTL art 83 mõttes on liidu õiguse autonoomsed mõisted, mis võivad muudes õigusvaldkondades olla teise tähendusega. Mõistete sisustamisel tuleb lähtuda autonoomsest kitsast sisulisest tõlgendusest. Mõiste EL-autonoomsus tähendab üksiti seda, et kui ühtlustatav meede ei kuulu karistusõiguse mõiste alla EL õiguse autonoomses tähenduses, ei taga ELTL V jaotis ega ELTL art 83 lg-s 3 sätestatud hädapiduri mehhanism liikmesriikide karistusõigussüsteemidele kaitset isegi siis, kui liidu halduskaristusõigus võiks mõjutada liikmesriigi karistusõigussüsteemi olulisi põhimõtteid. Doktoritöös leiti, et reeglina ei vasta liidu halduskaristusõigus „kuriteo“ mõistele ELTL art 83 mõttes. Ainsaks vaieldavaks erandiks on füüsilistele isikutele ette nähtud kõrge ülemmääraga trahvid, mille kohaldamise eelduseks on süüline käitumine ning mis võivad oma ulatusliku majandusliku ja sotsiaalse mõju tõttu sarnaneda karistusõigusliku karistusega.

Kuna liidu halduskaristusõigus ei kuulu ELTL art 83 kohaldamisalasse, piiravad selle arengut ennekõike subsidiaarsuse ja proportsionaalsuse põhimõtted. Aluslepingud ei sisalda eraldi pädevust liikmesriikide halduskaristusõiguste ühtlustamiseks. Halduskaristuste ühtlustamine on niisiis liidu kõrvalpädevus, mis tuleneb õigusest nõuda reguleeritava valdkonna nõuete jõustamist. Selline tuletatud pädevuse iseloom, koos halduskaristusõiguse paigutumisega karistusõigusega külgneval alal, seab ka kõrgemad nõuded subsidiaarsuse ja proportsionaalsuse põhimõtte austamisele ega luba liikmesriikide sanktsioonisüsteemide süsteemset ümberkorraldamist. Ennekõike ei ole subsidiaarsuse nõudega kooskõlas see, kui liidu õigus seab piiranguid liikmesriigi sanktsioonisüsteemi kasutamisele näitamata veenvalt, kas ja millised selle sanktsioonisüsteemi tunnused muudavad liidu õiguse jõustamise ebatõhusaks.

Viimaks seavad liidu halduskaristusõigusele piiranguid ka hartast tulenevad põhiõigused. Lisaks kohustusele tagada kriminaalmenetlusega võrreldavad menetlusgarantiid, tõstatas doktoritöö ka probleeme ettenähtavuse ja proportsionaalsuse seisukohast, seda iseäranis vahetult kohaldatavate ammendavate halduskaristusrežiimide – nagu isikuandmete kaitse üldmäärus – korral. Samuti märgiti, et karistuste drakoonilised määrad ei heiduta üksnes rikkumisi, vaid karistuse risk võib omada heidutavat mõju ka majandustegevuses osalemisele. See tähendab, et kõrge ülemmääraga halduskaristused võivad üksiti vastu töötada liidu teistele poliitikaeesmärkidele.

Vastus kolmandale uurimisküsimusele on seega, et EL halduskaristusõigust piiravad ühtaegu nii pädevuspõhised kui ka põhiõiguste-põhised piirid. ELTL art 83 ei luba muudel õiguslikel alustel selliste halduskaristuste ühtlustamist, mis on karistusõiguslikud liidu õiguse autonoomses mõttes; pädevuse andmise, subsidiaarsuse ja proportsionaalsuse põhimõtted piiravad seda, kui ulatuslikult võib

liit oma halduskaristusliku kõrvalpädevuse abil liikmesriikide sanktsioonisüsteemidesse sekkuda; ning põhiõigused nõuavad, et halduskaristuste ühtlustamisel ei piirataks ülemäära menetluslikke tagatise.

Uurimisküsimuste analüüs näitab, et EL halduskaristuste Lissaboni-järgsel arengul on oluline õiguslik ja süsteemne mõju. Kuigi haldusõiguslik silt võib õigustada halduskaristuste ühtlustamist väljaspool ELTL art-s 83 sätestatud alust, tuleb sealjuures silmas pidada selliste karistuste funktsiooni, raskust ja süsteemseid mõjusid.

Halduskaristusõiguse kujundamisel tuleb säilitada vahetegu kriminaal- ja halduskaristuste vahel, tagades samal ajal, et tõhusust ei taotletaks menetluslike tagatiste, õiguskindluse ega liikmesriikide õigussüsteemidesse ülevõtte sekkumise arvelt. See eeldab sidusat ja ettenähtavat õigusloomet, mis arvestab nii subsidiaarsuse kui proportsionaalsuse põhimõtetega. Nõuetele, mis eeldavad olulisi muudatusi liikmesriigi sanktsioonisüsteemides, peaks eelnema põhjalik analüüs, milles tuvastatakse olemasolevate riigisiseste mudelite ebatõhususe täpsed põhjused ning selgitatakse, miks vähem sekkuvad alternatiivid ei oleks piisavad.

Lahendus ei ole halduskaristusõiguse ulatuslikum ühtlustamine. See võib tekitada täiendavaid pädevus- ja subsidiaarsusküsimusi. Realistlikum eesmärk on selgem, järjekindlam ja läbipaistvam EL õiguslik raamistik, mis väldib ebaselgeid õiguslikke määratlusi, põhjendamatuid erinevusi õigusaktide vahel, õigusaktide kaudseid mõjusid ja ülemäära suuri trahvivahemikke.

Doktoritöö praktiline väärtus seisneb selles, et see toob esile selle, mil moel liidu halduskaristusõigus mõjutab karistamise piirjooni EL õiguses. EL karistusõiguse tulevik ei piirdu vaid ELTL art-te 82 ja 83 alusel vastu võetud õigusaktidega. Suur osa sellest on kujunenud ja kujuneb ka edaspidi halduskaristuste kaudu. Kui see areng jätkub senisel kujul, sealjuures senistes karistumäärades, muutub kriminaal- ja halduskaristuste eristamine üha raskemini põhjendatavaks. Doktoritöö ei väida, et halduskaristustest tuleks loobuda, vaid et halduskaristusõiguse arengul tuleb silmas pidada külgnemist EL karistusõigusega ning sellest iseloomust tulenevaid süsteemseid mõjusid. Halduskaristusõiguse areng vajab selgemaid piire, sidusamat ülesehitust ja suuremat austust liikmesriikide sanktsioonisüsteemide eripärade vastu.

PUBLICATIONS

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