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## Targeted Financial Sanctions: Criminal in Nature?

An Analysis of the Case Law of the ECtHR and the CJEU on the Nature of Targeted Financial Sanctions

*Abstract:*

*Several rights guaranteed by the ECHR and the CFR are applicable only in case of a ‘criminal charge’. Therefore, it is important to know whether, or not, a certain sanction is criminal in nature. It is equally important that the CJEU qualifies the same sanctions as criminal in nature as the ECtHR does, since Article 52(3) CFR states that the meaning and scope of the rights provided by the CFR must be at least the same as the meaning and scope of corresponding rights provided by the ECHR. This article provides an analysis of both Courts’ case law on the qualification of targeted financial sanctions (criminal in nature or not?) and examines whether significant differences can be identified. One of the conclusions is that the Courts might differ on the qualification of administrative fines, but that future case law will have to elucidate whether this is indeed the case.*

**Keywords:** targeted financial sanctions, administrative fine, criminal in nature, criminal charge, human rights protection, ECtHR, CJEU, case law

*Introduction*

At the moment, there are two instruments at the European level that protect fundamental rights: the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR). According to Article 52(3) CFR, the meaning and scope of the rights provided by the CFR must be at least the same as the meaning and scope of corresponding rights provided by the ECHR. Several provisions are only applicable in case of a ‘criminal charge’, such as the right to a fair trial (Article 6 ECHR), the legality principle (Article 7 ECHR), the presumption of innocence and the right of defence (Article 48 CFR), the principles of legality and proportionality of criminal offences and penalties (Article 49 CFR) and the *ne bis in idem* principle (Article 50 CFR). It is important that both Courts – *i.e.* the European Court

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of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) – qualify the same sanctions as criminal in nature<sup>1</sup>; otherwise the CJEU might not offer at least the same level of protection as the ECtHR as required by Article 52(3) CFR.

This article focuses on so-called targeted financial sanctions (see section II). It analyses whether these sanctions are qualified as criminal in nature by the ECtHR and the CJEU, respectively. Furthermore, it discusses whether the two Courts differ on the qualification of targeted financial sanctions as criminal in nature and how possible differences should be evaluated from the viewpoint of Article 52(3) CFR.<sup>2</sup> One of these targeted financial sanctions – the payment of an administrative fine (Article 5 sub a of Regulation 2988/95 on the protection of the European Communities' financial interests) – has been one of the most popular targeted financial sanctions since the 1980s, at least in the Netherlands.<sup>3</sup> Imagine that you have committed a traffic offence and that you have received an administrative fine (as was the case in *Öztürk v. Germany*; see section III.2). Can you invoke the right to a fair trial? And does the presumption of innocence apply? The answer to these questions depends on the question as to whether the fine is criminal in nature. It would be problematic if the ECtHR answered in the affirmative (which it does; see section III.2) and the CJEU did not, since this will result in a violation of Article 52(3) CFR. Taking into account that this sanction is imposed frequently, this example shows that the issue is highly relevant.

This article is structured as follows; The first section describes the relation between the ECtHR and the CJEU and discusses the meaning and purpose of Article 52(3) CFR. The second section succinctly elucidates the term 'targeted financial sanctions'. After that, the qualification of targeted financial sanctions in the case law of the ECtHR respectively the CJEU is discussed (section III and IV). These parts thus provide an overview of both Courts' general doctrine and the reasoning applied in specific cases in which the Courts considered whether a certain sanction is criminal in nature, and the resulting decisions as to the qualification of these sanctions. The fifth section examines the similarities and the differences between the case law of the ECtHR and the CJEU and evaluates possible differences in the light of Article 52(3) CFR. The conclusion provides an answer to the research question and speculates upon future developments.

- 1 This article uses 'criminal in nature' as an overarching concept in order to cover several formulations used by the ECHR and the CFR, such as 'charged', 'criminal offence', 'criminal proceedings', and 'criminal charge'. In case of the ECtHR the sanction is considered criminal in nature when it is imposed in the context of the determination of a criminal charge.
- 2 The results are based on a search of the case law using the ECtHR's Hudox and CJEU's Curia and EUR-Lex website database, using a range of search terms – such as (administrative) fine, criminal charge, sanction, targeted financial sanction, Regulation 2988/95 – intended to capture all the relevant cases. The 'snowball' research method has been applied to analyse the cases mentioned in the references made to earlier case law. Furthermore, a literature review has been conducted in order to find landmark cases and general literature on the origins and functioning of both Courts.
- 3 *M. den Uijl*, Straffen: de uitvoerende macht als de nieuwe rechterlijke macht?!, in: M. Duchateau/P. Kingma (eds.), *Regt spreken volgens de wet? Bijdragen over de staatsrechtelijke positie van de (Europese) rechter*, 2013, p. 9.

## I The Relation between the ECtHR and the CJEU

Quinn describes the relation between the ECtHR and CJEU beautifully by stating that the EU and the Council of Europe were like twins separated at birth, but growing increasingly close nowadays.<sup>4</sup> The main goal of both Courts was to realise European integration, but the path chosen towards this integration was different. The Council of Europe has chosen the path of common European standards of human rights, whereas the EU has chosen the economic path by focusing on establishing a common market.<sup>5</sup> However, in response to some landmark cases in which the importance of the protection of human rights was established explicitly, the economically oriented CJEU also recognised the importance of protecting these rights.<sup>6</sup> Nevertheless, there are still certain limits to the protection of human rights by the CJEU; see section V.2.c.

Nowadays, the protection of fundamental human rights is codified in several treaties, such as the CFR, of which Article 52(3) is of utmost value as to the relation between the ECtHR and the CJEU. This provision determines that

*“in so far as this Charter contains rights which correspond to rights as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”.*

As such, the CFR should provide at least the same protection as the ECHR. The meaning of Article 52(3) CFR has been clarified in the *DEB* case<sup>7</sup>, as the CJEU stated that not only the text of the ECHR is a determinant of the meaning and scope of the guaranteed fundamental rights, but also the case law of the ECtHR. Therefore, the CJEU also needs to look at the way the ECtHR has interpreted the concept of a criminal charge.

However, considering this provision, it is remarkable that the CJEU in general does not refer to the ECtHR or other relevant sources of human rights law and jurisprudence on a regular basis. References to these sources are only made sporadically and selectively, which may lead to “autonomous and potentially insufficiently informed case law” with regard to human rights matters.<sup>8</sup> To illustrate this, research shows that

4 G. Quinn, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, McGill Law Journal 2001, p. 849.

5 Quinn (fn. 4), pp. 854-855.

6 *Court of Justice of the European Union* (CJEU) 14.5.1974, case 4/73 (*Nold*), [1974]; *BVerfGE* 22 October 1986, 73, 339, *Solange II*; *Court of Justice of the European Union* (CJEU) 26.3.1987, case 46/87 (*Hoechst*), [1987]; *Niemitz v. Germany*, Application no. 13710/88, Judgement 16 December 1992; and *Court of Justice of the European Union* (CJEU) 22.10.2002, case 94/00 (*Roguet Freres*), [2002].

7 *Court of Justice of the European Union* (CJEU) 22.12.2010, case 279/09 (*DEB*), [2010], margin no 35.

8 G. de Búrca, *After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?*, Maastricht Journal of European and Comparative Law (MJ) 2013, pp. 173-174.

in the available case law of the CJEU from 2009 until the end of 2012 only in 27 of the 122 judgements in which the CJEU referred to the CFR the CJEU dealt to some extent with the substantive meaning of provisions of the CFR. In merely 10 out of the 27 cases, the CJEU actually referred to the case law of the ECtHR and in all these cases, the CJEU agreed with the reasoning of the ECtHR.<sup>9</sup> In the other 95 cases, reference was made to the CFR, but without focusing in depth on the substance, and in just 10 of these 95 cases, a provision of the ECHR was mentioned.<sup>10</sup>

Although the CFR should offer at least the same protection as the ECHR, a gap in legal protection arose because the ECtHR did not have the competence to deal with complaints against the EU institutions concerning the violation of human rights, as the EU is not (yet) party to the ECHR in this sense (see the conclusion of this article for a more extensive discussion of this subject).<sup>11</sup> The question popped up as to what should be done with cases in which national authorities have acted in the course of implementing EU law without discretion, while thereby possibly infringing upon human rights. The ECtHR decided in *Bosphorus* that if a decision is taken by a national authority, the state remains responsible for that decision under Article 1 ECHR, even if it is dictated by international law. This would, in practice, mean that the ECtHR is assessing the lawfulness of EU law without having competence to do so. In order to solve this conflict, the *Bosphorus* doctrine was established, which formulates the presumption of equivalent protection: any activity of a Member State undertaken as a result of international obligations is presumed to be in accordance with the ECHR and to provide equivalent protection of fundamental human rights in its substance and its control mechanisms, unless the protection of these rights is manifestly deficient.<sup>12</sup>

## II Targeted Financial Sanctions

The term ‘targeted financial sanctions’ refers to the sanctions mentioned in Article 5 of Regulation 2988/95. This regulation aims to protect the Union’s financial interests by introducing penalties that are “effective, proportionate and dissuasive” to ensure cor-

9 *De Búrca* (fn. 8), p. 174.

10 *De Búrca* (fn. 8), pp. 174-175.

11 C. Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, Human Rights Law Review 2006, p. 90.

12 *Bosphorus v. Ireland*, Application no. 45036/98, Judgement 30 June 2005, margin no 155: “State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling the observance, in a manner which can be considered at least equivalent to that for which the Convention provides”. See also margin no 156: “If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation”; and margin no 156: “[A]ny such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient”.

rect application of the Union rules (Article 1 of Regulation 2988/95). The sanctions listed in Article 5 are the following:

- “(a) payment of an administrative fine;
- (b) payment of an amount greater than the amounts wrongly received or evaded, plus interest where appropriate (...);
- (c) total or partial removal of an advantage granted by Community rules (...);
- (d) exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity;
- (...)
- (f) the loss of a security or deposit provided for the purpose of complying with the conditions laid down by rules or the replenishment of the amount of a security wrongly released (...).”

It should be noted that the ECtHR does not use the term ‘targeted financial sanctions’. However, this Court has ruled upon the nature of the administrative fine and a specific variant thereof – the tax surcharge – and these do fall within the scope of the Regulation (see sub a). The ECtHR has not ruled upon the nature of the other targeted financial sanctions that are discussed in this article, for these other sanctions are imposed only in the context of the EU regime.

### III The Qualification of Targeted Financial Sanctions by the ECtHR

This section first elaborates on the concept of a criminal charge as used by the ECtHR; next, the Court’s qualification of the administrative fine and the tax surcharge is examined.

#### 1 The Concept of a ‘Criminal Charge’

If a criminal charge<sup>13</sup> is established, the guarantees derived from Article 6 ECHR are applicable. Article 6(1) ECHR states that

*“[i]n the determination of his civil rights and obligations or of any criminal charge against him [emphasis added], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”*

Article 6(2) ECHR contains the presumption of innocence. Moreover, according to Article 6(3) ECHR

*“[e]veryone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the na-*

<sup>13</sup> In this section the term ‘criminal charge’ is used instead of ‘criminal in nature’ in order to use the terminology of the ECtHR.

ture and cause of the accusation against him; b) to have adequate time and facilities for the preparation of his defence; c) to defend himself in person or through legal assistance (...); d) to examine or have examined witnesses against him (...); e) to have free assistance of an interpreter if he cannot understand or speak the language used in court.”

In *Engel and others v. the Netherlands*<sup>14</sup>, the ECtHR decided to give an autonomous meaning to the concept of a ‘criminal charge’ and established three criteria to determine the existence of a criminal charge: the classification of the offence in domestic law, the nature of the offence, and the nature and degree of severity of the possible penalty.<sup>15</sup> The first criterion should be considered merely as a “starting point”, whereas the nature of the offence is of greater importance.<sup>16</sup> With regard to the second *Engel* criterion, the ECtHR makes a distinction between the situation in which the relevant provision of the national legislation is directed at the general public and the situation in which it is directed at a specific group of people possessing a specific status. The former involves the determination of a criminal charge, whereas the latter belongs to the field of disciplinary law.<sup>17</sup> As to the explanation of the application of the third *Engel* criterion, see section III.2.

It should be noted that the second and third criteria are not necessarily cumulative, but can be regarded as alternative.<sup>18</sup> If the ECtHR cannot arrive at a clear conclusion as to the existence of a criminal charge by an alternative approach, a cumulative approach can be used.<sup>19</sup>

## 2 The Qualification of Administrative Fines by the ECtHR

In *Öztürk v. Germany*, an administrative fine was imposed on the applicant, a Turkish citizen, for causing a traffic accident by colliding with another vehicle as a result of careless driving.<sup>20</sup> To be able to follow the hearing, Mr. Öztürk had to make use of an

14 *Engel and others v. the Netherlands*, Application no. 5370/72, Judgement 8 June 1976, margin no 81-83.

15 The three criteria have been affirmed in *Ezeh and Connors v. the United Kingdom*, Application no. 39665/98 and 40086/98, Judgement 9 October 2003, margin no 82. See also *P. van Dijk, F. van Hoof, A. van Rijn & L. Zwaaks* (eds.), *Theory and Practice of the European Convention on Human Rights*, 2006, pp. 543-554.

16 ECtHR, *Engel and others v. the Netherlands* (fn. 14), margin no 82.

17 See for instance *Oleksandr Volkov v. Ukraine*, Application no.21722/11, Judgement 9 January 2013, margin no 93. According to this judgement, an offence belongs to the field of disciplinary law if the regulation concerned is directed at a group of individuals possessing a special status, since the sanction can be considered “a classic disciplinary measure for professional misconduct”.

18 ECtHR, *Engel and others v. the Netherlands* (fn. 14), margin no 86.

19 ECtHR, *Ezeh and Connors v. the United Kingdom* (fn. 15), margin no 86. See also *Bendoun v. France*, Application no 12547/86, Judgement 24 February 1994, margin no 47.

20 ECtHR, *Öztürk v. Germany*, Application no. 8544/79, Judgement 21 February 1984, margin no 11.

interpreter, whose costs he had to bear himself.<sup>21</sup> According to Mr. Öztürk, this resulted in a violation of his right to a fair trial under Article 6 ECHR that offers the free assistance of an interpreter if the person charged with a criminal offence cannot understand or speak the language used in the court.<sup>22</sup> The government argued that Article 6 ECHR was not applicable, since the applicant was not charged with a criminal offence, but with a regulatory offence.<sup>23</sup> However, the ECtHR held that Article 6 ECHR was indeed applicable, because – taking into account the autonomous notion of a criminal charge and applying the *Engel* criteria<sup>24</sup> – the fine was criminal in nature: although the penalty lacked a certain degree of severity, the rule was directed towards all citizens who take part in traffic, and its aim was to punish and deter.<sup>25</sup> The Court reiterated this line of reasoning in *Lutz v. Germany*<sup>26</sup>. A penalty is also presumed to be criminal in nature if not paying the fine leads to imprisonment or to notification on a criminal record.<sup>27</sup>

### 3 The Qualification of Tax Surcharges by the ECtHR

The ECtHR has furthermore ruled upon the nature of a certain type of administrative fine, *i.e.* the tax surcharge. It has generally held that Article 6 ECHR does not apply to traditional taxation cases.<sup>28</sup> The ECtHR acknowledges the fact that fiscal payments are not part of the civil rights and obligations as mentioned in Article 6(1), for they belong exclusively to the domain of public law.<sup>29</sup> This has been confirmed in *Ferrazzini v. Italy*.<sup>30</sup>

However, in *Janosevic v. Sweden*<sup>31</sup> the ECtHR decided otherwise. In this case,<sup>32</sup> the applicant alleged that the decisions of the Tax Authority to enforce taxes and tax surcharges before a court had decided on the dispute violated his rights under Article 6 ECHR, more specifically the right to a fair hearing, the right to have proceedings within a reasonable time and the right to be presumed innocent until proved guilty according to the law.<sup>32</sup> The government relied on the argumentation used in *Ferrazzini v. Italy*, as discussed above by arguing that tax disputes did not fall within the scope of Article 6 ECHR under its civil head, and suggested that it neither fell under its criminal head, because tax surcharges belonged to administrative law, their aim was preven-

21 ECtHR, *Öztürk v. Germany* (fn. 20), margin no 13-14.

22 ECtHR, *Öztürk v. Germany* (fn. 20), margin no 45.

23 ECtHR, *Öztürk v. Germany* (fn. 20), margin no 46.

24 ECtHR, *Öztürk v. Germany* (fn. 20), margin no 50.

25 ECtHR, *Öztürk v. Germany* (fn. 20), margin no 53.

26 *Lutz v. Germany*, Application no. 9912/82, Judgement 25 August 1987, margin no 54-55.

27 *Žugić v. Croatia*, Application no. 3699/08, Judgement 31 May 2011, margin no 68.

28 *Van Dijk, Van Hoof, Van Rijn & Zwaaks* (eds.) (fn. 15), pp. 528-529.

29 *Schouten and Meldrum v. the Netherlands*, Application no. 19005/91 and 19006/91, Judgement 9 December 1994, margin no 50.

30 *Ferrazzini v. Italy*, Application no. 44759/98, Judgement 12 July 2001, margin no 29.

31 *Janosevic v. Sweden*, Application no. 34619/97, Judgement 23 July 2002.

32 ECtHR, *Janosevic v. Sweden* (fn. 31), margin no 59.

tive and fiscal in nature, and a prison sentence could not be imposed.<sup>33</sup> The ECtHR agreed on the conclusion that, in general, tax cases do not fall within the scope of Article 6 ECHR, but came to a different conclusion by applying the *Engel* criteria. Although tax surcharges are classified as administrative in domestic law, their aim is to punish and to enforce compliance with the rules on tax surcharges. Thus, they are deterrent and punitive measures.<sup>34</sup> Furthermore, the provisions are directed to the public in general and the punishment can be very severe in the sense that there is no fixed limit to the amount of the tax surcharge.<sup>35</sup> It can be concluded that in this case the ECtHR extended the application of Article 6 ECHR to tax proceedings by deciding that tax surcharges are criminal in nature.<sup>36</sup>

This decision was further strengthened in *Jussila v. Finland*.<sup>37</sup> In this case, the applicant also alleged that he had not been appointed a fair hearing as guaranteed by Article 6 ECHR in the proceedings in which a tax surcharge was imposed, because the courts did not hold an oral hearing.<sup>38</sup> The government argued that Article 6 ECHR was not applicable, since – according to the Finnish legal system – tax surcharges form part of administrative law, in which criminal law provisions do not play a role. According to the government, tax surcharges could not be considered as court-imposed sanctions under a general rule, because they were targeted at a specific group of citizens, namely those who are obliged to pay the Value-Added Tax. Furthermore, the tax surcharges aimed to protect the fiscal interests of the state and to exert pressure on taxpayers to act in accordance with their legal obligations, and the tax surcharge, which was relatively low, could not be transformed into a prison sentence.<sup>39</sup>

The ECtHR, applying the *Engel* criteria, concluded firstly that according to the classification of the offence in domestic law, tax surcharges are not criminal, but belong to the fiscal regime.<sup>40</sup> Secondly, the ECtHR noted, in contrast with the arguments put forward by the government, that tax surcharges were imposed by general legal provisions applicable to taxpayers in general, and that the purpose of the tax surcharges was to punish and to deter.<sup>41</sup> Although the penalty was not very severe, the ECtHR defined tax surcharges as criminal in nature and concluded that Article 6 ECHR was indeed applicable. However, the ECtHR also acknowledged that “[t]here are clearly “criminal charges” of different weight” and that

*“[t]ax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency”.*<sup>42</sup>

33 ECtHR, *Janosevic v. Sweden* (fn. 31), margin no 60-61.

34 ECtHR, *Janosevic v. Sweden* (fn. 31), margin no 66 and 68.

35 ECtHR, *Janosevic v. Sweden* (fn. 31), margin no 69.

36 ECtHR, *Janosevic v. Sweden* (fn. 31), margin no 71.

37 *Jussila v. Finland*, Application no. 73053/01, Judgement 23 November 2006.

38 ECtHR, *Jussila v. Finland* (fn. 37), margin no 3.

39 ECtHR, *Jussila v. Finland* (fn. 37), margin no 26.

40 ECtHR, *Jussila v. Finland* (fn. 37), margin no 37.

41 ECtHR, *Jussila v. Finland* (fn. 37), margin no 38.

42 ECtHR, *Jussila v. Finland* (fn. 37), margin no 43.

It can be concluded that the ECtHR, using the *Engel* criteria, qualifies both administrative fines and tax surcharges as criminal in nature. This has been confirmed in later case law, such as *Payker Yev Haghtanak Ltd v. Armenia*<sup>43</sup> – in which the Court decided that a tax surcharge was criminal in nature because of its amount – and *Hannu Lehtinen v. Finland*<sup>44</sup>, in which the ECtHR did not even mention the amount of the tax surcharge, but directly stated that a tax surcharge is criminal in nature, which was also the case in *Kallio v. Finland*.<sup>45/46</sup>

#### IV The Qualification of Targeted Financial Sanctions by the CJEU

This section discusses the criteria the CJEU uses for considering sanctions to be of a criminal nature and examines the qualification of the different kinds of targeted financial sanctions.

##### 1 Criteria for Qualifying Sanctions as ‘Criminal in Nature’

Several criteria for qualifying a sanction as criminal in nature can be distinguished in the CJEU’s case law. Firstly, the CJEU takes into account whether the rule is aimed at a specific group of people, such as those who have voluntarily applied for a scheme of aid. If the sanction is aimed at a specific group of people, it is considered to be administrative and not criminal in nature. It should be noted that the question whether the sanction applies to a specific group of people is intertwined with the argument relating to voluntariness, since the sanction can be aimed only at people who have voluntarily applied for Union aid. In *Maizena*<sup>47</sup> the CJEU stated that

*“if traders themselves decide to take advantage of the special arrangements involving advance release of their security, they do so voluntarily and in the light of the economic advantage which they see therein. The penalty is thus no more than a counter-balance to the early release of the security, which is not released definitively but merely provisionally (...).”*<sup>48</sup>

The CJEU applied the same line of reasoning in *KCH*<sup>49</sup>, where it considered that the rules in question were directed exclusively at persons who had voluntarily made use of an agricultural aid scheme. Annotator De Moor-Van Vugt points out that

43 *Payker Yev Haghtanak Ltd v. Armenia*, Application no. 21638/03, Judgement 20 December 2007.

44 *Hannu Lehtinen v. Finland*, Application no. 32993/02, Judgement 22 July 2008.

45 *Kallio v. Finland*, Application no. 40199/02, Judgement 22 July 2008.

46 See G. Kofler, M. Poiares Maduro & P. Pistone, *Human Rights and Taxation in Europe and the World*, 2011, pp. 402-406.

47 *Court of Justice of the European Union* (CJEU) 18.11.1987, case 137/85 (*Maizena*), [1987].

48 CJEU, *Maizena* (fn. 47), margin no 13.

49 *Court of Justice of the European Union* (CJEU) 11.7.2002, case 210/00 (*Käserei Champignon Hofmeister*), [2002].

“[i]t seems to be the idea of “contract” which defines the nature of the sanction: it cannot be a punishment, if one has agreed to it oneself.”<sup>50</sup>

Secondly, the CJEU considered whether the sanction forms an integral part of a scheme of aid or a scheme of security: if it is part of a scheme of aid or a scheme of security, the sanction is not considered to be criminal in nature. In *Maizena*, the CJEU set out reasons for considering a sanction as an integral part of a system of security:

“the penalty constitutes the corollary of the system of security and is intended to achieve the same objectives as the security itself. That sanction is imposed at a flat rate and is independent of any culpability on the part of the trader. It is therefore an integral part of the system of security at issue and is not criminal in nature.”<sup>51</sup>

To be an integral part of the system, the sanction should be “interwoven” with the underlying legal framework.<sup>52</sup> The argument of the sanction being an integral part of a scheme of aid or a scheme of security has been repeated in *Germany v Commission*<sup>53</sup>, where the CJEU emphasised that the sanction was inherently linked to a right following from the scheme of aid, and in *KCH*<sup>54</sup> and *Bonda*<sup>55</sup>.

Thirdly, the CJEU adopted the abovementioned *Engel* criteria by examining the nature of the infringements and the degree of severity of the sanctions in order to determine whether a sanction is criminal in nature in *Spector Photo Group*.<sup>56</sup> This was the first case in which the CJEU explicitly brought its case law concerning the notion of ‘criminal nature’ into conformity with the case law of the ECtHR.<sup>57</sup> The CJEU repeated this approach in *Bonda*, where the Court first examined the legal classification of the offence under EU law. Secondly, the Court addressed the purpose of the penalty to determine whether it was punitive.<sup>58</sup> In this regard, the CJEU took into account whether the measures could be applied to only a specific group of people, whether their aim was to protect the management of the EU funds and whether the penalty

50 Annotation by A.C.J. De Moor-Van Vugt in *Court of Justice of the European Union* (CJEU) 11.7.2002, case 210/00, AB Rechtspraak Bestuursrecht 2002, 392.

51 CJEU, *Maizena* (fn. 47), margin no 13. The CJEU thus followed the opinion of Advocate General J. Mischo of 11 June 1987.

52 *De Moor-Van Vugt* (fn. 50), margin no 4.

53 *Court of Justice of the European Union* (CJEU) 27.10.1992, case 240/90 (*Germany v. Commission*), [1992], margin no 26.

54 *De Moor-Van Vugt* (fn. 50), margin no 4.

55 *Court of Justice of the European Union* (CJEU), 5.6.2012, case 489/10 (*Bonda*), [2012], margin no 31-32.

56 *Court of Justice of the European Union* (CJEU) 23.12.2009, case 45/08 (*Spector Photo Group*), [2009], margin no 42. The CJEU referred to *inter alia Engel and others v. the Netherlands and Öztürk v. Germany*.

57 Annotation by R.J.G.M. Widdershoven in *Court of Justice of the European Union* (CJEU) 5.6.2012, case 489/10, AB Rechtspraak Bestuursrecht 2012, 315, margin no 2.

58 As annotator Widdershoven mentions, it can be argued that it would make more sense – from a systematic point of view – if the CJEU discussed the non-repressive nature of the sanctions under the third criterion, which concerns the nature and degree of severity of the sanctions. See *Widdershoven* (fn. 57), margin no 3.

might become ineffective.<sup>59</sup> Thirdly, the CJEU considered the degree of severity of the penalty.<sup>60</sup> In *Åkerberg Fransson*<sup>61</sup> the CJEU stated again that, in order to determine the (criminal) nature of the imposed sanction, the *Engel* criteria should be applied.

## 2 The Qualification of the Sanctions Listed in Article 5 of Regulation 2988/95

### a) Administrative Fines and Tax Surcharges (a)

In *Spector Photo Group*, the CJEU discussed the nature of the administrative fine. In this case, a fine had been imposed upon Spector Photo Group and one of its managers for insider dealing. The CJEU applied the second and third *Engel* criteria and held that, considering the nature of the infringements and the degree of severity of the sanctions, it could be concluded that the sanctions were criminal in nature.<sup>62</sup>

In *Åkerberg Fransson*, the CJEU discussed the nature of the tax surcharge, a specific type of administrative fine.<sup>63</sup> *Åkerberg Fransson* was accused of having committed serious tax offences and therefore a fine had been imposed upon him. In the course of subsequent criminal proceedings at national level, the question arose whether the *ne bis in idem* principle of Article 50 CFR was applicable. After a request by the national court for a preliminary ruling on the interpretation of EU law, the CJEU had to determine whether the previously imposed fine was criminal in nature. The CJEU did not itself decide the matter, but held that it was for the national court to determine the nature of the sanction, thereby taking into account the three *Engel* criteria, which the CJEU had reiterated in *Bonda*.<sup>64</sup> As explained in section V.2.a of this article, one might wonder whether in this specific case it would have been better if the CJEU itself had decided on the nature of the sanction. According to annotator Widdershoven, the

59 However, as Widdershoven remarks, the latter factor should not be considered decisive. After all, in *KCH* the CJEU also qualified the sanction as not criminal in nature, although there was no way for it to become ineffective. See *Widdershoven* (fn. 57), margin no 3.

60 *CJEU, Bonda* (fn. 55), margin no 36-46.

61 *Court of Justice of the European Union* (CJEU) 26.2.2013, case 617/10 (*Åkerberg Fransson*), [2013].

62 *CJEU, Spector Photo Group* (fn. 56), margin no 42. The CJEU referred to *inter alia Engel and others v. the Netherlands* and *Öztürk v. Germany*.

63 It should be noted that in its judgment the CJEU uses the terms 'tax surcharge' and 'tax penalty' instead of 'administrative fine'. For reasons of consistency, the terminology of Article 5(1)(a) of Regulation 2998/95 is used.

64 *CJEU, Åkerberg Fransson* (fn. 61), margin no 32-37. With this decision the CJEU does not follow the opinion of Advocate General Cruz Villalón, who proposes that the *ne bis in idem* principle must be interpreted as not precluding criminal proceedings relating to offences for which a penalty has already been imposed in administrative proceedings, provided that the criminal court can take into account that previously imposed administrative penalty in order to mitigate the criminal punishment. See the opinion of Advocate General Cruz Villalón of 12 June 2012, margin no 96, and the annotation by R.J.G.M. Widdershoven in *Court of Justice of the European Union* (CJEU) 26.2.2013, case 617/10, AB Rechtspraak Bestuursrecht 2013, 131, margin no 8.

CJEU should have qualified the fine imposed in *Åkerberg Fransson* as criminal in nature.<sup>65</sup>

b) Payment of an Amount Greater than the Amounts Wrongly Received (b)

In *KCH*, the CJEU ruled upon the nature of the sanction mentioned in Article 5(1)(b) of Regulation 2988/95: the payment of an amount greater than the amounts wrongly received. This sanction had been imposed, because KCH had requested a higher export refund for the agricultural product it exported than the amount of refund it was entitled to receive. Referring to the same types of arguments as used in *Maizena* and *Germany v. Commission*, the CJEU found that the sanction imposed upon KCH was not of a criminal nature, since it formed an integral part of the aid systems and intended to ensure the sound financial management of EU funds. Moreover, the infringed rules were directed exclusively at people who voluntarily participated in an agricultural scheme of aid. According to the CJEU, it was undisputed that in the present case only traders who had applied for export refunds were likely to have the penalty of Article 5(1)(b) of Regulation 2988/95 imposed upon them.<sup>66</sup> On the basis of these arguments, the CJEU concluded that the sanction imposed upon KCH should not be qualified as criminal in nature, thereby following the opinion of Advocate General Stix-Hackl.<sup>67</sup>

A remarkable aspect of the CJEU's judgment in this case is mentioned by annotator De Moor-van Vugt. She notes that the sanction imposed upon KCH – *i.e.* the sanction mentioned in Article 5(1)(b) of Regulation 2988/95 – is comparable to the surcharge, which in turn is currently called a fine. As De Moor-van Vugt points out, it can be argued that it is peculiar that the CJEU in *KCH* did not qualify the sanction as criminal in nature, since administrative fines are normally considered to be criminal in nature, as explained above.<sup>68</sup>

c) Removal of an Advantage Granted by Community Rules (c) and Exclusion from an Advantage for a Period Subsequent to that of the Irregularity (d)

The CJEU discussed the nature of the sanction of removing an advantage granted by Union rules (Article 5(1)(c) of Regulation 2988/95) and the exclusion from the advantage for a period subsequent to that of the irregularity (Article 5(1)(d) of Regulation 2988/95) in *Bonda*. The latter sanction is discussed in more detail at the end of this section. The advantage *in casu* consisted of receiving the so-called single area payment, which is a form of Union aid in the field of agriculture. The CJEU held that these

65 *Widdershoven* (fn. 64), margin no 7.

66 *CJEU, Käserei Champignon Hofmeister* (fn. 49), margin no 41-42.

67 Opinion of Advocate General C. Stix-Hackl of 27 November 2001 in *Court of Justice of the European Union* (CJEU) 11.7.2002, case 210/00 (*Käserei Champignon Hofmeister*), [2002], margin no 33-34.

68 *De Moor-Van Vugt* (fn. 50), margin no 1-2.

sanctions were not criminal in nature. The Court's argumentation can be divided into two parts: first, the CJEU used arguments from its own case law, and second, it discussed the criteria used by the ECtHR to determine whether a sanction is of a criminal nature.

The CJEU started with emphasising that the infringed rules were aimed at a specific group of people, that the penalties constituted specific administrative instruments which formed an integral part of the scheme of aid, and that they were intended to ensure the sound financial management of Union funds.<sup>69</sup> The Court then added three other reasons for considering the imposed sanctions not to be criminal in nature. Firstly, the CJEU referred to Article 1 of Regulation 2988/95, which states that any infringement that negatively affects the Union budget gives rise to the application of *administrative* measures and penalties. Secondly, the CJEU stated that it follows from Article 5(1)(c) and Article 5(1)(d) of that Regulation that these sanctions constitute *administrative* penalties. Thirdly, the CJEU mentioned that the ninth recital in the preamble to and Article 6(5) of that regulation stated that administrative penalties laid down in pursuance of the objectives of the common agricultural policy form an integral part of the schemes of aid, that they have their own purpose, and that the penalties may be imposed independently of any criminal ones, "if and insofar as they are not equivalent to such penalties."<sup>70</sup> It is clear that this third argument partly overlaps with what the CJEU held earlier in its judgment.

Additionally, the CJEU stated that applying the *Engel* criteria also led to the conclusion that the sanctions were not criminal in nature: the sanctions imposed in *Bonda* were not classified as criminal sanctions under EU law, their purpose was not punitive and their sole effect was to exclude Bonda from receiving aid.<sup>71</sup>

Annotator Widdershoven notes that, as a consequence of *Bonda*, most administrative sanctions that can be imposed in the context of Union aid should be qualified as non-criminal in nature. This was already clear from *KCH* as regards the sanction of Article 5(1)(b) of Regulation 2988/95. It appears from *Bonda* that the sanctions of sub c and d are not of a criminal nature either. Widdershoven argues that application of the arguments used in *Bonda* leads to the conclusion that the same might apply to the sanctions of Article 5(1)(e) and Article 5(1)(f) of Regulation 2988/95. He furthermore points out that the nature of the administrative fine is not completely clear, but that these are hardly ever prescribed in regulations concerning Union aid, and that he would not be surprised if the CJEU qualified them as being non-criminal in nature.<sup>72</sup> In order to avoid confusion, it should be noted that this case dealt with a different kind of administrative fine than *Åkerberg Fransson*. The first kind of fines imposed are done so in the framework of Union aid regulations. These fines are directed at a specific group of people – *i.e.* persons who have freely chosen to apply for Union aid – and

69 CJEU, *Bonda* (fn. 55), margin no 31-32.

70 CJEU, *Bonda* (fn. 55), margin no 33-35.

71 CJEU, *Bonda* (fn. 55), margin no 36-46. Thus the CJEU followed the opinion of Advocate General Kokott, delivered on 15 December 2011.

72 Widdershoven (fn. 57), margin no 4.

constitute an integral part of the scheme of aid. For those reasons, Widdershoven states that this type of administrative fines may be qualified as not criminal in nature by the CJEU.<sup>73</sup> The administrative (fiscal) fine imposed in *Åkerberg Fransson* was different as the rule was not directed at a specific group of people – but instead to all tax payers – and did not constitute an integral part of a Union aid scheme. Therefore, it is not surprising that Widdershoven argues that the fine imposed in *Åkerberg Fransson* was criminal in nature. This is also in line with the CJEU’s judgment in *Spector Photo Group*.<sup>74</sup>

Furthermore, the CJEU discussed the nature of the sanction mentioned in Article 5(1)(d) of Regulation 2988/95 – *i.e.* the exclusion from an advantage for a period subsequent to that of the irregularity – in *Germany v. Commission*. In this case, the advantage consisted of participation in a Union aid scheme in the field of agriculture. The CJEU held that the sanction of exclusion was not criminal in nature, since it formed an integral part of the aid scheme and was “intended to ensure the sound financial management of the Union public funds.”<sup>75</sup>

According to annotator Vermeulen<sup>76</sup>, the CJEU seems to have followed the opinion of Advocate General Jacobs, who argued that criminal sanctions are characterised by the fact that their purpose

“(...) exceeds that of simple deterrence, and will normally involve such matters as the stigma of social disapproval or the attribution of moral blame.”<sup>77</sup>

Since administrative sanctions are not defined by the stigma of social disapproval or the attribution of moral blame, they are not criminal in nature. However, it should be noted that in its judgment the CJEU itself did not mention the stigma of social disapproval or the attribution of moral blame as factors that play a role in determining the nature of a sanction.

#### d) Withdrawal of Decisions by which Securities have been Released and Repayment of these Securities (f)

Finally, in *Maizena* the CJEU considered the nature of the sanction mentioned in Article 5(1)(f) of Regulation 2988/95. The Court held that this sanction was not of a criminal nature as it was aimed at a specific group of people – *i.e.* those who voluntarily

73 *Widdershoven* (fn. 57), margin no 4.

74 See section IV.2.a of this article.

75 *CJEU, Germany v. Commission* (fn. 53), margin no 26.

76 Annotation by B.P. Vermeulen in *Court of Justice of the European Union* (CJEU) 27.10.1992, case 240/90, AB Rechtspraak Bestuursrecht 1993, 316.

77 Opinion of Advocate General F.G. Jacobs of 3 June 1992 in *Court of Justice of the European Union* (CJEU) 27.10.1992, case 240/90 (*Germany v. Commission*), [1992], margin no 11.

“take advantage of the special arrangements involving advance release of their security” – and constituted an integral part of the system of security.<sup>78</sup>

### V Analysing and Evaluating the Similarities and Differences

#### 1 The Criteria used by the ECtHR and the CJEU to Define a Sanction as Criminal in Nature

Examining the case law of both Courts, it is clear that nowadays the *Engel* criteria are applied in order to determine whether a sanction is criminal in nature. The ECtHR has used these criteria since its *Engel* judgment in 1976, whereas the CJEU has referred explicitly to these criteria only since the *Spector Photo Group* case in 2009. The relatively late reference of the CJEU to the *Engel* criteria may be explained by the fact that the CFR was made formally binding by the Lisbon Treaty in 2009, as a result of which the CJEU has to function in certain cases as a “human rights adjudicator” as well.<sup>79</sup> Since the Lisbon Treaty of 2009, the role of the CJEU as a human rights tribunal has augmented significantly due to the binding force of the rights included in the CFR, the increasing scope of the powers and competences of the EU, and the extended jurisdiction of the CJEU allowed by the Lisbon Treaty.<sup>80</sup> As a result of the binding force of the rights included in the CFR, Article 52(3) CFR became legally binding and the CJEU was obliged to offer at least the same protection as the ECtHR.

The Courts do not differ in their application of the first *Engel* criterion, *i.e.* the classification of the offence in domestic law. As to the second criterion (*i.e.* the nature of the offence) and the third criterion (*i.e.* the nature and degree of severity of the sanction) it can be concluded that there are not many considerable differences either. Both the ECtHR and the CJEU examine whether the aim of the sanction is to deter or dissuade and to punish. The CJEU additionally considers whether the aim of the sanction is to ensure the sound financial management of Union funds, which indicates that the sanction is not criminal in nature. Furthermore, both Courts take into account whether the sanction is addressed to a specific group of people or to the general public. However, the ECtHR applies a more narrow concept of ‘a specific group’, *i.e.* only certain professional groups such as lawyers or doctors, whereas the CJEU implements a broader concept in its case law by stating that a specific group of people can also consist of everyone who applies for a scheme of aid. Moreover, in the CJEU’s reasoning the argument relating to voluntariness (see section IV.1) plays a role, whereas the same does not apply to the ECtHR. Lastly, the ECtHR has stated that it does not matter

<sup>78</sup> *CJEU, Maizena* (fn. 47), margin no 13. The CJEU thus followed the opinion of Advocate General J. Mischo of 11 June 1987.

<sup>79</sup> *De Búrca* (fn. 8), p. 169.

<sup>80</sup> *De Búrca* (fn. 8), p. 170.

whether “the offenders deserve the stigma of the criminal penalty”<sup>81</sup>, whereas this may be taken into account by the CJEU.

## 2 The Qualification of Targeted Financial Sanctions by the ECtHR and the CJEU

### a) Administrative Fines and Tax Surcharges (Article 5 of Regulation 2988/95 sub a)

As is clear from section III.2, the ECtHR discussed the nature of the administrative fine in *Öztürk v. Germany* and *Lutz v. Germany*. Application of the *Engel* criteria led to the conclusion that the administrative fines imposed in these cases were qualified as criminal in nature. Moreover, the ECtHR has ruled upon the nature of a certain type of administrative fine, *i.e.* the tax surcharge (see section III.3). The ECtHR ruled in its earliest case law that tax surcharges are not criminal in nature; later, it held that these sanctions can be criminal in nature depending on the amount of the fine; and since *Hannu Lehtinen v. Finland* and *Kallio v. Finland* tax surcharges are qualified as criminal in nature, without any reference being made to the amount of the fine. This illustrates that, over time, the ECtHR has more and more easily qualified tax surcharges as criminal in nature, and in its most recent view their criminal nature is undisputed.

In contrast, the CJEU’s view on the qualification of administrative fines and tax surcharges is not completely clear. It follows from section IV that two types of situations need to be distinguished: the situation in which the fine is aimed at a specific group of people and constitutes an integral part of a scheme of aid (as was the case in *Bonda*), and the situation in which the fine is aimed at the general public and does not constitute an integral part of a scheme of aid (as was the case in *Spector Photo Group* and *Åkerberg Fransson*). In the former case, the fine would probably be qualified as non-criminal in nature. In the latter case, the nature of the fine is not entirely clear. The administrative fine discussed in *Spector Photo Group* was qualified as criminal in nature. From this case, the more general statement has been deduced that when a fine is aimed at the general public, it is criminal in nature according to the CJEU.<sup>82</sup> However, in *Åkerberg Fransson*, the CJEU referred the question about the nature of the fine to the national court, which should apply the *Engel* criteria as referred to in *Bonda*. This is not in itself peculiar, since it is not uncommon for the CJEU to leave questions concerning the applicability of the *ne bis in idem* principle for the national court to decide. This follows from, for instance, the *Van Esbroeck* case, which dealt with the *ne bis in idem* principle enshrined in Article 54 of the Convention Implementing the Schengen Agreement (CISA).<sup>83</sup> The fact that the CJEU refers the question concerning the nature of the previously imposed fine to the national court is not very problematic either, for the national courts are obliged to apply the ECHR and take into account the ECtHR’s

81 ECtHR, *Lutz v. Germany* (fn. 26), margin no 57.

82 *Widdershoven* (fn. 57), margin no 4.

83 *Court of Justice of the European Union* (CJEU) 9.3.2006, case 436/04 (*Van Esbroeck*), [2006], margin no 37-38.

case law on the *ne bis in idem* principle. Nevertheless, one might argue that it would have been better for reasons of clarity if the CJEU in the specific case of *Åkerberg Fransson* had itself decided upon the nature of the sanction. As annotator Widdershoven points out, the ECtHR – applying the *Engel* criteria, which the CJEU adopted in *Bonda* – decided in *Janosevic v. Sweden* that the fine imposed in that case was criminal in nature. *Janosevic v. Sweden* strongly resembles *Åkerberg Fransson* in that both cases deal with fiscal fines imposed by Swedish authorities. It is thus clear that the Swedish fiscal fine is qualified as criminal in nature by the ECtHR. Therefore,

“[u]nless the CJEU would not be willing to follow the application by the ECtHR of the *Engel* criteria in the *Janosevic* case – but that would constitute an infringement of Article 52(3) CFR – the tax surcharge is thus ‘criminal’ in the sense of *Bonda* and thus in the sense of Union law.”<sup>84</sup>

As a result, one could agree with Widdershoven that in the specific case of *Åkerberg Fransson* – in which the criminal nature of the sanction was very clear – it might have been better if the CJEU itself had decided upon the nature of the sanction. The fact that it did not has two implications.

First, it allows for some uncertainty as to the qualification of administrative fines by the CJEU, which could have been avoided if the Court itself had established the nature of the sanction. Future case law of the CJEU may clarify this matter.

Second, the fact that the CJEU in *Åkerberg Fransson* did not itself decide that the imposed fine was criminal in nature allows for the possibility that the CJEU did not want to follow the qualification by the ECtHR.<sup>85</sup> If the CJEU and the ECtHR indeed differ on the qualification of administrative fines, this will be problematic in light of Article 52(3) CFR, which obliges the CJEU to attach at least the same meaning and scope to rights provided by the CFR as the meaning and scope of corresponding rights in the ECHR. In this regard, the interpretation by the ECtHR of rights laid down in the ECHR is also of importance.<sup>86</sup> If the interpretation of the two Courts indeed diverges, the Member States would have two conflicting obligations: the principle of supremacy of Union law clashes with the obligation to act in accordance with the ECHR.<sup>87</sup>

<sup>84</sup> Widdershoven (fn. 64), margin no 7.

<sup>85</sup> It should be noted that annotator Widdershoven mentions two other possible explanations for the fact that the CJEU referred the question whether the fine was criminal in nature to the national court. However, he notes that these explanations still do not explain why the CJEU in this concrete case did not itself decide upon the nature of the fine. See Widdershoven (fn. 64), margin no 6-7.

<sup>86</sup> See section I of this article.

<sup>87</sup> *K. Lenaerts & E. de Smijter*, *The Charter and the Role of the European Courts*, 2001, p. 92.

b) Other Targeted Financial Sanctions (Article 5 of Regulation 2988/95 sub b-f)

It follows from section IV that the CJEU qualifies the other sanctions discussed in that section as non-criminal in nature. This applies to the replenishment of the amount of a security wrongly released (Article 5(1)(f) of Regulation 2988/95; *Maizena*), the exclusion from an advantage for a period subsequent to that of the irregularity (Article 5(1)(d) of Regulation 2988/95; *Germany v. Commission* and *Bonda*), the payment of an amount greater than the amounts wrongly received (Article 5(1)(b) of Regulation 2988/95; *KCH*), and the removal of an advantage granted by Community rules (Article 5(1)(c) of Regulation 2988/95; *Bonda*).

c) The EU's Competence in the Area of Freedom, Security and Justice, and the Protection of Human Rights

The reluctance of the CJEU to define targeted financial sanctions as criminal in nature may be explained by the fact that the competence of the Union in the criminal Area of Freedom, Security and Justice is relatively new. Since the entry into force of the Lisbon Treaty in 2009, the Union gained more supranational powers in the field of criminal matters due to the transference of relevant powers from the national level of Member States to the level of the EU.<sup>88</sup> The EU shares its competence to regulate criminal justice with the Member States, resulting in a limitation of the scope of action of the Member States: Member States shall exercise their competence to the extent that the Union has not exercised its competence (Article 2(2) TFEU). The EU is able to strengthen judicial cooperation derived from the principle of mutual recognition and to harmonise procedural and substantive criminal law by establishing 'minimum rules'. It is thus clear that the EU is able to influence criminal proceedings in Member States.

However, the extent to which fundamental rights are protected in criminal proceedings in consequence of application of EU law cannot easily be defined. Taking into consideration the judgements in the *Radu* and *Melloni* cases, it can be concluded that protection of fundamental rights guaranteed by the constitutions of Member States does not have priority over primacy of EU law and cannot provide a basis for refusing execution of a European arrest warrant.

The case of Mr. Radu concerned the execution in Romania of four European arrest warrants issued by the German authorities for acts of aggravated robbery.<sup>89</sup> Mr. Radu opposed to the execution of all European arrest warrants, stating that despite the fact that the ECHR and the CFR were not considered primary Union law at the time of the European arrest warrant procedure, this procedure must be interpreted and applied

88 *T. Marguery*, European Union Fundamental Rights and Member States Action in EU Criminal Law, *Maastricht Journal of European and Comparative Law (MJ)* 2013, p. 283.

89 *Court of Justice of the European Union (CJEU)*, 29.1.2013, case 396/11 (*Radu*), [2013], margin no 2 and 16.

in conformity with these instruments.<sup>90</sup> The Romanian court asked preliminary questions essentially as to whether a Member State executing a European arrest warrant must observe the CFR and whether an executing Member State may refuse extradition when there is (a risk of) infringement of the requested person's rights under Articles 5 and 6 of the Convention or Articles 6, 48 and 52 of the CFR.<sup>91</sup> Contrary to the Opinion of Advocate General Sharpston, who concluded that the judicial authorities must act in conformity with the fundamental rights set out in the Convention and the CFR<sup>92</sup> and that extradition might be refused in exceptional circumstances on the basis of these rights, which is the case when there is a risk of “fundamentally destroy[ing] the fairness of the trial”<sup>93</sup>, the CJEU decided that the executing judicial authorities cannot refuse to execute a European arrest warrant on the basis that the requested person was not heard by the issuing authority before the arrest warrant was issued.<sup>94</sup> Notwithstanding the general nature of the preliminary questions, the CJEU thus did not take the opportunity to declare as a general principle that the authority executing a European arrest warrant has to take into account the rights as contained in the CFR in order to unequivocally protect fundamental rights.

In *Melloni* the applicant, living in Spain, was sentenced to 10 years' imprisonment for bankruptcy fraud by Italian courts *in absentia*, although represented by two lawyers of his choice, and extradited by the Spanish authorities to the Italian authorities on the basis of a European arrest warrant.<sup>95</sup> Mr. Melloni claimed that his right to a fair trial had been indirectly infringed, since there was no possibility in Italian law to appeal against sentences imposed *in absentia*, which violated the Spanish Tribunal Constitucional's case law that required a possibility to appeal as condition for surrender in case of serious offences.<sup>96</sup> However, this case law was not in line with Article 4a(1)(b) of the Council Framework Decision 2002/584/JHA as amended by the Council Framework Decision 2009/299/JHA, which stated (among others) that if the convicted person had been “aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial”, the executing judicial authority may not refuse to execute the European arrest warrant.<sup>97</sup> The CJEU highlighted that the abovementioned Framework Decisions were established to “facilitate and accelerate judicial cooperation” in criminal cases in order to achieve an area of freedom, security and justice for which a high level of confidence –

90 CJEU, *Radu* (fn. 89), margin no 19.

91 CJEU, *Radu* (fn. 89), margin no 20, 23.

92 Opinion of Advocate General E. Sharpston of 18 October 2012 in *Court of Justice of the European Union* (CJEU), 29.1.2013, case 396/11 (*Radu*), [2013], margin no 52.

93 Sharpston (fn. 92), margin no 89. See also margin no 83 and 108(3).

94 CJEU, *Radu* (fn. 89), margin no 43.

95 *Court of Justice of the European Union* (CJEU), 26.2.2013, case 399/11 (*Melloni*), [2013], margin no 14.

96 CJEU, *Melloni* (fn. 95), margin no 16, 18, 20-21.

97 CJEU, *Melloni* (fn. 95), margin no 23.

mutual recognition – between Member States is needed.<sup>98</sup> In addition, the CJEU found the line of reasoning of the national courts that their practice provides a higher standard of protection than Article 4a(1) of Framework Decision 2002/584 and thus has priority according to Article 53 of the CFR to be flawed. Such an interpretation would not only undermine the principle of primacy of EU law, but also allow a Member State to avoid applying EU legal rules that are in conformity with the CFR, which threatens the efficacy of that framework decision.<sup>99</sup> Thus, in this case, primacy and efficacy of EU law has precedence over the protection of fundamental rights.

The implication of these judgments in the future may result in a controversial situation: in consequence of the application of the principle of supremacy of EU law, the CFR grants maximum rights, whereas the ECHR contains minimum standards. By making the allowance of a higher standard of protection of fundamental rights dependent on the principles of primacy, unity and effectiveness of EU law, the CJEU makes it *de facto* almost impossible for a Member State to grant a higher level of protection as permitted in Article 53 CFR.<sup>100</sup> Therefore, even though over the course of time human rights protection has received more attention from the economically oriented CJEU (see section I), certain limitations can still be identified.

### Concluding Remarks

The ECtHR's case law on the qualification of targeted financial sanctions shows that if the aim of the sanction is to punish or deter, if the norm applies to the general public, and if the sanction or its consequences are very severe, the proceedings involve a criminal charge and Articles 6 and 7 ECHR will be applicable. The CJEU's approach can be summarised by stating that it is "greatly inspired by the aim of the sanctions and by the scope of the rules".<sup>101</sup> If the sanction intends to protect the Union's financial interests, and if it is aimed at a specific group of people (*e.g.* only people who have voluntarily applied for participation in a Union aid scheme), it will probably not be criminal in nature. It is interesting that the CJEU primarily mentions conditions that indicate that a targeted financial sanction is not criminal in nature, instead of conditions that indicate that they are criminal in nature – as such, the indications are negatively formulated. The analysis of the case law of both Courts leads to the conclusion that the possibility that the ECtHR and the CJEU differ on the qualification of administrative fines is not something which can be ruled out. Future case law concerning administrative fines may clarify this point. However, if there indeed is a difference in the qualifi-

<sup>98</sup> CJEU, *Melloni* (fn. 95), margin no 37.

<sup>99</sup> CJEU, *Melloni* (fn. 95), margin no 56-58.

<sup>100</sup> *S. Swoboda*, The self-perception of the European Court of Justice and its neglect of the defense perspective in its preliminary rulings on judicial cooperation in criminal matters. A small note on a fundamental misunderstanding, *Zeitschrift für Internationale Strafrechtsdogmatik* 2015(7-8), p. 366.

<sup>101</sup> *A. de Moor-van Vugt*, Administrative Sanctions in EU Law, *Review of European Administrative Law* 2012, p. 40.

cation of administrative fines as criminal in nature, this will be problematic in light of Article 52(3) CFR.

It could be argued that the accession of the EU to the ECHR might lead to more clarity with regard to the ECtHR's viewpoint as to the qualification of the targeted financial sanctions mentioned in Article 5(1)(b-f) of Regulation 2988/95. At the moment, the ECtHR does not have the competence to decide upon disputes in which the EU is a party and the *Bosphorus* doctrine will be applied.<sup>102</sup> The accession of the EU to the ECHR might change this, because then the ECtHR will have the competence to decide on cases in which the EU is a party. If the case concerns a targeted financial sanction and one of the guarantees provided for in Article 6 or 7 ECHR is at issue, the ECtHR may need to formulate an opinion on the qualification of that targeted financial sanction: criminal in nature or not?

However, it is not likely that the accession of the EU to the ECHR will occur soon due to the obstructing behaviour of some Member States and the fact that the CJEU considered the agreement on the accession incompatible with Article 6(2) TEU or Protocol No 8 relating to Article 6(2) TEU. The Court expressed its serious concerns about the effect the accession would have on its exclusive authority to rule on matters of EU law, and considered the accession would be a hard matter to reconcile with the EU's specific features. Firstly, the Court held that the agreement on the accession would negatively "affect the specific characteristics and the autonomy of EU law (...)" due to a lack of coordination in some respects between the ECHR (and its protocols) and EU law and the danger that the agreement might erode the principle of mutual trust between Member States. Secondly, the CJEU considered the agreement to be incompatible with Article 344 TFEU, since it allows disputes concerning the application of the ECHR in matters of EU law to be adjudicated by the ECtHR. Thirdly, according to the Court, the way in which the co-respondent mechanism and the procedure for the prior involvement of the CJEU are regulated does not preserve "the specific characteristics of the EU and EU law". Finally, the fact that the judicial examination of some of the EU's actions in the sphere of Common Foreign and Security Policy (CFSP) would lie in the hands of a "non-EU body", was considered problematic.<sup>103</sup>

The negative conclusion of the Court regarding the accession of the EU to the ECHR might have surprised the Member States and the EU institutions – as there seemed to be a broad consensus at the CJEU hearing on 5 and 6 May, 2014, on the compatibility of the draft accession agreement with the EU Treaties – and can be considered as a

*"somewhat formalistic and sometimes uncooperative attitude in defence of its own powers vis-à-vis the European Court of Human Rights".<sup>104</sup>*

102 See section I of this article.

103 *Court of Justice of the European Union (CJEU)* 18.12.2014, opinion 2/13, [2014], margin no 258.

104 *Editorial Comments*, The EU's accession to the ECHR – a "NO" from the ECJ!, *Common Market Law Review* 2015(52), p. 1.

Advocate General Kokott also concluded in her view that the draft accession agreement is compatible with the Treaties.<sup>105</sup> In essence, there are no obstacles for the EU to accede to the ECHR, provided that “some relatively minor modifications or additions” are made.<sup>106</sup>

Article 218 TFEU prescribes that the Council is to adopt unanimously the decision concluding the agreement on EU accession to the ECHR after obtaining the consent of the European Parliament and its decision enters into force after approval of all Member States in conformity with their respective constitutional requirements.<sup>107</sup> In light of the negative attitude of some Member States and the CJEU towards the EU’s accession to the ECHR, this will be difficult to achieve soon.

In the context of the uniform protection of fundamental rights in the EU, accession of the EU to the ECHR can be encouraged in order to fix the gap in legal protection: individuals can appeal to the ECtHR in the case of infringements caused by EU institutions, as the ECtHR will have the competence to decide upon disputes which the EU institutions are party to. As such, the legal protection of individuals will be improved in comparison to the current situation in which individuals cannot seek judicial review at the EU level, except for some measures in the sphere of CFSP – but this does not completely fill the gap at the Member State level.<sup>108</sup> In addition, the accession of the EU to the ECHR will establish a European common area for human rights protection with common standards applicable to both EU Member States and EU institutions in which the ECtHR will have the competence to deliver the final judgement on the issue at hand (Article 46(1) ECHR). This will avoid diverging human rights protection case law of the ECJ and the ECtHR. Lastly, accession of the EU to the ECHR can be seen as highly symbolic as to the protection of human rights and can enhance the legitimacy of the EU, since the ECtHR as an external body can supervise acts of the EU from purely a human rights perspective without a specific Union interest.<sup>109</sup>

All in all, it is clear that only time can tell (a) whether the CJEU qualifies administrative fines as criminal in nature or not, and (b) whether the other targeted financial sanctions are perceived as criminal in nature by the ECtHR. Therefore, the subject of targeted financial sanctions remains a relevant object of future research in the context of European law.

105 View of Advocate General J. Kokott of 13 June 2014 in *Court of Justice of the European Union* (CJEU) 18.12.2014, opinion 2/13, [2014], margin no 279.

106 *Kokott* (fn. 105), margin no 278.

107 See also *CJEU* opinion 2/13 (fn. 103).

108 *Editorial Comments* (fn. 104), p. 4.

109 *Editorial Comments* (fn. 104), p. 4.