AUTONOMOUS CONCEPTS OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN MATTERS OF DISCIPLINARY, ADMINISTRATIVE, FINANCIAL AND CRIMINAL LIABILITY

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Abstract

Often, the delimitation between criminal law per se and other branches of public law involving the application of sanctions by the authorities of the Member States or by the institutions, bodies, offices and agencies of the European Union is difficult to operate.

From the point of view of the guarantees of the fair trial, as they are regulated by art. 47 of the Charter of Fundamental Rights of the European Union and art. 6 of the Council of Europe Convention for the Protection of Fundamental Rights and Freedoms, both the ECJ and the ECHR have developed, through continuous and elaborated jurisprudence, autonomous concepts on the basic notions by which aforementioned guarantees operate: "criminal charges", "criminal proceedings "," criminal sanction "," court "," court with jurisdiction in criminal matters "etc.

The present study analyses the mechanisms of the influence exercised by the autonomous concepts developed in the ECHR case-law on the mentioned legal topic on the legal acts of the Union, but also the uniform meanings resulting from the corroboration of these autonomous concepts with those of the ECJ jurisprudence in the same field.

Starting from some basic concepts of ECHR jurisprudence on the notion of criminal offence, synthesized in the Engel Criteria and many subsequent cases, such as Bendenoun v. France, Jussila v. Finland, Ezeh and Commons v. United Kingdom, the issue of the delimitation we have referred to above acquires contours in the case-law of ECJ in relevant cases such as Bonda, Baláž or Hans Åkerberg Fransson.

Keywords: *Criminal liability, disciplinary liability, administrative liability, financial liability, the right to a fair trial, autonomous concepts in ECHR jurisprudence and ECJ case-law, court, criminal charge, criminal offence, criminal sanction, Engel Criteria, criminal court.*

1. Preliminary considerations

The various forms of legal liability, characteristic of public law branches, involve the commission of unlawful acts and the application of sanctions, which are often difficult to distinguish from their raw typology: criminal liability and punishment as a typical criminal sanction.

The basic criterion of the distinction, which is easy to see at first glance, is the gravity of the unlawful act that generates the liability and the legal nature of the applicable sanction, namely its preventive / repressive character (in the case of criminal liability) and the absence of such a character of liability specific to other branches of public law).

The importance of fair interpretation of the legal nature of liability is particularly important in the context of respecting the right to fair trial and other fundamental rights and freedoms in procedural context. Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome in 1950, establishes binding minimum guarantees for the conduct of a fair trial, which are distinct according to the criminal or civil nature of the matter submitted to litigation, under Article 6 of the Convention. Paragraphs 2 and 3 of the Article apply only where the safeguards of the fair trial relate to criminal proceedings while paragraph 1 applies to any type of trial.

Regarding the importance of establishing procedural boundaries depending on the criminal or non-criminal nature of the legal matter submitted to trial from the perspective of the same Convention, Additional Protocol no. 7, done at Strasbourg in 1984, by art. 4, entitled "*The right not to be tried or punished twice*" refers exclusively to criminal proceedings. In this context, paragraph 1 of the above article states that "*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State*". The principle is known in the European Union as well as in the world, in its Latin formula: "*ne bis in idem*".

For the Member States of the European Union, as well as for the institutions (in particular the Court of Justice), the Union's bodies, offices and agencies, when applying directly European Union law, the fair trial guarantees and the *ne bis in idem* principle are governed by the provisions of the Charter of fundamental rights of the European Union.

In this context, there is the issue of coordination

fundamental freedoms regulated by the Charter and the same safeguards, as regulated by the

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Convention for the Protection of Human Rights and Fundamental Freedoms. The issue seems very simple in the view of the Treaty on European Union (abbreviated as TEU), whose art. 6 par. (2) sentence I states that "*the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms*".

Notwithstanding this provision as part of the Union's constitutional basis for the protection of fundamental rights, the opinions[1] drawn up by the Commission for the accession of the Union to the Convention have been rejected by the Court of Justice. The doctrine raised pertinent and essential questions about the Court of Justice's two refusals to endorse the Commission's proposals for the conclusion of an agreement on the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms: "*Is there political and legal will to continue the process for the European Union to become party to the European Convention on Human Rights? Are we facing a permanent blockade or only a crisis that will naturally be overcome by profound reflections, reflections that will at one point materialize in a positive legal text accepted by the parties? This question intervenes in the conditions in which we refer, to the provisions of art. 218 TFEU, according to which a Member State, the European Parliament, the Council or the Commission can obtain the opinion of the Court of Justice on the compatibility of an envisaged agreement with the provisions of the Treaties. In the event of a negative opinion from the Court, that agreement may enter into force only after its amendment or revision of the Treaties*"[2]

However, until the accession of the Union to the aforementioned Convention (which would greatly simplify the situation), the provisions of the fundamental treaties of the Union, those of the Charter and those of the Convention must be interpreted in a coherent and unitary manner, supported by case-law of the Court of Justice of the European Union and the European Court of Human Rights (abbreviated as the ECHR), in order to build a fair, solid legal interface between the Charter's protection system and that of the Convention.

As stated above, the main fundamental rights to which we refer in this study are: the right to a fair trial and the right not to be prosecuted or punished twice for the same offence (*ne bis in idem*). In the Charter of Fundamental Rights of the Union, Art. 47 establishes the right to an effective remedy and to a fair trial, and art. 50, the right not to be tried or convicted twice for the same offense. The provisions of the Charter apply, in accordance with Art. 51 par. (1), to Union institutions, bodies, offices and agencies, in compliance with the principle of subsidiarity, and to Member States only if they implement Union law. On the other hand, the Charter does not extend the scope of Union law beyond its powers (Article 51 (2) of the Charter).

There are, of course, many situations in which the application of the Charter's provisions fall within the scope of art. 51 thereof; to illustrate our approach in the present study, we point out: the application of administrative sanctions under Art. 5 of Regulation No 2988/95 on the protection of the financial interests of the European Communities[3] by the authorities of the Member States or by OLAF under Council Regulation 883/2013 on OLAF's investigations[4], the application of measures and penalties provided for the implementation of the common agricultural policy or other Union sectoral areas in which aid is granted, the administrative or penal sanctions applied by the Member States under national transposing legislation of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax[5] and of the Implementing Regulation of Directive 2006/112 / EC on the common system of value added tax[6].

Also, regarding the legal interface between the Charter and the Convention, the provisions of art. 52 par. (3) of the Charter, which states that in so far as the Charter contains rights which correspond to rights 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.

By virtue of this provision of the Charter, when it is necessary to determine the extent of the right to a fair trial or that of *ne bis in idem* principle, the interpretation of art. 47 and 50 respectively of the Charter must be made in the light of Art. 6 of the Convention and Art. 4 of the Additional Protocol no. 7 to the Convention. The

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[1] Opinion of the Court (Full Court) of 18 December 2014, Opinion delivered on the basis of Article 218 (11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - with EU and EU Treaties, ECLI: EU: C: 2014: 2454.

Opinion No 2/94 of the Court of 28 March 1996 "*Accession of the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms*", ECLI: EU: C: 2014: 2475.

[2] A. Fuerea, *Considerentele pe care se întemeiază avizul negativ al Curții de Justiție de la Luxemburg referitor la Acordul privind aderarea Uniunii Europene la Convenția pentru apărarea Drepturilor Omului și a Libertăților fundamentale*, Revista de Drept Public nr. 2/2015, anul XX (47), Editura Universul Juridic, p. 91-92.

[3] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312 from 23.12.1995.

[4] Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 201 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248 from 18.9.2013.

[5] Published in OJ L 347 from 11.12.2006.

[6] Council Implementation Regulation (EU) No 282/2011 of 15 March 2011laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast), published in OJ L 77 from 23.03.2011.

interpretation of the latter legal texts was done over decades by the ECHR case-law and of the first by the jurisprudence of the Court of Justice of the European Union. In the case of that Court, the interpretation was undergone in the light of some fundamental principles of interpretation established by the ECHR, of which the most important is the "*criminal charge*".

2. The autonomous concept of the "*criminal charge*" in the context of the interpretation of the right to a fair trial, set out by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms

The principle of equity has totally circumvented purely national logic in the interpretation of art. Article 6 of the Convention, which acquires a transnational and supranational legal vocation: "*it leaves the Member States a fairly limited freedom: Article 6, unlike others, such as Articles 8 to 12, does not allow national data to be taken into account at all. That is why we are talking about the rigidity of Article 6* "[7].

The first important case of the ECHR, where the issue of the distinction between disciplinary and criminal liability in the matter of the right to a fair trial, as provided by Article 6 of the Convention was *Engel and others against the Netherlands*[8]. The ECHR's decision in this regard was to consecrate both the autonomous concept of "*criminal charge*" and the criteria for determining it, which remained in the judicial history under the name of "*Engel Criteria*". Some prestigious academics, looking at the case-law of the Court of Justice of the European Union, have carefully observed how these criteria form the basis of the demarcation between criminal law and other branches of law in European Union[9], consolidating the autonomous concept of "*criminal nature of the accusation*". Thus, although they are formally distinct, the "*criminal charge*" and the "*criminal nature of the accusation*" complement each other when the criminal matter has to be distinguished from the civil nature of an accusation, procedure or sanction.

Nominally, the autonomous concept of "*criminal charge*" was stated in the ECHR decision in *Deweer v. Belgium* (1980)[10], §. 42 para. 2 and the conclusion on the definition of this autonomous concept was that the criminal charge is the official notification of an individual made by the competent authority about the allegation that he had committed an offence. The formula is a synthesis of the previous jurisprudence (§. 42 para. 3 of the judgment's motivation), where, in connection with the application of the reasonable time principle of the criminal trial, it was established that the starting point of the trial is, as the case may be: the one in which a person has been arrested, the one in which he/she has been formally notified about being prosecuted before o court of law or when the person has been notified that pre-trial investigations have begun.

Coming back to Engel case, the state of affairs concerns three military servicemen of the Dutch Army committing deviations from military discipline, on the basis of which they have been subject to disciplinary sanctions. The essential question to which the Strasbourg Court had to answer was whether the right to a fair trial under Art. 6 of the Convention applies to those disciplinary proceedings in its criminal dimension[11]. The choice of the state to criminalize conduct is discretionary, but necessarily implies the enforcement of the safeguards of the fair trial in criminal matters[12]. The omission by the unique will of the national states to apply the rules of the fair criminal trial is not acceptable[13]. A partial conclusion of the ECHR, expressed in §. (81) the last paragraph is that *"«the autonomy» of the concept of «criminal» operates only in one sense*."

From § (82) to § (85) of the Decision, the Court sets out the so-called "*Engel Criteria*" as follows:

a) the provision of illicit deed in the law as a criminal offense[14];

[7] J. Pradel, *La notion de procès équitable en droit pénal européen*, Revue générale de droit, volume 27, numéro 4, décembre 1996, p. 508

[8] Case Engel and Others v. The Netherlands, Judgment, Strasbourg, 8 June 1976, series A, no. 22.

[9] A. Klip, *European Criminal Law. An Integrative Approach*., 3rd edition, Ius Communitatis Series, Volume 2, Intersentia, Cambridge-Antwerp-Portland, 2016, p. 190-194.

[10] ECHR, Case of Deweer v. Belgium, Application no. 6903/75, Judgment, Strasbourg, 27 February 1980, ECLI: CE: ECHR: 1980:0227JUD000690375.

[11] Engel Decision, §. 79 second paragraph: "*Led thus to examine the applicability of Article 6 in the present case, the Court will first investigate whether the said proceedings concerned "any criminal charge" within the meaning of this text; for, although disciplinary according to Netherlands law, they had the aim of repressing through penalties offences alleged against the applicants, an objective analogous to the general goal of the criminal law*".

[12] §. (81) paragraph 4 Engel Decision: *"The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not (...) constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7. Such a choice, which has the effect of rendering applicable Articles 6 and 7, in principle escapes supervision by the Court".*

[13] §. (81) paragraph 5 Engel Judgment: *"The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 and even without reference to Articles 17 and 18, to satisfy itself that the disciplinary does not improperly encroach upon the criminal".*

[14] §. (82) paragraphs 1 and 2: *"Hence, the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given "charge" vested by the State in question - as in the present case - with a disciplinary character nonetheless counts as "criminal" within*

b) the nature of the offence[15];
c) the severity of the sanction[16].

By the jurisprudence which followed the decision in *Engel and others v. the Netherlands*, the accusation that failed to fulfil any of the "*Engel Criteria*" does not automatically lead to the disqualification of a "*criminal charge*" in the sense of the autonomous concept established. On the other hand, the qualification as a "*criminal charge*" has often been recognized by the ECHR only by verifying a single "*Engel criterion*" (less the first, considered formal).

Most cases of accepting the qualification of a "*criminal charge*" on the basis of the verification of one of the criteria set out above referred to the criterion of the nature of the offence, assessed in terms of the punitive and deterrent nature of the sanction provided by the law for the illicit deed subject of the charge.

A first example of this is the ECtHR's decision on *Öztürk v. Germany*[17]. By a decision of an administrative authority, the applicant Öztürk, a Turkish citizen resident in Germany who did not speak German well enough, was fined for a road traffic offense. Just a few years ago, the same illicit deed was foreseen as a crime, but later it was decriminalized due to the need to simplify its sanctioning procedure, being considered minor, and imposing sanctions in approximately 5 million cases annually at Germany's level. The applicant challenged the sanction before the competent court but, in the course of the proceedings, dropped the appeal. By the judgment in question, the applicant was ordered to bear the costs of the proceedings, including the fees of the interpreter used by him during the proceedings. The applicant filed an appeal against the first-instance judgment, challenging his obligation to pay the court costs; the court dismissed the appeal.

In his complaint to the Human Rights Commission, the complainant alleged the violation by the German State of the provisions of Art. 6 par. (3) lit. (e) of the Convention, according to which any person charged within criminal proceedings has minimum rights, including the right to free assistance of an interpreter if he/she does not understand or speak the language used in court.

The fundamental legal issue in this case was also to decide whether the charge to the plaintiff, on the basis of which a fine was imposed, was a "*criminal charge*" in the sense of the autonomous concept developed by the ECHR in interpreting the terms of the guarantee the fair trial set out by art. 6 of the Convention. Given that the interpreter was not made available free of charge by the court to the applicant Öztürk, but only if payed, his complaint concerning the violation by Germany of Art. 6 par. (3) lit. (e) of the Convention should have been admissible only if the ECHR considered that the charge originally filed with the applicant was a "*criminal charge"* (which, moreover, was the case).

The ECHR found that the offense was not set out at the time of its commission by the criminal law, but until recently (reported at the time of the sanctioning) was a formal criminal offense. The reason for the decriminalization was the need to simplify the sanction procedure (§ 47 of the decision).

Paragraph 48 of the Decision recalls the criteria set out in the judgment *Engel and others v. the Netherlands*, and §. 50 of the decision reaffirms the autonomy of the concept of "*criminal*" in the context of art. 6 of the Convention.

Although the fact that the illicit act committed by the applicant is not a criminal offense but a violation of the substantive German law, the ECHR noted that procedural law provisions of the Code of Criminal Procedure apply to the sanctioning of this infringement by analogy, by continuity with the previous legal nature, established by law until 1975, that of a criminal offense (§ 51 of the decision).

The second "*Engel criterion*," the nature of the offence, was analysed by the ECHR in terms of the legal nature of the sanction prescribed by law for the perpetration of the offence. Thus, within §. 52 of the Decision, the Court sees a number of substantive and procedural differences in the nature of the sanction: German law distinguishes between the fine as an administrative sanction and the fine as a criminal penalty, and the prison sentence was not provided for contraventions, but only for criminal offenses. Also, the contravention sanctions are not retained in the criminal

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the meaning of Article 6 (art. 6). In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States".

[15] §. (82) paragraph 3: *"The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government".*

[16] §. (85) of the Decision. The ECHR further examines the maximum penalties that could be applied by the Supreme Military Court to plaintiffs. For Engel, the sentence taken into account by the Court was two days *'strict arrest'*, which is, in the ECHR's view, a penalty too soft to be considered a criminal punishment. Into the §. (85) par. 4 of the Decision, the Court considers that the sanctions applied to the applicants by Witt, Dona and Schul were indeed based on "*criminal charges*" because their purpose was to impose serious sentences involving deprivation of liberty.

In the end of §. (85) of the Decision, the ECtHR states that, although in the present case the Supreme Military Court unequivocally condemned the applicant de Witt to only 12 days of *'aggravated arrest'*, in other words, a sentence not involving deprivation of liberty (§. 62), the final outcome of the appeal could not diminish the severity of the sanction initially taken into consideration.

The paragraph close with: "*The Convention certainly did not compel the competent authorities to prosecute Mr. de Wit, Mr. Dona and Mr. Schul under the Military Penal Code before a court martial (paragraph 14 above), a solution which could have proved less advantageous for the applicants. The Convention did however oblige the authorities to afford them the guarantees of Article 6* ".

[17] ECHR, Court (Plenary), Case of *Öztürk v. Germany* (Application no. 8544/79), Judgment, Strasbourg, 21 February 1984.

record. These arguments tend to plead for a legal nature of administrative sanctions in that case different of the criminal one.

However, the Court notes in §. 53 of the decision that the sanction consisting of the fine imposed on the applicant for a contravention was punitive, which is the "*distinctive feature of the criminal sanction*". Also, in the same paragraph of the decision, the Court points out that the system of tripartite division of offenses according to their gravity, in crimes, felonies and misdemeanours still persists in many contemporary states, suggesting that the latter do not really have a legal nature fundamentally distinct from that of crimes and felonies, as criminal acts of greater or less seriousness. We consider that this perspective is particularly interesting because it addresses in a historical manner and subject to the necessity of the judiciary to dispose of an enormous burden of causes without significance, the need to transfer the decision of sanctioning from the judicial system to the administrative one. This pragmatic solution does not interfere with the legal nature of the accusation: it stays criminal.

By the judgment in *Öztürk v. Germany*, the ECHR supports the idea that the legal nature of the sanction applicable to an unlawful act should not be assessed in a quantitative way, but in a qualitative one, by assessing the punitive nature of the sanction versus a purely preventive nature. Taking the clear signs of the influence of classical doctrine of criminal law, the ECHR does not seem to assume a positivist view of the nature of the punishment: it is still regarded as repression, and not simply as prevention or removal of the danger.

Also, in the effort to assess the nature of the offence, according to the second "*Engel criterion*", the Court examines the addressability of the legal rule violated by the illicit deed, starting from another dogma of the classical doctrine of criminal law, according to which the norms that protect those social values that form the object of criminal offenses have general addressability. They are not designed for determined groups of people nor for individuals seen alone. From this point of view, the ECHR addresses the issue from the perspective that the rules in the present case, imposing the social value of road traffic safety, must be respected by everyone in the society as user of public roads.

This latter criterion, of the general addressability of the legal norm infringed by the illicit act, should be considered as circumscribed to the second "*Engel criterion*" (the nature of the act) because it relates to the nature of the criminal act through the legal object, namely the social value protected. However, in the jurisprudence of the ECHR that would follow the Öztürk case, it would become a true fourth criterion of the Engel type.

Thus, in the ECHR judgment in *Bendenoun v. France*[18], in which the applicant Michel Bendenoun was involved in three parallel proceedings, all based on the same legal context: the first a customs procedure, the second a fiscal one and the third an undoubted criminal one, the Court, in §47, refers to the "*four factors*" to be analysed "*in the light of the case law and in particular the Öztürk case"*.

The first criterion assessed in § 47 of the decision is precisely the general addressability of the rules that protect the legal object of the illicit deed, the Court considering that the provisions of the General Code of Taxes relating to the offences in the case "*concern all citizens, in their capacity as taxpayers, and not a particular group with a special status* ".

In the continuation of legal syllogism, the Court examines the nature of the unlawful deeds, from the point of view of the nature of the sanction provided for by the law for the offence, considering that the tax increases are not intended as a compensation for damage but "*essentially as a punishment to deter reoffending*". In conclusion, the Court stated that those sanctions are preventive and repressive.

According to the third "*Engel Criterion*", the seriousness of the sanction stipulated by the law for committing such offences, in §. 47 par. 5 of the decision, the Court considers that these penalties, consisting of fines of FF 422 534 for the applicant and FF 570 398 for his company (therefore very important), cumulated with the possibility of transforming the first fine into days of imprisonment in case of non-payment in due course, outlines the seriousness of the sanction.

In concluding the evaluation of the "*Engel Criteria*", the last paragraph of §. 47 notes: *"Having weighed the various aspects of the case, the Court notes the predominance of those which have a criminal connotation. None of them is decisive on its own, but taken together and cumulatively they made the "charge" in issue a "criminal" one within the meaning of Article 6 para. 1, which was therefore applicable"*.

What is specific to this ECHR decision is that, for the first time, for the purposes of determining the criminal nature of a charge as an autonomous concept, it considers a combination of criteria already established by the case-law of the Court which, does not characterize the accusation as criminal, but only partially and conjugated, leads to such a conclusion.

In *Ferrazzini v. Italy*[19], following a transfer of immovable property to a company founded by the applicant for the purposes of agritourism, he requested the Italian tax authority to apply reductions to three taxes to be paid, of which the former was VAT. With regard to VAT, the tax authorities found from the tax declarations of the applicant that the property transferred to the company was undervalued, for which reason the applicant was liable to pay the tax corresponding to the real value of the property plus

[18] ECHR, Court (Chamber), Case of Bendenoun v. France, Application no. 12547/86, Judgment, Strasbourg, 24 February 1997, series A, no. 287.

[19] ECHR, Case of Ferrazzini v. Italy, Application no. 44759/98, Judgment, Strasbourg, 12 July 2001.

penalties. Following the administrative appeal of the sanction applied, the tax authorities waived the case as a result of accepting the applicant's tax relief requests.

Regarding the situation of the other taxes and duties owed, the fiscal authority informed the applicant that his claims for reduction of payment amounts were rejected and that he would be required to pay administrative penalties equal to 20% of the amount of the sums due if he did not pay them within 60 days of the date of communication. The complainant challenged the decisions before the tax commission (administrative body), which subsequently rejected them. In October 2000, the applicant appealed before the regional tax commission and then applied to the ECHR invoking the breach of the reasonable time rule, guaranteed by Art. 6 par. (1) of the Convention, in the context in which the first procedure lasted for more than 10 years and the second procedure for more than 12 years.

The position of the Government was that the provisions of Art. 6 par. (1) of the Convention do not apply to tax proceedings, and in the present case they did not concern a "*criminal charge*". Moreover, the Government argued that, in Italy, the procedure for the enforcement of a tax provision is carried out in accordance with the procedure laid down by law for civil liability. The complainant expressed a similar position, considering the nature of the proceedings as civil and not criminal.

At §. 20 of the Judgment, the Court held that: " *The parties having agreed that a "criminal charge" was not in issue and the Court, for its part, not perceiving any "criminal connotation" in the instant case (see, a contrario, Bendenoun v. France, judgment of 24 February 1994, Series A no. 284, p. 20, § 47), it remains to be examined whether the proceedings in question did or did not concern the "determination of civil rights and obligations*".

Analysing the belonging to the public or the private law of the fiscal legal matters, §. 29, third sentence, of the Judgment states: " *The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant*". Hence the conclusion expressed in the last sentence of the paragraph mentioned: "*It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer*".

The Court concludes in the sense of that inapplicability of the provisions of Art. 6 par. (1) of the Convention.

A complete and systematic analysis of the criteria for determining the incidence of the provisions of Article 6 (1) of the Convention is implemented by the ECHR in the *Jussila v. Finland* Judgment[20].

The complainant, manager of a car repair company, has filed tax returns in 1998 on VAT. By detecting a number of inaccuracies, particularly of an accounting nature, in those statements, the fiscal authority made an estimate of the turnover of the company, which was higher than that declared by the company, which led to the increase in the amount owed as VAT. The tax authorities communicated to the applicant a decision on the basis of which he had to pay an increase equal to 10% of the amount of the rights he was ultimately considered to be debtor (308.8 Euro). Subsequently, the applicant challenged the tax decision by administrative means, and then in court. In the appeal proceedings, before an administrative tribunal, the applicant requested the hearing in court of himself, of the tax inspector who handled the file and an *ex parte* expert. However, the court was pleased with the submission by the tax inspector of written observations and the submission of an *ex parte expert* report. The Administrative Court rejected the applicant's request to be heard in the proceedings before the court and the request for the fiscal inspector and the *ex parte* expert to be heard, considering that all the parties involved were aware of their claims and the hearings in those circumstances became useless. In the applicant's appeal, the Supreme Administrative Court also rejected the complainant's request for hearings.

In the reasoning developed by the ECHR to determine whether Art. 6 par. (1) of the Convention is applicable in this case, the following steps were taken:

a) excluding the application of art. 6 of the Convention in its civil aspect - the case-law - explained in the Ferrazzini decision against Italy;
b) analysis of the *Engel Criteria* as follows:

- the provision in law of the criminal nature of the act - the Court notes that both the *Engel v. the Netherlands Judgment* and that of *Ezeh and Connors v. the United Kingdom*[21] do not attach any particular importance to the verification of this criterion, which is purely formal, but the accent goes instead to the nature of the offence and the severity of the sanction[22];
- the lack of seriousness of the sanction provided by law is not such as to remove the criminal nature of the act[23];
- the admissibility of both a partial analysis of each criterion and the possibility of a cumulative assessment as a whole in order to draw the conclusion that the

[20] ECHR, Court (Grand Chamber), Case of Jussila v. Finland, Application no. 73053/01, Judgment, Strasbourg, 23 November 2006, ECLI: CE: ECHR:2006:1123JUD007305301.

[21] ECHR, Court (Grand Chamber), *Case of Ezeh and Connors v. United Kingdom*, Applications nos. 39665/98 and 40086/98, Judgment, Strasbourg, 9.10.2003, ECLI: CE: ECHR:2003:1009JUD003966598.

[22] The Judgment in *Ezeh and Connors v. The United Kingdom*, cited above, §. 82, which refers to the text §. 82 of the Engel and Others v. Netherlands judgment, cited above, note 14.

[23] Judgment in Jussila v. Finland §. 31, with reference to the Judgment in Öztürk v. Germany §. 54, the second sentence: "*The relative lack of severity of the sanction to be enforced (...) cannot deprive an offense of its inherent criminal nature*."

accusation is criminal[24];

- the criterion of the seriousness of the sanction, which the Court did not consider particularly important in the *cases Öztürk v. Germany* and *Bendenoun v. France*, however, gains significant value in its judgment in *Morel v. France*[25];

c) the conclusion was based solely on the second "*Engel criterion*", namely the nature of the act, deduced from the "*preventive and repressive*" purpose of the sanction[26], and thus the incidence of art. 6 of the Convention, but without any breach of the fundamental guarantee of the fair trial by the fact that the courts rejected the requests for hearings in question, while respecting the contradictory nature of the written procedure[27].

The partially dissenting opinion shared by the judges Costa, Cabral Barreto and Mularoni, to which Judge Calfish has also rallied, expresses the view that, among the criteria considered to establish the applicability of Art. 6 par. (1) of the Convention, the criminal aspect, only two are satisfied in *Jussila v. Finland*: the general applicability of the rules on tax obligations and the punitive / preventive nature of the sanction, while the act is not provided for by the criminal law and the value of the sanction is modest. Applying the Bendenoun cumulative assessment, the supporters of the opinion consider that the conditions of the autonomous concept of "*criminal charge*" are not fulfilled and, on the other hand, following the decision of *Ferranzzini v. Italy*, there cannot be either the civil respect of the right to a fair trial.

In the partially dissenting opinion of Judge Loucaides, to which the judges Zupančič and Spielman have also stated they adhere, it was expressed the view that the rules of the fair trial require the national courts to hear the plaintiff and to have a genuine public debate as a requirement of the right to a trial fair. The partially dissenting opinion insists on the fact that the small amount of the sanction applied is insignificant compared to the sanction itself, which implies *ipso facto* an infamous character, a social stigma for the applicant. In this equation, the state does not appear as a subject of law, but as a holder of the power to enforce the law.

In support of this last dissenting opinion, we also bring the following arguments:

- interpersonal communication, manifested in court by orality and the unmediated reach of the evidence by the judge, is a value *eo ipso*;
- the perception of the defendant who is denied the right to speak in his or her own trial is that of the contempt and arrogance of the judges, who probably see in his/her hearing only a waste of time;
- the right to question witnesses and experts as part of the right of defence is fundamental; most of the time, from this newly created relationship results precious cognitive elements;
- the public procedure guarantees observance of the process of administration of justice by society; it is a way of verifying compliance with the principle of the rule of law, since no one can simply be obliged to believe in the rule of law without evidence in this respect and without personal experience;
- the mere fact of the public and oral procedure does not impede the effectiveness and speed of the procedure;
- the ideas of the defence and prosecution are developed successively during the court hearing, feeding each other on the way of the orality and spontaneity it induces.

The same reasoning on the use of the "*Engel Criteria*" to outline the concept of "*criminal charge*" and "*criminal trial*" respectively was also used in many other ECHR cases, including some more recent ones, such as *Zolotukhin v. Russia*[28] and *Grande Stevens v. Italy*[29].

In the decision in *Grande Stevens v. Italy*, the applicants were administratively sanctioned by CONSOB[30] for "*manipulation of the market*"[31] with fines ranging from 3,000,000 to 5,000,000 Euros. On appeal, the Court of Appeal in Torino reduced the amount of the fines to some of the claimants, reaching

[24] Judgment in Jussila v. Finland §. 31 sentence II and §. 32, last sentence, with references to the decision in Bendenoun v. France, §. 47 last paragraph: " *These factors may be regarded however in context as relevant in assessing the application of the second and third Engel criteria to the facts of the case, there being no indication that the Court was intending to deviate from previous case-law or to establish separate principles in the tax sphere. It must further be emphasised that the Court in Bendenoun did not consider any of the four elements as being in themselves decisive and took a cumulative approach in finding Article 6 applicable under its criminal head*".

[25] ECHR, Décision finale sur la recevabilité de la requête 54559/00, présentée par Jean Morel contre la France (translated from French by the author of the stydy)- the applicant was sanctioned because he did not file a VAT return even though his turnover exceeded the level for which the declaration was mandatory, pursuant to certain provisions of the Fiscal Code. He was required to pay a 10% increase of the payment amount, 4450 FF, ie 678 Euros. The amount of the tax penalty was considered "*of minor importance*" by the Court (paragraph 10 of the motivation). However, the ECHR based its decision not to consider that the provisions of Art. 6 par. (1) of the Convention are applicable in that case on the whole assessment of the "*Engel criteria*".

[26] Judgment in Jussila v. Finland §. 38.

[27] Idem, §. 48.

[28] ECHR, Court (Grand Chamber), Case of Sergey Zolotukhin v. Russia, Application no. 14939/03, Judgment, Strasbourg 10 February 2009, ECLI: CE: ECHR:2009:0210JUD001493903.

[29] ECHR, Court (Second Section), Case of Grande Stevens v. Italy, Application no. 18640/10, Judgment, Strasbourg, 4 March 2014, final 07.07.2014, ECLI: CE: ECHR:2014:0304JUD001864010.

[30] CONSOB = Commissione Nazionale per la Società e la Borsa = National Commission for Society and Stock Exchange (Italy), an independent administrative body with the role of ensuring investor protection, transparency and the development of stock exchanges.

[31] Offences set out by art. 187 ter, § 1 of Legislative Decree no. 58 of 24 February 1998: "*Without prejudice to criminal penalties when the offense constitutes a crime, any person who, through the media, including the Internet or any other means, disseminates false or misleading information, news or rumours' liable to generate false indications or misleading on financial instruments will be administratively sanctioned with a fine between € 200,000 and € 5,000,000.* ".

between € 600,000 and € 1,200,000. Marrone and Grande Stevens have remained with CONSOB's initial sanction of 5 and 3 million respectively.

The Court of Appeal also noted that, besides the application of administrative sanctions by CONSOB, this authority informed the Prosecutor's Office that the same persons committed the offense set out and punished by art. 185 §. 1 of the same Legislative Decree no. 58 of 24 February 1998[32].

By the indictment of 7 November 2008, the applicants were brought to trial before the Turin Tribunal for the aforementioned offense, with the same content as the offense for which they were administratively sanctioned. Before the court, the applicants alleged breach of the *ne bis in idem* principle. The Prosecutor's Office opposed that defence by stating that the Italian legal texts in question were merely transpositions of the provisions of Directive 2003/6 / EC of 28 January 2003[33], which did not prohibit the cumulation of administrative and criminal penalties. In this regard, the court ruled that the two sanctions would not have been applied "*for the same deed*" because only the text of criminalization required the intention to be an element of the subjective side of the offense, while the administrative text also accepted the guilt; on the other hand, only the text of criminalization provided the requirement that the behaviour be capable of causing a significant change in the value of financial instruments. Moreover, the court also noted the incidence of the provisions of art. 14 of Directive 2003/6 / EC, which provide for the possibility of imposing penalties as well as administrative sanctions for violations of its provisions.

By the judgment of 28 February 2013, the Torino Court of Appeal convicted the plaintiffs Gabetti and Grande Stevens for the offense withheld against them by indictment (the other defendants being acquitted on various grounds of fact and law). In so doing, the Court of Appeal held that there had been no violation of the *ne bis in idem* principle.

Before the ECHR, the applicants invoked the violation of the right to a fair trial in the proceedings before CONSOB and the breach of *ne bis in idem* principle, stipulated in art. 4 of the Additional Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As regards the applicability of the provisions of Art. 6 par. (1) of the Convention, the Court again referred to the *'Engel Criteria'*, pointing out that they were alternative rather than cumulative, by making the usual point-by-point analysis from the previous case-law[34]. Thus, the Court held that the acts which gave rise to the sanction applied by CONSOB were not provided for by the criminal law, but by their nature the legal provisions infringed by the applicants were designed to guarantee the integrity of the financial markets and the confidence in the security of transactions. The Court "*considers that the fines applied were essentially designed to punish, in order to prevent a repeat of the violation*." The sanctions were not applied to repair the financial damage, and their basis was the seriousness of the facts and not the damage suffered by the investors. The fines applied were, however, not transformable into prison days in the case of their default (as was the case in *Anghel v. Romania*) [35]. Finally, the Court notes the severity of the sanctions provided by law and even applied by CONSOB for violation of the provisions of the Legislative Decree: fines of up to EUR 5,000,000, pointing to §. 99 decision that those sanctions "*were criminal, as nature*". The logical consequence of this reasoning was that of determining the applicability of art. 6 par. (1) of the Convention.

3. The link between the autonomous concepts of "*criminal charge*" / "*criminal matter*" and the "*same facts*" in the context of the European Convention for the Protection of Human Rights and Fundamental Freedoms

The autonomous concepts of "*criminal charge*"/"*criminal matter*" are particularly relevant to determining the incidence in a particular criminal case of the *ne bis in idem* principle. Thus, often, the question is to establish the existence of a violation of this principle when, for the same facts, a person is sanctioned administratively, fiscally or disciplinary, and later or even simultaneously, the person is investigated, prosecuted and sometimes even convicted.

The *ne bis in idem* principle is a fundamental guarantee in the domestic law of the national states[36], being in principle provided by numerous constitutions of the EU Member States[37], by art. 4 of the Additional Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 50 of the Charter of Fundamental

[32] "*Anyone who disseminates false information, performs simulated transactions or uses other fraudulent acts that are objectively apt to generate a significant change in the value of financial instruments will be punished by imprisonment between 1 and 6 years and a fine from 20,000 to 5,000 .000 Euro* ".

[33] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), published in *OJ L 96, 12.4.2003*

[34] ECHR, Judgment *Grande Stevens v. Italy*, §. 94-99.

[35] Ibid., §. 95, 96.

[36] Known in American law and generally in the adversarial system as "*double jeopardy*".

[37] See to that effect art. 103 (3) of the Grundgesetz (Fundamental Law of the Federal Republic of Germany), Article 40 (5) Constitution of the Republic of Estonia, Art. 23 (3) Constitution of the Republic of Lithuania, art. 39 (9) Constitution of Malta, art. 29 (5) Constitution of the Portuguese Republic, Art. 50 (5) Constitution of the Slovak Republic, Art. 31 Constitution of the Republic of Slovenia, etc. Outside the European Union, it is worth mentioning Amendment V to the United States Constitution (Double Jeopardy Clause). For details see G. Coffey, *The Constitutional Status of the Double Jeopardy Principle*, Dublin University Law Journal. 30 (2008), Thomson Reuters, pp. 138-165.

Rights of the European Union, as well as in numerous international conventions[38].

The *ne bis in idem* principle, from the perspective of art. 4 paragraph 1 of Additional Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, reads as follows: *"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State*".

It is noted that the wording of Additional Protocol no. 7 to the European Convention on *ne bis in idem* principle refers only to the situation where the element "*idem*", namely the prosecution or conviction, occurs in the same state where the person has been acquitted or convicted. There is no transnational perspective of this principle.

Nothing in the text of art. 4 para. 1 of Additional Protocol no. Article 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms does not preclude a person being convicted or acquitted in a particular member of the Council of Europe and then prosecuted or convicted for the same facts in another Member State[39]. This will no longer apply in the context of the autonomous concept consisting of the *ne bis in idem* principle of European Union law (the Charter or the Convention Implementing the Schengen Agreement), where this principle becomes transnational and supranational.

From the point of view of a supranational jurisdiction, such as the ECHR, in relation to a legal text of the kind previously cited, almost all concepts with which that rule operates are accepted as defined in the domestic law of the State concerned, less the concept of "*the same fact*", which must have a common meaning for the interpretation of the rule, which is why it was defined as an autonomous concept in ECHR jurisprudence.

An act that cannot be classified as object of a "*criminal charge*" from the point of view of this autonomous concept, cannot attract a punishment and therefore cannot constitute a "*same fact*" as an autonomous concept that removes the possibility of a new investigation, prosecution or new punishment.

We do not intend in this study to carry out a thorough study of the *ne bis in idem* principle, but only to highlight the deep and intimate relationship established between the two aforementioned autonomous concepts.

To that end, we note that many ECHR decisions aim to establish the right to a fair trial in criminal matters (Article 6 § 1 of the Convention) as a first step before addressing the issue of the incidence of the *ne bis in idem* principle.

For the purpose of illustrating this mechanism, we turn to the ECHR judgment in *Grande Stevens v. Italy*, as we have referred to above, in terms of applying the "*Engel Criteria*" to determine the incidence of the autonomous concept of "criminal matter". As we have already seen, CONSOB, having sanctioned the plaintiffs by administrative means for manipulations of the securities market, sent the evidence to the prosecutor's office, who, following a criminal investigation, prosecuted the plaintiffs for an offence qualified by law as a crime. The applicants alleged violation of the *ne bis in idem* principle, but the Italian courts rejected the defence with a motivation mainly referring to the subjective side of the offence.

In their application to the ECHR, the applicants have again invoked the violation of the same principle by the Italian national courts. As explained above, the ECHR considered that the sanction applied to the applicants was based on a *'criminal charge'*, in a *'criminal matter'* thus creating the premises for the analysis of the *ne bis in idem* principle incidence.[40]

In pursuing its legal syllogism, the ECHR examines whether there are *"same facts"* in the CONSOB decision and in the indictment of the prosecutor's office. The Court has, through this concept, understood the material identity of the facts, and not the conditions under which acts or inactions are prescribed by law as offenses[41]. The concept was also defined in previous ECHR cases in this area[42].

Following the analysis of the CONSOB sanctioned facts materiality and of those sent before the court by the Prosecutor's Office, the ECHR concluded that: "*the procedures clearly referred to the same*

[38] Article 14 (7) of the International Covenant on Civil and Political Rights, Art. 20 Rome Statute of the International Criminal Court, art. 54 Convention on the Implementation of the Schengen Agreement (CISA), art. 8 (4) Interamerican Convention on Human Rights.

[39]For further explanation, see P.P. Paulesu, *Ne bis in idem and Conflict of Jurisdiction* in R. E. Kostoris, Editor, *Handbook of European Criminal Procedure*, Springer International Publishing AG, Switzerland, 2018, pp. 398-402. The aforementioned author finds the same situation in the case of the ne bis in idem principle of the International Covenant on Civil and Political Rights (Article 14 (7)).

[40] ECHR, judgment in Grande Stevens v. Italy, §. 222: "Applying those principles to the case at hand, the Court notes, firstly, that it has just concluded, under Article 6 of the Convention, that there existed valid grounds for considering that the procedure before the CONSOB involved a "criminal charge" against the applicants (see paragraph 101 above) and also observes that the sentences imposed by the CONSOB and partly reduced by the court of appeal constituted res judicata on 23 June 2009, when the judgments of the Court of Cassation were delivered (see paragraph 38 above). From that date, the applicants ought therefore to be considered as having been "already finally convicted of an offence" for the purposes of Article 4 of Protocol No. 7".

[41] Ibid. §. 224: "It remains to be ascertained whether those new proceedings were based on facts which were substantially the same as those which had been the subject of the final conviction. In this regard, the Court notes that, contrary to what the Government seem to be asserting (see paragraph 217 above), it follows from the principles set out in the case of Sergey Zolotukhin, cited above, that the question to be answered is not whether or not the elements of the offences set out in Articles 187 ter and 185 § 1 of Legislative Decree No. 58 of 1998 are identical, but whether the offences with which the applicants were charged before the CONSOB and before the criminal courts concerned the same conduct".

[42] ECHR, Zolotukhin v. Russia, cited above, §. 82: "Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same".

conduct of the same persons and on the same date"[43] and therefore, *"this finding is sufficient to conclude that there has been a violation of Art. 4 of Protocol no. 7 "*[44].

The question of whether or not the accusation underlying one of the "*convictions*" was to be found as criminal, based on the "*Engel Criteria*", following a constant practice in the application of the *Criteria*, started to be doubted by the ECHR, in the judgment in case *A and B v. Norway*[45]. In the case, the applicants together with other persons have traded in the financial market and the proceeds from these activities were not declared at the tax authority, which discovered the facts in the course of an audit, almost four years after they were perpetrated. Total damages to the state as a result of non-payment of taxes related to undeclared income were 3.6 million Euros. The tax authority notified the prosecutor's office, who, after conducting the criminal investigation, prosecuted the plaintiffs for the offense of tax evasion. Before being convicted of imprisonment on the basis of the indictment, the applicants were sanctioned by the tax authorities forcing them to pay penalties representing 30% of the amount of the taxes owed to the income they did not declare. The applicants have raised a claim before the ECHR that a violation of the *ne bis in idem* principle occurred in the Italian justice system.

In §. 105 of the Judgment, the Court recalls its jurisprudential tradition, also expressed in the Zolotukhin case, to establish the criminal character of the charge on the basis of the "*Engel Criteria*", but at §. 107 points out that it does not appear justified to start from such an analysis in the present case, applying more precise criteria than those mentioned above. Moreover, the Court noted that there was a need for a *'calibrated approach*' as regards the way in which the *ne bis in idem* principle is applied in procedures combining administrative and criminal penalties.

Within this new "*calibrated approach*" to which the Court refers, the *"States should be able legitimately to choose complementary legal responses to socially offensive conduct (such as non-compliance with road-traffic regulations or non-payment/evasion of taxes) through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned"*[46].

Thus, the ECHR no longer considers that an integrated approach combining administrative and criminal penalties for the same facts in their purely material sense would defeat *ne bis in idem*, especially when the two categories of sanctions would present different purposes and would be in the competence of different authorities.

In order to allow such cumulation, at §. 132 of the Judgment, the Court sets out precise rules:

- the procedures pursue complementary goals and therefore address not only abstractly but also concretely different aspects of incorrect social behaviour;
- the duality of the proceedings in question is a foreseeable consequence, both legally and practically, of the same behaviour (idem);
- inquiries should be carried out in such a way as to avoid, as much as possible, duplication of gathering and evaluation of evidence, in particular through appropriate interaction between the various competent authorities to ensure that the evidence in a procedure is acquired also for the other procedures;
- the sanction imposed in the procedures that become definitive earlier should be taken into account in those that become definitive later, ultimately preventing the person from incurring an excessive burden, the latter risk being the lowest if there is in place a mechanism which is designed to ensure the proportionality of the total amount of sanctions imposed;
- there is a certain temporary link between procedures that is sufficiently tight to protect the individual from uncertainty and prolonged delays[47].

Analysing carefully the above criteria, the ECHR concluded that, in the case, to each of the complainants, there is a sufficiently close link, both in substance and in time, between the decision on tax penalties and the subsequent criminal conviction for that they can be considered as part of an integrated system of penalties under Norwegian law for failing to provide accurate information in a tax return resulting in a faulty assessment of taxes[48].

4. The concept of "*criminal charge*" and the principles "*ne bis in idem*" and "*nulla poena sine culpa*" in the case-law of the Court of Justice of the European Union

Because the criminal dimension of European Union law has appeared relatively late, especially since the Amsterdam Treaty, the Court of Justice of the European Union (CJEU/ECJ) was seized with very few cases before 1997.

Such a case is Hansen & Søn[49]. In application of Regulation (EEC) No. 543/69 of the Council from 25 March 1969 on the approximation of the laws of the Member States relating to road transport, which obliges employers in this field to oblige drivers to have specific

[43] ECHR, the judgment in Grande Stevens v. Italy, cited above, §. 227.
[44] Ibid., §. 228.
[45] ECHR, Grand Chamber, Case of A and B v. Norway, Applications nos. 24130/11 and 29758/11, Judgment, Strasbourg, 15 November 2016, ECLI: CE: ECHR:2016:1115JUD002413011.
[46] Ibid., §. 121.
[47] Ibid., §. 134.
[48] Ibid. §. 153.
[49] CJEU, Judgment of the Court, 10 July 1990, C-326/88, Anklagemyndigheden and Hansen & Søn, ECLI:EU:C:1990:291.

driving and resting intervals, by means of a Danish ministerial order, it was set out the provision that the employer would be fined if the employee did not comply with the rules on rest referred to in that regulation, even if the employer had no guilt in respect of that breach of law. In such a case, Hansen & Søn was sanctioned with a fine in absence of the existence of any intention or fault on its part in connexion to the unlawful act perpetrated by an employee. In those circumstances, the Danish Court of Appeal asked the CJEU a preliminary question as to whether the regulation at issue prohibits the adoption of national provisions under which an employer whose drivers are in breach of the provisions of that regulation may be subject to criminal sanction, even if the violations are not an intentional or negligent act of the employer.

This request for a preliminary ruling raises the question of whether, in application of Community law, the adoption by the Member States of rules based upon objective criminal liability is admissible. Hansen & Søn also argued that the criminal sanctioning of employers in that context extends the scope of the Regulation and that only Denmark has chosen to apply criminal sanctions for the unlawful acts of the employees, a situation which is likely to distort fair trade competition in the economic field of road transports.

In response, the CJEU stated that the Regulation leaves the discretion of the Member States to the implementation of its provisions, and Article 18 of the Regulation allows Member States to determine the legal nature and severity of the sanctions to be imposed in the event of its breach. Moreover, the Court also refers to the provisions of Art. 5 of the EEC Treaty, which required Member States to take all necessary measures to ensure the effective application of Community law.

The preliminary ruling stated that neither that regulation nor the general principles of Community law does not preclude the application of national provisions according to which an employer whose drivers are in breach of the provisions of the Regulation on working and resting time may be the subject of a punishment decided in criminal proceedings, despite the fact that such violations cannot be attributed to an intentional unlawful act or negligence on the part of the employer, provided that the foreseeable punishment is similar to those imposed for violation of national law for acts of similar nature and importance and proportionate with the severity of the violation committed.

In so doing, the Court insisted on the principles of Community law generally applicable in such cases: the effective and dissuasive nature of the sanction, the principle of proportionality and assimilation, referring to the case-law on the "*Greek maize case*"[50], taking note of the fact that in Denmark, the protection of the working environment is ensured mainly by the application of criminal penalties, as well as by assessing the proportionality of the sanction against the seriousness of the facts.

By the aforementioned decision, the Court implicitly accepts criminal liability which is not based on guilt (objective) but only under condition that national law allows it. Such a position violates a fundamental principle of law, concomitantly seen as a fundamental rights guarantee: *nulla poena sine culpa*. We can validly deduce the importance of this principle in guaranteeing the defence rights in criminal proceedings, *per a contrario*, by applying the presumption of innocence principle (set out in Article 48 of the Charter of Fundamental Rights of the European Union and Article 6 (2) of the European Convention on Human Rights and Fundamental Freedoms)[51].

However, in §. 47 of the CJEU's judgment in *Käserei Champignon Hofmeister*, the Court notes: "*in other areas, the Court has accepted that a system of strict criminal liability penalising breach of a Community regulation is not in itself incompatible with Community law*". The quote refers to §. 19 of the Hansen & Søn judgment.

The preliminary ruling in *Käserei Champignon Hofmeister* appears confusing because in *Hansen & Søn*, the Court was not questioned whether the objective criminal liability is contrary to Community law but rather whether the existence of such a liability in the national law of a Member State legitimates its existence also in Community law. However, it must be made clear that at the time of the judgment in *Hansen & Søn* (1990) there were no provisions in the fundamental treaties of the Communities on human rights or on the issue of criminal justice in the Community context and the Charter was not yet adopted.

The Court's ruling in *Käserei Champignon Hofmeister* (abridged KCH) has brought to light, as a response to *Hansen & Søn*, the autonomous concept of the CJEU on the principle *nulla poena sine culpa*, but also the autonomous concept of "*criminal charge*" and "*criminal matter*". The latter was approached,

[50] CJEU, Judgment of the Court of 21 September 1989, *Commission of the European Communities v. Hellenic Republic*, C - 68/88, ECLI:EU:C:1989:339.

[51] CJEU, Judgment of the Court (Fifth Chamber) of 11 July 2002, case Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas, C-210/00, ECLI:EU:C:2002:440.

In §. 29 of the judgment, the Court has noted that *"KCH argues that, in the light of its importance and the fact that it does not aim merely to eradicate the consequences of an unlawful act, the penalty laid down in Article 11 of Regulation No 3665/87 is of a criminal nature. Since it allows the imposition of such a penalty even in the absence of any fault, the provision is contrary to the principle 'nulla poena sine culpa', which is part of the general principles of Community law. This is a principle recognised by Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereinafter 'the ECHR'), by the law of the Member States, and by Community law itself*".

More, §. 30 of the same judgment states that *nulla poena sine culpa* is also applicable to administrative sanctions.

seemingly unrelated to the ECHR jurisprudence based on the "*Engel Criteria*" check, to which we have referred above. Although the CJEU ignored such an approach in its decision, the similarities are clear. As in the case of *Hansen & Søn* judgment in 2002, when the *Käserei Champignon Hofmeister* decision was handed down, the Treaties did not refer directly to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union has not yet been written. However, as we have already shown (in footnote 51) and we will continue to do so, the CJEU's awareness of the acquis of the European Convention has progressed significantly.

The case concerns the application to the exporter KCH by the German customs authorities of financial penalties for breach of the provisions of Regulation (EEC) No. 3665/87[52], art. 11 para. (1) subparagraph (1) (a). In fact, KCH stated that it has exported a quantity of melted cheese for which it had applied for export refunds, receiving an advance of DEM 30 000 on the basis of statutory refunds, but subsequently on the occasion of a check by the customs authority, it was found that the product also contained vegetable fats, in these conditions not fulfilling the conditions to allow for any export refunds to be paid.

KCH challenged the financial penalty imposed by the customs authority in the framework of the domestic justice system, claiming that it has purchased the product subsequently exported without being aware that the supplier did not complied with the quality standards of the goods and has not had a reasonable opportunity to carry out checks to the supplier. In law, KCH argued that the principle of *nulla poena sine culpa* had been violated and, in the alternative, that there was a case of force majeure consisting of the impossibility of carrying out prior checks at the supplier's premises.

As regards the *nulla poena sine culpa* principle, the interpretation of which was to be given by way of the preliminary ruling, the Court held that this principle applies only where the charge is of a criminal nature and hence the Court's first task within the legal syllogism constructed is to determine whether the sanction in question was based on a provision of a criminal nature[53].

Further to the reasoning, the Court holds that:

- the legal rules infringed are not of general application, but are addressed only to economic operators who have chosen to avail themselves of the benefits of an aid scheme in agricultural matters[54];
- the amount of the payment under the sanction provided for by the Regulation is directly proportional to the amount unreasonably levied by the economic operator before the irregularity has been discovered by the authorities[55];
- it is difficult to give accurate export declarations, that is why the sanction merely encourages exporters to carry out checks on suppliers adapted to the frequency and intensity of the concrete needs or to be sheltered by contractual clauses which provide for compensation from contractors when the goods are inadequate or to conclude insurance policies for the same purpose[56];
- the proof of a possible fraudulent intention of the exporter is so difficult to produce that the regulation constructs exporters as the last link of the export-purchase chain for exported goods that can ensure compliance of the goods with the export declaration[57];
- " *In the context of a Community aid scheme, in which the granting of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness, the penalty imposed in the event of non-compliance with those requirements constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound financial management of Community public funds* "[58].

The Court's conclusion was that an accusation like the one based on Art. 11 para. 1 subparagraph 1 (a) of Regulation (EEC) No. 3665/87 cannot be regarded as a criminal charge[59].

Seeing the arguments above presented, we note that the CJEU, without saying it, has only analysed the ECHR criteria for determining the autonomous concept of "*criminal charge*", with certain nuances coming from the specific regime of Community agricultural aid (general applicability of the norm, the nature of the offence and the nature of the sanction). In so doing, the Luxembourg Court has begun to construct a self-contained concept of the "*criminal charge*" or, more precisely, of the "*criminal sanction*". Between the two autonomous concepts, however, there is a strong link, based, whether it is labelled as such or not, on the "*Engel Criteria*".

Concerning the issue of the same text of the aforementioned regulation in the context of *nulla poena sine culpa* principle, the CJUE's decision in *Société d*

[52] Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products, OJ 351/1987.

Under art. 11 para. (1) subparagraph (1) of the Regulation, where it is found that, for the purposes of granting an export refund, an exporter has claimed a refund higher than that applicable, the refund due for the export in question shall consist of the refund applicable to the product actually exported, reduced by an appropriate amount:

a. half the difference between the requested refund and the one applicable to the actual export made;

b) double the difference between the requested refund and the applicable refund if the exporter deliberately provided false data.

[53] *Käserei Champignon Hofmeister Judgment* §. 35.

[54] Ibid. §. 41, first sentence.

[55] Ibid. §. 43.

[56] Ibid. §. 63.

[57] Ibid. §. 61.

[58] Ibid. §. 41, last sentence.

[59] Ibid. §. 44.

'Exportation de Produits Agricoles SA (SEPA) case, also relying on previous rulings, noted that *"The liability on which that penalty is based is essentially objective in nature. It follows that the reduction referred to in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 must be applied even if the exporter has not committed any fault "*[60].

Turning to the issue of the autonomous concept of "*criminal charge*" and the "*Engel Criteria*", Advocate General Juliane Kokott, in her conclusions in Bonda, examined precisely the applicability of these criteria in order to establish the criminal or administrative nature of the sanctions in question also for observing the *ne bis in idem* principle[61]. Starting with §. 51 of the conclusions, the evaluation of the "*Engel Criteria*" is made by the Advocate General (hereinafter referred to as AG) by reference to the CJEU's decision in *Käserei Champignon Hofmeister*, referred above. AG also points out indirectly to the equivalence of the "*Engel Criteria*" with those applied by the CJEU in *Käserei Champignon Hofmeister*, even if the CJEU did not use that well-known name and made no reference to ECHR jurisprudence in the matter[62]. By analysing upon this method, AG reaches the conclusion that there was no "*criminal charge*" in the matter, so that the *ne bis in idem* principle was not violated.

In fact, Łukasz Marcin Bonda, an independent Polish farmer, submitted an application to the managing authority for agricultural aid in 2005, in which he made inaccurate declarations on the area under cultivation and on the types of agricultural crops. By finding that the declaration is inconsistent with the reality, the administrative authority rejected the farmer's application for aid and applied to him an administrative measure prohibiting entitlement to agricultural aid for three years further from that time under Article 138 of Regulation (EC) No. 1973/2004 of 29 October 2004[63]. Subsequently, Bonda was convicted in first instance for committing the offense of subsidy fraud set out by Article 297 (1) of the Polish Penal Code, to eight months' imprisonment with conditional suspension of execution, the trial period being two years and a fine of 80 days, calculated at a rate of PLN 20 per day. On appeal, the court asked the CJEU a preliminary question as to the legal nature of the sanction set out by the EU regulation and the incidence of the *ne bis in idem* principle.

In the judgment[64], the Court relied on the analysis made by AG Kokott in her approach to the autonomous concept of *'criminal proceedings'*[65], based on the *'Engel Criteria'* analysis, by reference to the previous case-law, including Käserei *Champignon Hofmeister* case, with references also to the provisions of art. 325 TFEU, on the protection of the financial interests of the European Union and to the provisions of the so-called PIF Regulation[66]. Express references to "*Engel Criteria*" were also made largely in §. 37-45 of the Judgment, concluding that they have not been accomplished.

Thus, *"the Court has previously held that penalties laid down in rules of the common agricultural policy, such as the temporary exclusion of an economic operator from the benefit of an aid scheme, are not of a criminal nature"* [67]and *"there is nothing to justify a different answer being given with respect to the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004"*[68].

The conclusion of the preliminary decision was that: *"the measures provided for in the second and third subparagraphs of that provision, consisting in excluding a farmer from receiving aid for the year in which he made a false declaration of the eligible area and reducing the aid he can claim within the following three calendar years by an amount corresponding to the difference between the area declared and the area determined, do not constitute criminal penalties"*.

A similar issue is also addressed in the CJEU's judgment of *Hans Åkerberg Fransson*[69]. The only notable difference is that the sanctions regarding to whom the question whether they are criminal or not related to statements inconsistent to the reality of the suspected taxpayer, which led to the undervaluation of the VAT due to the state budget and to the Union budget, through the mechanism of the VAT common system. The Court's conclusion was that the penalties imposed on the petitioner under the national legislation

[60] CJEU, Judgment of 6 December 2012 in Case C-562/11, Société d 'Exportation de Produits Agricoles SA (SEPA) v. Hauptzollamt Hamburg-Jonas, ECLI: EU: C: 2012: 779, §. 26.

[61] Opinion of Advocate General Juliane Kokott delivered on 15 December 2011 in Case C-489, Łukasz Marcin Bonda, ECLI: EU: 2011: 845, starting with §. 45.

[62] Ibid. §. 52: "*For the purposes of the second Engel criterion, the ECtHR essentially reviews the same elements which the Court of Justice also applied in its judgment in Käserei Champignon Hofmeister* ".

[63] Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IV a of that Regulation and the use of land set aside for the production of raw materials, OJ L 345/2004.

[64] CJEU, Judgment of the Court (Grand Chamber), 5 June 2012, case C-489/10, reference for a preliminary ruling in the criminal proceedings against Łukasz Marcin Bonda, ECLI:EU:C:2012:319.

[65] Ibidem, note 61, §. 36.

[66] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, *OJ L 312, 23.12.1995.*

[67] Ibidem, note 61, §. 28.

[68] Ibid., §. 31.

[69] CJEU, Judgment of the Court (Grand Chamber) from 26 February 2013 in Case C-617/10, Åklagaren v. Hans Åkerberg Fransson, ECLI: EU: C: 2013: 105.

transposing Directive 2006/112 / EC[70] are not criminal in nature.

In order to do so, the Court once again verified the fulfilment of the "*Engel Criteria*" without naming them[71].

A somewhat similar legal issue is addressed in the CJEU judgment in *Menci*[72]. Thus, in the transposition of Directive 2006/112 / EC on the common system of VAT, the Italian law provided both an administrative penalty for non-payment of VAT at the prescribed time, representing a percentage share of the amount owed to the tax with that title and a criminal penalty (imprisonment from 6 months to 2 years) for the same fact. Again, the criminal nature of the administrative sanction, the *ne bis in idem* principle, and the necessary and proportionate nature of the cumulation between the two types of sanctions is being discussed, as tax returns have been made in accordance with reality and there are no indications of fraud being committed.

In that decision too, the Court applies the "*Engel Criteria*" to determine the possible criminal nature of the act sanctioned with the percentage increases in the payment amount as a tax liability[73]. However, unlike previous cases when, as a result of the analysis of the *Engel Criteria*, the finding was that the facts in question were not criminal, in the present case, with regard to the administrative sanction, the Court ruled that, by the repressive nature of the sanction and by its seriousness it has, in fact, a criminal nature (§ 33).

As regards the principle of *ne bis in idem*, the criterion of the identity of the material facts was applied or, rather, "*the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned*" (§ 35) as well as ECHR jurisprudence. Given the criminal nature of the administrative sanction applied before the prosecution of the defendant Luca Menci for an offense with largely the same content, the Court considers that this would be acceptable from the point of view of the *ne bis in idem* principle only if seen as a restriction of a fundamental right which, according to Article 52 (1) of the Charter of Fundamental Rights of the Union must be provided for by law, respect the substance of rights and freedoms, be necessary and proportionate to the aim pursued.

Another judgment, which concerns the criminalization in Italian criminal law of the offense of non-payment of VAT, is that of *Mauro Scialdone* [74](the case has many similarities with the *Procura della Repubblica v. Luca Menci*).

Thus, Siderlaghi, having Mauro Scialdone as its manager and administrator, was found by the financial administration not to have paid the VAT for the annual declaration for 2012 in the amount of 175 272 Euros within the time limits set by law. The tax authority imposed on the company an administrative penalty consisting in the payment of penalties representing 30% of the total amount of VAT owed. The Prosecutor's Office filed an indictment against the defendant Scialdone for committing an offense having the same constitutive content as above (being a criminal offence only if a minimum threshold of 50,000 Euro was due). During the trial, a partial repeal of the incrimination rule occurred, in the sense that the fact was no longer an offense if the amount due was less than EUR 250 000 (when the debt was due to non-payment of VAT) and less than EUR 150 000 (when the debt came from the non-payment of income tax).

In those circumstances, the Tribunal of Varese referred to the CJEU a number of preliminary questions, which were subsequently restructured by the Court, having as a common denominator the idea of separating the amount due from which the act constitutes an offense according to whether the debt represents VAT or, respectively, income tax. The same tribunal also questioned whether the partial decriminalization of the offense did not violate the provisions of Art. 325 TFEU, in order to create less favourable regulatory conditions for combating fraud against the financial interests of the Union.

The Court has built its legal reasoning based on the ideas of the constitutive treaties (Article 325 TFEU) and the legal acts of the Union, according to which Member States must combat fraud and any illicit activity affecting the financial interests of the EU through measures that are effective, dissuasive, proportionate and consistent with the principle of assimilation. The scope of VAT is covered by these provisions.

The fact of failing to pay the VAT-based debt, provided that the declarations establishing that charge were made in accordance with the reality does not constitute a "*fraud*" relating to the financial interests of the Union (the frauds being expressly described in the Convention drawn up on the basis of Article K. (3) of

[70] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/2006.

[71] Judgment in the case of Hans Åkerberg Fransson, §. 35: " *Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 Bonda [2012] ECR, paragraph 37)*".

[72] Judgment of the Court (Grand Chamber) of 20 March 2018 in Case C-524/15, preliminary ruling in criminal proceedings Procura della Repubblica v. Luca Menci, ECLI: EU: C: 2018: 197.

[73] Judgment in Menci case §. 26: " *As regards assessing whether proceedings and penalties, such as those at issue in the main proceedings, are criminal in nature, it must be noted that, according to the Court's case-law, three criteria are relevant. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur (see, to that effect, judgments of 5 June 2012, Bonda, C-489/10, EU:C:2012:319, paragraph 37, and of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 35)*".

[74] CJEU, Judgment of the Court (Grand Chamber) of 2 May 2018, preliminary ruling in Case C-574/15, Criminal proceedings concerning Mauro Scialdone, ECLI: EU: C: 2018.295.

the Treaty on European Union, on the protection of the financial interests of the European Communities, also called the PIF Convention[75])[76]. Non-payment of VAT due falls within the category of "*illegal activities*" likely to affect the financial interests of the Union within the meaning of Art. 325 para. (1) TFEU, which therefore requires effective and dissuasive sanctions[77]. In this respect, the Court's reasoning continues with the analysis of the effective, dissuasive, proportionate and respecting of the principle of assimilation character of the legislative criminalisation text. The Court's conclusion is that all of these criteria are met in relation to the partial decriminalization of the VAT non-payment in the sense that it no longer constitutes an offense under Italian law but only from a threshold of EUR 250 000.

5. The autonomous concept of "court having jurisdiction in particular in criminal matters"

This autonomous concept was developed by the CJEU in the case of *Marián Baláž*[78]. The legal act of the Union interpreted in the context of this judgment is Council Framework Decision 2005/214 / JHA on the application of the principle of mutual recognition to financial penalties[79] and the basic notions of that Framework Decision are "*decision*", "*court having jurisdiction in particular in criminal matters*" and "*financial penalty* ".[80]

In the present case, the Czech citizen Marián Baláž was sanctioned for a violation of a provision of the Austrian Road Code when he ignored the meaning of the indicator "*prohibiting access to motor vehicles with a mass greater than 3.5 tons* ". The sanction applied was a fine of EUR 220 or, in case of non-payment, 60 hours of imprisonment. The offender did not contest the sanction applied by the administrative authorities, although he was informed about that and the right to challenge it. Because it was not enforced in Austria and the offender was living in the Czech Republic, the Austrian authorities sent the financial sanctioning decision to the judicial authorities in the latter country for recognition and enforcement. The decision was recognized in the Czech Republic. Subsequently, the offender filed an appeal against the recognition decision, arguing in particular that the decision could not be enforced as long as it was not susceptible of being the subject of an appeal before a "*court having jurisdiction in particular in criminal matters*".

The Prague High Court therefore addressed a preliminary ruling request for the interpretation of the aforementioned concept, asking CJEU, *inter alia*, whether it is an "*autonomous concept*".

The Court has held that it is indeed an *'autonomous concept'* by applying its constant doctrine that whenever the legal act of the Union does not refer to the national law of the Member States, that notion must be understood in a unitary manner throughout Union in the context of that provision and in the light of the objective pursued by the legal act[81].

The Court deconstructs the concept in question by examining first the "court" component, taking into account criteria such as: "whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent"[82].

In order to analyse also the second structural component of the autonomous concept, namely the quality of the court to have " jurisdiction in particular in criminal matters", the Court undertakes an analysis that is in fact a parallel to the one when, in various cases, among which those referred to above, established the character of a "*criminal charge*" of facts qualified by national law as contraventions. The Court moves the debate from the periphrasis cited in the first part of this paragraph to the concept of "*criminal*

[75] Published in OJ C 316 from 27.11.1995.

[76] Scialdone case §. 39: " *Likewise, a failure to pay declared VAT does not constitute 'fraud' within the meaning of the PFI Convention. For the purposes of that convention, according to Article 1(1)(b) thereof, 'fraud' in respect of EU revenue involves 'non-disclosure of information in violation of a specific obligation' or the 'use or presentation of false, incorrect or incomplete statements or documents'. As is apparent from paragraph 37 above, such failures to comply with declaration obligations are not at issue in the present case. Moreover, while that provision also refers to the 'misapplication of a legally obtained benefit', it should be pointed out, as the German Government observes, that failure to pay declared VAT within the time limit prescribed by law does not give the taxable person such a benefit since the tax is still payable and the taxable person is acting unlawfully by failing to pay it* ".

[77] Ibid. §. 44.

[78] Judgment of the Court (Grand Chamber) of 14 November 2013 in Case C-60/12, preliminary ruling in proceedings for the enforcement of a financial penalty issued against Marián Baláž, ECLI: EU: C: 2013: 733.

[79] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76, p. 16), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24)

[80] In the sense of art. 1 lit. (a) of Framework Decision 2005/214 / JHA, the concept of "decision" means "a final decision requiring a financial penalty to be paid by a natural or legal person where the decision was made by (iii) an authority of the issuing State other than a court in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters". Art. 1 (b) of the same Framework Decision defines "the financial penalty" as "the obligation to pay a sum of money on conviction of an offence imposed in a decision".

[81] Judgment Marián Baláž. §.26. The Court refers to several decisions it has made in cases concerning autonomous concepts relating to the European Arrest Warrant procedure, such as those in Mantello and Kozłowski (C-261/09 and C-66 respectively / 08).

[82] Ibid. §. 32.

proceedings"[83] and this is naturally related to the "*criminal charge*" because criminal proceedings applies to a criminal accusation.

The CJEU's conclusion was that an independent administrative authority such as the *Unabhängiger Vervaltungssenat* (*Independent Administrative Senate*) in Austria is a "*court having jurisdiction in particular in criminal matters*". The main reason for awarding such a qualification is that, even though it is *de facto* an administrative authority, according to Austrian law, it has the power to judge appeals against decisions on sanctioning contravention[84].

In conclusion, the Court defines the autonomous concept of "court having jurisdiction in particular in criminal matters" as "any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure"[85].

6. Conclusions

In international law and European Union law, before supranational jurisdictions, fundamental notions known by all contemporary national law systems acquire unitary meanings, otherwise it would be impossible to interpret the legal norms that these systems of law impose. This phenomenon occurs whenever supranational rules do not expressly refer to the meaning of the respective notions of the national law of each state.

An essential question of contemporary law is where the field of criminal law regulation begins and ends in its *lato sensu* meaning, both in substantive and procedural terms. In short, what are the "*criteria*" that define "*the criminal*" and delimit it from other branches of law that impose similar sanctions as the nature of the punishment. Such branches of law are administrative law and tax law, and sanctions similar to those of criminal law are administrative, disciplinary, financial and fiscal.

This study demonstrates the permanence and ubiquity of the so-called "*Engel Criteria*" in the conceptual delimitation referred to in the previous paragraph. By applying these criteria, the European Court of Human Rights and the Court of Justice of the European Union have defined "*autonomous concepts*" (unrelated with the meaning they have in the national law of the states) to allow the isolation of what we call "*criminal*". Such an epistemological separation is essential in the matter of respecting human rights and fundamental freedoms, whether it relates to the Council of Europe Convention having that object, or whether the legal instrument under consideration is the Charter of Fundamental Rights of the European Union. Between the two there are clauses that coordinate them, as we have seen in Section I of the study, laid down in the fundamental treaties of the Union but also in the Charter. As a result of these clauses, the autonomous concepts of the ECHR migrate into the legal order of the European Union, itself an autonomous legal order, where they are adapted by the Court of Justice of the European Union to the realities of the latter.

The first autonomous concept was that of the "*criminal charge*" (*Deweer case*), followed immediately by *"criminal matter"* linked directly to the "*Engel Criteria*" with particular importance in the context of the right to a fair trial and the *ne bis in idem* principle, in its turn a different concept from the point of view of its content in the context of the Convention and the Charter. Concerning the efforts to delimit the "*criminal charge*", the concepts of "*criminal penalties*", "*criminal proceedings*", "*court having jurisdiction in particular in criminal matters*" and, last but not least, the principle "*nulla poena sine culpa*" were also defined as autonomous concepts.

All these autonomous concepts together form an orderly system that allows a coherent interpretation of the national law of the Member States of the Council of Europe, the interaction of these systems of law between themselves and separately of the European Union law.

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[83] Ibid. §. 36: "*To that end, the court having jurisdiction within the meaning of Article 1(a)(iii) of the Framework Decision must apply a procedure which satisfies the essential characteristics of criminal procedure, without, however, it being necessary for that court to have jurisdiction in criminal matters alone*".

[84] Ibid. §. 39 last sentence: "*In an appeal of that kind, which has suspensory effect, the Unabhängiger Verwaltungssenat has unlimited jurisdiction and applies a criminal procedure which is subject to compliance with the procedural safeguards appropriate to criminal matters*".

[85] Ibid. §. 42.