

Dawid Miąsik

Polish Academy of Science, Poland

dawidmiasik@yahoo.com

ORCID ID: <https://orcid.org/0000-0001-5974-9233>

Kamil Kapica

Polish Academy of Science, Poland

kapica.kamil@gmail.com

ORCID ID: <https://orcid.org/0000-0002-5932-4953>

The Duty of National Administrative Authorities to Respect the EU's Fundamental Rights in Fining Proceedings and the Consequences Thereof

Abstract: Fines levied on individuals, including entrepreneurs, are measures of vital importance for securing the effectiveness of EU law. They are primarily imposed by national administrative authorities who apply national laws. Those authorities must respect the EU's fundamental rights during national fining proceedings following the *Fransson* and *Pfleger* formulas. They must also respect the general principles of EU law. These rights and principles shield individual entrepreneurs against arbitrary and unlawful activities by national authorities. They determine whether an individual can be fined, how high a fine is legitimate and how the fining proceedings should be conducted.

Keywords: Charter of Fundamental Rights, implementing EU law, general principles of EU law, national administrative authorities, national fining proceedings, sanctions

Introduction

Member States are under a general duty stemming from Article 4, Paragraph 3, Treaty on European Union (TEU) to secure the effectiveness of EU law.¹ One such

1 This article was prepared as part of a grant from the National Science Centre, 'The Impact of Principles of EU Law on the Imposition of Fines by National Public Administration Bodies', No. 2021/43/B/HS5/01252. Treaty on European Union (consolidated version OJ 2012 C 326/15).

duty is the adoption and enforcement of various penalties against those who infringe EU law.² In principle, Member States have the freedom to choose the sanctions which seem to them to be appropriate. However, they must respect the general principles of EU law, including the fundamental rights now guaranteed by the Charter of Fundamental Rights (CFR or the Charter) while exercising this power.³ This obligation also covers various measures undertaken by national administrative authorities (NAAs) towards entrepreneurs.⁴ The concept of fundamental rights as EU general principles was initially developed in cases concerning undertakings, beginning with the *Nold* ruling.⁵ In subsequent judgments concerning EU competition rules, a catalogue of fundamental rights (as general principles of EU law) addressed to undertakings was gradually developed and finally recognized in the Charter.

While it is obvious that EU fundamental rights encompass entrepreneurs (undertakings),⁶ this article examines various aspects of the duty of NAAs to respect these rights during proceedings leading to the imposition of a financial penalty. Such proceedings fall within the scope of EU law when fines are to be imposed for infringements of national legislation implementing EU law or legislation interfering with the working of the internal market. EU fundamental rights impact these proceedings at different stages. They influence the decisions of NAAs to open proceedings, to close them, to impose a fine and to set the level of a fine. NAAs are also obliged to disapply provisions of national law incompatible with EU fundamental rights. This may lead to the setting of lower fines or even the prevention of the NAA from fining an undertaking altogether.

2 K.E. Sørensen, Member States' Implementation of Penalties to Enforce EU Law: Balancing the Avoidance of Enforcement Deficits and the Protection of Individuals, 'European Law Review' 2015, vol. 40, no. 6, p. 811; J. Łacny, Korekty finansowe nakładane przez Komisję Europejską na państwa członkowskie za niezgodne z prawem wydatkowanie funduszy UE, Warsaw 2017, p. 342; C. Mik, Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki. Tom I, Warsaw 2000, p. 679.

3 Judgments of the Court of Justice of 1 October 2020 on the case of *Criminal proceedings against TG and UF*, C-603/19, para. 49; of 6 October 2021 on the case of *ECOTEX BULGARIA*, C-544/19, para. 84; of 24 February 2022 on the case of *PJ*, C-452/20, para. 36; of 16 July 2015 on the case of *Chmielewski*, C-255/14, para. 21.

4 J.T. Lang, The Duties of National Authorities under Community Constitutional Law, 'European Law Review' 1998, vol. 23, no. 2, pp. 109–131, here pp. 119–20; R. Kral, National Normative Implementation of EC Regulations: An Exceptional or Rather Common Matter? 'European Law Review' 2008, vol. 33, no. 2, pp. 243–256, here p. 244; C.-D. Ehlermann, The European Administration and the Public Administration of Member States with Regard to Competition Law, 'European Competition Law Review' 1996, vol. 16, no. 8, pp. 454–460, here p. 458.

5 Judgment of the CJ of 14 May 1974 on the case of *J. Nold, Kohlen- und Baustoffgroßhandlung*, C-4/73.

6 E. Gill-Pedro, Whose Freedom Is It Anyway? The Fundamental Rights of Companies in EU Law, 'European Constitutional Law Review' 2022, vol. 18, no. 2, pp. 183–206.

1. National administrative authorities and the duty to apply EU law

NAAs, as emanations of the Member States, are obliged to apply EU law as such and to respect all its structural principles, such as direct effect and primacy (the *Costanzo* formula).⁷ Although established in the late 80s, this formula can still be an issue, requiring the Court of Justice (CJ) to repeat that NAAs – and not only courts – are bound by EU law.⁸ This reluctance of NAAs to respect the principles of EU law is not unfamiliar to Polish practice. For example, administrative courts lately regularly revoke the fining decisions of Polish tax authorities who apply Article 112(b) of the VAT Act, despite the judgment of the CJ in C935/19 *Grupa Warzywna*, in which the CJ ruled that this provision of Polish law is incompatible with the European principle of proportionality.⁹ This shows persistent problems with respecting both the principle of the primacy of EU law and general principles of EU law at the administrative level.

The duty of NAAs to respect the principles of EU law stems from the binding effect of EU primary and secondary law within national legal orders. This means that NAAs must always consider sources of EU law whenever they act within the scope of its application.¹⁰ Under the principle of uniform interpretation and application of EU law, NAAs are bound by the interpretation of EU law adopted by the CJ.¹¹ They must ascertain in all proceedings whether EU law is applicable, how the CJ has interpreted it and what the consequences are for the interpretation and application of national law. NAAs must respect the principle of consistent (conforming) interpretation of

7 Judgment of the CJ of 22 June 1989 on the case of *Fratelli Costanzo SpA*, C-103/88, para. 31; M. J.M. Verhoeven, 'The 'Costanzo Obligation' and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?' *Review of European and Administrative Law* 2010, vol. 3, no. 1, pp. 23–64.

8 Judgments of the CJ of 10 March 2022 on the case of '*Grossmania*' *Mezőgazdasági Termelő és Szolgáltató Kft*, C-177/20, para. 46; of 4 December 2018 on the case of *Minister for Justice and Equality and Commissioner of An Garda Síochána*, C378/17, para. 38.

9 Judgment of the District Administrative Court in Białystok of 24 February 2023, I SA/Bk 1/23 9, Lex No. 3503544 and judgments of other courts cited therein. See also judgment of the District Administrative Court in Gliwice of 21 January 2022, I SA/Gl 540/20, Lex No. 3120676, judgment of the District Administrative Court in Wrocław of 21 July 2023, I SA/Wr 557/22, Legalis No. 2893752, and judgment of the District Administrative Court in Bydgoszcz of 22 June 2022, I SA/Bd 308/22, Legalis No. 2706722; Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Journal of Laws 2022, item 931, with amendments); judgment of the CJ of 15 April 2021 on the case of *Grupa Warzywna Sp. z o.o.*, C-935/19.

10 See e.g. 'The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of European Union law'; judgment of the CJ of 3 July 2014 on the case of *Kamino International Logistics BV and Others*, joined cases C129/13 and C130/13, para. 31.

11 Judgment of the CJ of 4 June 2009 on the case of *T-Mobile*, C-8/08, para. 50.

national law.¹² If such an interpretation is not possible, NAAs may not apply national provisions incompatible with directly effective provisions of EU law.¹³

2. National administrative authorities and the duty to apply EU fundamental rights and general principles

The duty of NAAs to respect fundamental rights and general principles of law is a consequence of their obligation to apply EU law. Both these sources of basic rights constitute an integral part of the EU's legal order, as confirmed by Article 6 TEU.¹⁴ This implies that NAAs are bound to respect European fundamental rights whenever they act within the scope of EU law,¹⁵ since European fundamental rights and general principles are not applicable on their own (Article 51(1) CFR).¹⁶

Hence a link between national fining proceedings and substantive or procedural EU law is necessary. The leading case on this issue is C-617/10 *Fransson*, which was decided following a preliminary reference made in the context of national fining proceedings.¹⁷ In this case, it was established that national tax penalties and criminal proceedings for tax evasion secured the effectiveness of EU tax law. The result of the case was that national fining proceedings fall within the scope of EU law whenever

12 Judgment of the CJ of 24 June 2019 on the case of *Popławski*, C573/17, para. 94; J.T. Lang, The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflections, 'European Law Review' 2001, vol. 26, no. 1, pp. 84–93, here p. 88. For extensive analysis, see A. Soltys, Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewniania efektywności prawa Unii Europejskiej, Warsaw 2015, pp. 213–221.

13 Judgments of the CJ of 5 March 2019 on the case of *Eesti Pagar*, C349/17, para. 90; of 7 April 2022 on the case of *KW and SG*, C-102/21 and C-103/21, para. 46; *Minister for Justice...*, *op. cit.*, paras 38–39; of 21 January 2020 on the case of *Banco de Santander*, C274/14, para. 78; of 12 January 2010 on the case of *Petersen*, C341/08, para. 80; of 14 September 2017 on the case of *The Trustees of the BT Pension Scheme*, C628/15, para. 54.

14 M. Domańska, Swobody rynku wewnętrznego a prawa podstawowe – refleksje na tle orzecznictwa TS, 'EPS' 2012, no. 1, p. 8.

15 R. Grzeszczak, A. Szmigielski, Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych, 'EPS' 2015, no. 10, p. 1. On the rights of the defence, see e.g. *Kamino...*, *op. cit.*, para. 31. On the right to an effective judicial remedy, see e.g. judgment of the CJ of 8 May 2019 on the case of *PI v. Landespolizeidirektion Tirol*, C230/18, ECLI:EU:C:2019:383, para. 91. On the principle of legitimate expectations, see e.g. judgment of the CJ of 16 March 2006 on the case of *Emsland-Stärke GmbH*, C-94/05, paras 30–32.

16 P. Mádr, Article 51 of the EU Charter of Fundamental Rights from the Perspective of the National Judge, 'Review of European Administrative Law' 2020, vol. 13, no. 4, pp. 53–85.

17 Judgment of the CJ of 26 February 2013 on the case of *Hans Åkerberg Fransson*, C617/10.

they are carried out to penalize an individual for failure to perform a duty stemming from a source of EU law – even indirectly, as in the case of directives.¹⁸

Another link between EU law and national fining proceedings takes the form of the interference of national provisions sanctioned by fines with the freedoms of the internal market. In *C-390/12 Pflieger*, the CJ, elaborating on the formula of the *ERT* case, ruled that the use by a Member State of exceptions provided for by EU law to justify an obstruction of a fundamental freedom guaranteed by the Treaty must be regarded as ‘implementing Union law’ within the meaning of Article 51(1) CFR.¹⁹ Hence NAAs must verify in fining proceedings whether national legislation prohibiting undertakings from specific activity or imposing an obligation under the penalty of a fine is compatible with the EU’s fundamental rights.²⁰

It follows from *C-617/10 Fransson* and *C-390/12 Pflieger* that Article 51 of the Charter covers both ‘derogation’ and ‘acting as an agent’ situations.²¹ The NAAs are bound by EU fundamental rights when they take measures addressed to individuals that affect their legal situations regulated directly or indirectly by EU law, both primary and secondary. General principles of law also apply to national proceedings that fall within the scope of EU law and supplement the rights enshrined in the Charter (see Section 3 below). There is therefore no need for provisions such as Article 3

18 D. Düsterhaus, M. Safjan, Stosowanie prawa UE przez państwa członkowskie z perspektywy Trybunału Sprawiedliwości – od pełnej zgodności między Kartą i prawem UE do barier proceduralnych ją niweczących, ‘EPS’ 2016, no. 8, pp. 14–15; M. Szpunar, Kilka uwag systematyzujących na temat zakresu zastosowania Karty Praw Podstawowych UE, ‘EPS’ 2015, no. 10, p. 9; F. Fontanelli, Implementation of EU Law through Domestic Measures after Fransson: The Court of Justice Buys Time and ‘Non-Preclusion’ Troubles Loom Large, ‘European Law Review’ 2014, vol. 39, no. 5, pp. 682–700, here pp. 683 and 691; B. van Bockel, P. Wattel, New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson, ‘European Law Review’ 2013, vol. 38, no. 6, pp. 866–883, here p. 871; K.E. Sørensen, Member States..., *op. cit.*, p. 811; M. Brkan, The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core, ‘European Constitutional Law Review’ 2018, vol. 14, no. 2, pp. 332–368, here p. 351. On the general principles of EU law, see J.T. Lang, The Duties of National..., *op. cit.*, pp. 119–20; see also judgments of the CJ of 16 October 2019 on the case of *Glencore Agriculture Hungary Kft.*, C-189/18, para. 59; and of 16 May 2017 on the case of *Berlioz Investment Fund*, C682/15, para. 41: ‘National legislation, such as that at issue in the main proceedings, which provides for a penalty for failure to respond to a request from the national tax authority that is intended to enable that authority to comply with the obligations laid down by Directive 2011/16 must, therefore, be regarded as implementing that directive.’

19 Judgment of the CJ of 30 April 2014 on the case of *Pflieger and Others*, C390/12, ECLI:EU:C:2014:281, para. 36; judgment of the CJ of 18 June 1991 on the case of *Elliniki Radiofonia Tileorassi AE (ERT)*, C-260/89, para. 41.

20 *ECOTEX*..., *op. cit.*, para. 89.

21 M. Szpunar, Kilka uwag..., *op. cit.*, pp. 6–7; M. Domańska, Swobody..., *op. cit.*, pp. 9–10; R. Grzeszczak, A. Szmigielski, Sądowe..., *op. cit.*, p. 13; N. Półtorak, Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej, ‘EPS’ 2014, no. 9, p. 19; B. van Bockel, P. Wattel, New Wine..., *op. cit.*, p. 877; F. Fontanelli, Implementation..., *op. cit.*, p. 684.

of Directive 2019/1, which expressly provides that national competition authorities must respect EU fundamental rights and general principles of law in fining proceedings where Articles 101 and 102 TFEU are applied.²²

2.1. National fining proceedings and implementation of EU secondary law

Following the reasoning expressed in C-617/10 *Fransson*, the NAAs are bound by principles of EU law whenever they apply national implementing provisions which fine for a failure to perform specific duties envisaged originally in EU secondary law, because in such cases, the finding of a breach of national law is dependent upon the interpretation of EU law mandating specific behaviour by an individual.²³ Such provisions of EU law are substantial for adjudicating whether an individual entrepreneur has infringed the law. They determine whether national fining proceedings have substance, since a fine may not be imposed if a specific behaviour does not violate EU law. They do not influence the interpretation and application of national sanctioning or procedural provisions, as this is the role of the EU's fundamental rights and general principles. However, nowadays, EU secondary law tends to regulate various issues directly concerning fines on the national level.²⁴ This makes it much easier to establish a link between national fining proceedings and EU law and its fundamental rights. The direct impact of EU law on national sanctions and fining proceedings may take different forms.

First, sources of EU secondary law usually contain a special provision on Member States' duty to provide fines applicable to infringements of the national provisions adopted under a specific directive or to 'take all measures necessary to ensure that these penalties are enforced'.²⁵ This is often supplemented by an obligation to provide for penalties that are 'effective, proportionate, and dissuasive'.²⁶ Such a clause

22 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (O.J. L 11, 14.01.2019, pp. 3–330).

23 Judgment of the CJ of 24 March 2021 on the case of A, C-950/19, paras 31–33; N. Półtorak, *Zakres związania...*, *op. cit.*, p. 22.

24 See A. De Moor-van-Vugt, *Administrative Sanctions in EU Law*, 'Review of European Administrative Law' 2012, vol. 5, no. 1, pp. 5–41.

25 Article 8 of Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (O.J. L 080, 18.03.1998, p. 27, with amendments); Article 31(1) of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (O.J. L 26, 02.02.2016, pp. 19–59, with amendments); Article 23(3) of Directive 2014/40/EU of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (O.J. L 127, 29.04.2014, with amendments).

26 *Ibidem*; Article 19 of Regulation (EC) No. 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonization of certain social legislation relating to road transport (O.J. L 102, 11.04.2006, pp. 1–14, with amendments).

directly forces NAAs to respect the general principle of proportionality. Regarding regulations, EU law tends to be even more precise: Member States may be required to introduce fines for failure to perform specific obligations. For instance, Article 14 of Regulation No. 2018/1672 provides for the obligation to introduce sanctions for failing to perform the obligation stipulated in Article 3 thereof.²⁷ While directives leave a wide margin of discretion to the national legislator regarding the spectrum of behaviours subject to a fine, regulations may do the opposite; they may narrow this margin only to infringements indicated expressly by the regulation.²⁸ In both instances, there can be no doubt that national fining proceedings based on national provisions adopted to fulfil the sanctioning duties stipulated in EU regulations fall within the scope of EU law.²⁹

Second, EU law may be more specific regarding the type, form and level of sanctions that the Member States should provide for in their legal systems.³⁰ For example, Article 23(3) of Directive 2014/40/EU names the 'financial administrative penalty' as one of the sanctions that the Member States may apply. Moreover, this directive also deals with the level of sanctions and the premise of guilt. It provides that in the case of intentional infringement of provisions implementing this directive, the fines imposed may be of such an amount as to 'offset the economic advantage sought through the infringement'.³¹ Such a provision is a clear sign that a fine imposed by an NAA will be dissuasive yet proportionate if its level deprives the offender of all the identified benefits resulting from the breach of EU law, albeit only if it has been proved that the infringement was intentional. In a similar fashion, Article 89 of Regulation No. 1224/2009 on one hand requires national authorities to impose sanctions that would 'effectively deprive those responsible of the economic benefit derived from their infringement'³², without 'prejudice to the legitimate right to exercise their profession'

27 Failure to submit a declaration on the transport of cash from or to the EU worth equal to or greater than EUR 10,000 – art. 14 of regulation (EU) 2018/1672 of the European Parliament and of the Council of 23 October 2018 on controls on cash entering or leaving the Union (O.J. L 284, 12.11.2018, pp. 6–21). See *Chmielewski...*, *op. cit.*, paras 5–7 and the judgment of the CJ of 31 May 2018 on the case of *Lu Zheng*, C-190/17.

28 E.g. judgment of the CJ of 9 September 2021 on the case of *Criminal proceedings against FO*, C-906/19, paras 45–46.

29 See, amongst others, the judgments of the CJ of 26 September 2013 on the case of *Texdata Software*, C-418/11, paras 74–75; and A, C-950/19..., *op. cit.*, para. 28.

30 See for example Article 31(1) of Directive (EU) 2016/97..., *op. cit.*, which obliges Member States to implement administrative sanctions and other applicable measures, but foresees no such duty in the case of criminal sanctions. (However, the obligations remain, without prejudice, for 'the right of Member States to provide for and impose criminal sanctions'.)

31 Directive 2014/40..., *op. cit.*, Article 23(3).

32 Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a community control system for ensuring compliance with the rules of the common fisheries policy (O.J. L 343, 22.12.2009).

of the fined undertaking in the future.³³ By providing this, such provisions add specific criteria to testing the proportionality of fines imposed by an NAA: all the profits from the infringement may be consumed by the fine, while a fine exceeding the 'benefits' must be calculated in such a manner that would not drive the fined entrepreneur from the market. EU secondary law may also define who will be fined under national legislation (e.g. a driver, a company or both), thus determining the personal scope of national fining proceedings.³⁴ It may also determine the degree of seriousness of breaches of EU legislation which directly impacts the severity of fines that may be imposed on an individual.³⁵

Third, EU law may provide for a procedure that delays the power of the NAA to impose fines. In such instances, EU law calls for the empowerment of the NAA to fine undertakings not for failure to fulfil the obligation resulting from EU directives and implementing legislation but only for the failure to execute administrative decisions establishing such a violation and requiring the undertaking concerned to bring its behaviour in line with EU law.³⁶ Here the fining decisions of NAAs are considered the measure of last resort designed to discipline only refractory infringers.

The requirement of 'implementing EU law' is also met in all proceedings where the domestic NAAs aid the fining authorities of another Member State, e.g. in the execution of fines imposed on individuals under their jurisdiction, as established by Directive 2010/24.³⁷ A fine imposed in one Member State may not be executed in another country if the right to an effective remedy had not been provided to the individual penalized in the fining state.³⁸ This shows that EU law influences not only national fining proceedings but also proceedings designed to execute a fine that had been previously imposed.

2.2. National fining proceedings and implementation of EU primary law

National fining proceedings may also fall within the scope of EU law even in the absence of EU secondary legislation imposing obligations on individuals. Under established case law, national sanctions should not have the effect of jeopardizing the

33 Order of the CJ of 1 March 2022, *K.M. v. Director of Public Prosecutions*, C493/21.

34 Article 19(2) of Regulation (EC) No. 561/2006..., *op. cit.*; judgment of the CJ of 9 June 2016 on the case of *Eurospeed Ltd*, C-287/14, para. 32.

35 Judgment of the CJ of 9 February 2012 on the case of *Márton Urbán*, C210/10, paras 33 and 41.

36 See as an example Article 155(3–5) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II), OJ L 335, 17.12.2009, pp. 1–155). See also the judgment of the Polish Supreme Court of 7 July 2011, III SK 52/10, Lex No. 1001322.

37 Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties, and other measures (O.J. L 84, 31.03.2010, pp. 1–12).

38 Judgment of the CJ of 26 April 2018 on the case of *Eamonn Donnellan*, C34/17, paras 61–62.

internal market.³⁹ The CJ considers national sanctions as restrictions on fundamental freedoms since they render the exercise of these freedoms less attractive, even when they are not discriminatory.⁴⁰ So in cases falling within the scope of the TFEU, NAAs may legitimately apply national sanctioning provisions and impose fines only if they are compatible with EU fundamental rights and general principles.⁴¹

3. The EU's fundamental rights and general principles of law applicable to national fining proceedings

Depending on the substance of the fining proceedings, virtually all the EU's fundamental rights and general principles may be potentially applied in national fining proceedings by directing the interpretation of substantive provisions of EU law regulating the duties of individuals (directly or indirectly).⁴² From the point of view of national fining proceedings, those of the most significant importance are fundamental rights enshrined in Articles 48–50 CFR:

1. The presumption of innocence and the right of defence (Article 48 CFR),
2. The principle of the legality of criminal offences and penalties (Article 49, Paragraphs 1 and 2),
3. The right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50 CFR).

These directly regulate the rights of all individuals subject to fining proceedings and impose various substantive and procedural obligations upon NAAs. However, the fundamental rights listed apply only to criminal proceedings.⁴³ Therefore it is always necessary to verify whether a given fining proceeding falls into the category of criminal character.⁴⁴ The test developed by the CJ consists of three criteria:

39 Judgment of the CJ of 3 March 2020 on the case of *Google Ireland Limited*, C-482/18, paras 37 and 44.

40 Judgments of the CJ of 12 September 2019 on the case of *Maksimovic and Others*, C64/18, C140/18, C146/18 and C148/18, paras 30, 33 and 34; and of 14 November 2021 on the case of *MT v. Landespolizeidirektion Steiermark*, C-231/20, paras 38–39. Discriminatory fines clearly violate the TFEU; K.E. Sorensen, Member States..., *op. cit.*, p. 824. See judgment of the CJ of 27 January 2022 on the case of *European Commission v. Kingdom of Spain*, C-788/19, concerning fines, the imposition of which resulted in differentiated treatment between Spanish residents on the basis of the location of their assets, which will serve as an adequate reference.

41 *MT...*, *op. cit.*, para. 45.

42 E.g. the Customs Code; see *Kamino...*, *op. cit.*, paras 31 and 69.

43 See M. Szpyrka, *Europejskie standardy stosowania kar pieniężnych na przykładzie polskiego prawa telekomunikacyjnego*, Warsaw 2020, pp. 60–64.

44 Judgments of the CJ of 10 November 2022 on the case of *DELTA STROY 2003*, C-203/21, paras 51–52; of 13 September 2018 on the case of *UBS Europe*, C-358/16, para. 60; *Texdata...*, *op. cit.*, paras 79 and 83.

1. The legal classification of the offence under national law,
2. The nature of the offence,
3. The nature and degree of severity of the penalty the person concerned is liable to incur.⁴⁵

The third factor is decisive since the most crucial consideration is whether a fine to be imposed by an NAA has a punitive purpose.⁴⁶ It follows from the CJ jurisprudence that several sanctions classified under national law as administrative sanctions were nevertheless classified as criminal ones under this test, i.e. the confiscation of the product or the profit gained as a result of the offence and the goods used for the commission thereof;⁴⁷ an administrative fine of between EUR 20,000 and 5 million, which may be increased by up to three times its amount or up to an amount ten times greater than the proceeds or profit obtained from the offence;⁴⁸ or a fine of 30% of the VAT due which is added to the payment of that tax.⁴⁹ We maintain that practically any fine above EUR 500 should be qualified as a criminal sanction under the CFR.⁵⁰

The classification of a fine as a criminal sanction is irrelevant to other EU fundamental rights and general principles of EU law, which apply to any sanctions provided for under national law. Article 47 CFR and the principle of proportionality provide the best examples. The former protects the individual against arbitrary and unlawful activities by the authorities.⁵¹ As a result, addressees of EU law have the right to challenge before the court the legality of any decision issued by any national authority aiming at the implementation of EU law.⁵² As for the principle of proportionality, it has a twofold nature: as a fundamental right enshrined in Article 49, Paragraph 3, CFR, it applies to criminal sanctions only; as a general principle of EU law it applies to all national fining proceedings.⁵³ It also has a broader scope of application than Article 49, Paragraph 3, CFR, and is used to examine not only the severity of a fine imposed. Proportionality entails the assessment of all factors that may be

45 See e.g. judgments of the CJ of 6 June 2012 on the case of *Prosecutor General v. Łukasz Marcin Bonda*, C-489/10, para. 37; *Fransson...*, *op. cit.*, para. 35; of 20 March 2018 on the case of *Garlsson Real Estate SA and Others*, C-537/16, para. 28.

46 Judgment of the CJ of 20 March 2018 on the case of *Criminal proceedings against Luca Menci*, C-524/15, paras 31–32.

47 Judgment of the CJ of 11 February 2021 on the case of *K.M.*, C77/20, para. 31.

48 *Garlsson...*, *op. cit.*, para. 34.

49 *Luca Menci...*, *op. cit.*, para. 33.

50 Judgment of the CJ of 4 October 2018 on the case of *Dooel Uvoz-Izvoz Skopje Link Logistic NešN*, C-384/17, para. 22 in conjunction with paras 45–46.

51 M. Safjan, Rządy prawa a przyszłość Europy, 'Europejski Przegląd Sądowy' 2019, vol. 8, p. 6; M. Górski, Prawo do skutecznego środka prawnego w Article 47 Karty Praw Podstawowych UE – znaczenie i deficyty, 'Europejski Przegląd Sądowy' 2016, vol. 8, p. 37.

52 *Berlioz...*, *op. cit.*, para. 51.

53 *Chmielewski...*, *op. cit.*, paras 21 and 22.

considered when fixing such a fine, as well as factors constituting an infringement.⁵⁴ Other general principles important for fining proceedings include the principle of legal certainty and rights of defence.⁵⁵

This shows that general principles of EU law may supplement EU fundamental rights acknowledged in the CFR if the personal or material scope of the application of a fundamental right is narrower than the general principle of EU law on which this fundamental right was based. The principle of good administration is another fundamental right that operates in such a manner. While the CFR contains a fundamental right (Article 41), it binds European institutions only. However, as a general principle of EU law, the principle of good administration is also applicable to NAAs as a source of their duty to reason decisions imposing sanctions upon the individual.⁵⁶

4. The impact of the EU's fundamental rights and general principles of law on national fining proceedings

The fundamental rights enshrined in Articles 47–50 CFR and the general principles of EU law provide entrepreneurs who are parties to fining proceedings with guarantees that NAAs must observe. These guarantees are activated at various stages of the proceedings. Limiting the analysis of their operation to the purpose of this article, it is worth recalling that Article 50 CFR impacts the legality of initiating subsequent fining proceedings when another NAA has already fined an individual for the same behaviour or they have been subjected to criminal proceedings *sensu stricto*.⁵⁷ This right must be considered at the initial stage of the proceedings (the decision to initiate fining proceedings) or at a later stage (the decision not to fine). On the other hand, since this fundamental right is not absolute, an NAA may impose a second fine (collateral/parallel) for the same behaviour in certain circumstances after having carried out the test envisaged in Article 52, Paragraph 1, CFR (the decision to fine).⁵⁸

While national fining proceedings are conducted under domestic procedural rules covered by the principle of national procedural autonomy, the EU fundamental rights limit this autonomy. For example, during the whole course of fining proceedings falling within the scope of EU law, NAAs must observe the European standard

54 *Lu Zheng...*, *op. cit.*, para. 40, and *Márton Urbán...*, *op. cit.*, paras 53–54.

55 E.g. *Emsland-Stärke...*, *op. cit.*, paras 43–44, and *Kamino...*, *op. cit.*, paras 30–31.

56 *MT...*, *op. cit.*

57 See M. Szpyrka, *Europejskie standardy...*, *op. cit.*, pp. 254–281.

58 Judgment of the CJ of 5 May 2022 on the case of *Criminal proceedings against BV*, C-570/20; see also M. Vetzó, *The Past, Present and Future of the Ne Bis In Idem*. Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of *Menci*, *Garlsson* and *Di Puma*, 'Review of European Administrative Law' 2018, vol. 11, no. 2, p. 68.

concerning the rights of defence.⁵⁹ This standard may influence different aspects of the national procedure, such as access to files or burden of proof.⁶⁰ The presumption of innocence resulting from Article 48 CFR also prohibits fining individual entrepreneurs unless their responsibility has been established.⁶¹

While Article 48 CFR provides individuals with procedural safeguards, Article 49 CFR impacts the interpretation and application of substantive law and fining provisions. As an umbrella provision, it encompasses several fundamental rights, such as *nullum crimen sine lege* (Article 49, Paragraph 1, Sentence 1, CFR), *nulla poena sine lege* (Article 49, Paragraph 1, Sentence 2, CFR) and proportionality of sanctions.⁶² Legal certainty and specific principles resulting from it operate in favour of individuals by limiting the scope of application of fining proceedings through restrictive interpretation.⁶³ The impact of the principle of proportionality of sanctions (Article 49, Paragraph 3, CFR) has already been mentioned. Here it should be pointed out that this principle affects not only the decisions of the NAA as to the level of a fine but also the decision of an NAA to fine an individual (e.g. proportionality interferes with national rules demanding NAAs impose sanctions in each case of a violation of a national rule, irrespective of specific circumstances).⁶⁴

The right to an effective remedy against the fining decision is worth a separate remark. Under Article 47 CFR, Member States must provide a right to judicial proceedings against measures adopted by NAAs.⁶⁵ However, this right has always been interpreted as obliging the NAAs to justify their decisions adequately.⁶⁶ Consequently,

59 *DELTA STROY...*, *op. cit.*, paras 51–55; *UBS Europe...*, *op. cit.*, para. 60; *Texdata...*, *op. cit.*, paras 79 and 83. Also see K. Kowalik-Bańczyk, *Prawo do obrony w unijnych postępowaniach antymonopolowych*, Warsaw 2012, pp. 80–103; M. Szpyrka, *Europejskie standardy...*, *op. cit.*, pp. 313–318.

60 *UBS Europe...*, *op. cit.*, para. 61; Judgment of the CJ of 28 February 2018 on the case of *Sporting Odds Limited*, C-3/17, para. 56.

61 *DELTA STROY...*, *op. cit.*, paras 45–46.

62 See the analysis by M. Szpyrka, *Europejskie standardy...*, *op. cit.*, pp. 158–195 and pp. 226–253.

63 See for example *FO...*, *op. cit.*, paras 45–46 and the judgment of the CJ of 20 December 2017 on the case of *Vaditrans BVBA*, C-102/16, para. 51.

64 Judgments of the CJ of 14 May 2020 on the case of *T-Systems*, C-263/19, paras 74–75; *PJ...*, *op. cit.*, para. 54; *Chmielewski...*, *op. cit.*, para. 29; of 28 February 2018 on the case of *M.A.T.I. SUD SpA*, C523/16 and C536/16; *Doael...*, *op. cit.*

65 Judgment of the CJ of 13 December 2017 on the case of *Soufiane El Hassani v. Minister Spraw Zagranicznych*, C-403/16, paras 41–42. For more details, see R. Puchta, *Warunki dopuszczalności powołania się na ochronę wynikającą z Article 47 KPP – uwagi na tle wyroku TSUE z 13.12.2017 r. w sprawie El Hassani*, *Państwo i Prawo* 2019, no. 4, pp. 35–52; R. Puchta, *Kognicja sądów administracyjnych w zakresie kontroli decyzji wydanych w sprawach wizowych przez konsulów. Glosa do postanowienia NSA z dnia 19 lutego 2018 r.*, II OSK 1346/16, *Państwo i Prawo* 2019, no. 8, pp. 146–156; M. Szpyrka, *Europejskie standardy...*, *op. cit.*, pp. 282–303.

66 Judgments of the CJ of 15 May 1986 on the case of *Marguerite Johnston*, C-222/84; of 24 November 2020 on the case of *R.N.N.S. and K.A.*, C-225/19; *PI...*, *op. cit.*, para. 91; of 4 June 2013 on the case of *ZZ*, C-300/11, para. 53; *Berlioz...*, *op. cit.*, para. 84.

it is unacceptable to issue a decision without justification and shift a burden of proof to the addressee of the decision in terms of challenging the ruling contained therein.⁶⁷ Therefore Article 47 CFR imposes some positive obligations on the NAAs at the stage of administrative proceedings.

5. The effects of the EU's fundamental rights and general principles on national fining proceedings

The EU fundamental rights and general principles on national fining proceedings impact the interpretation and application of substantive and procedural provisions of national law applicable to fining proceedings. In most cases, a simple change of the NAAs' routine in which fining proceedings are carried out will suffice to respect the rights and principles under consideration. For example, the NAA should always allow the addressee of the fining decision to submit their observations before the decision is adopted (thus respecting the rights of defence) or should take all circumstances of the case into account when setting the amount of the fine (to respect the principle of proportionality). Take, for example, C-564/15 *Farkas*; under Hungarian law, the amount of the penalty was set, by default, at 50% of the amount of the VAT that the taxable person was required to pay to the tax authority.⁶⁸ The law also stipulated that the amount of the fine may in exceptional circumstances be reduced, or even remitted, after all the circumstances of the case in question are weighed up, particularly the circumstances in which the tax liability arose and the seriousness and frequency of the taxable person's unlawful conduct. This legislation, as such, was compatible with the principle of proportionality.⁶⁹ However, the NAA levied the default sanction without considering any mitigating circumstances. This resulted in a disproportionate application of national provisions that otherwise were proportionate. A sanction of 50% of the VAT amount that the taxable person was required to pay to the tax authority could be levied in other circumstances, e.g. in a case concerning tax fraud.

NAAs must also interpret national provisions in conformity with the standards resulting from such rights and principles. If such an interpretation is not possible, the NAAs are bound to disapply such national provisions insofar as their application would lead to a result contrary to the EU's fundamental rights or general principles. These rights and principles operate as directly effective sources of EU law.⁷⁰ They are covered by the Simmenthal rule even in the absence of a specific CJ ruling confirming

67 *Pl...*, *op. cit.*, para. 77.

68 Judgment of the CJ of 26 April 2017 on the case of *Farkas*, C564/15.

69 *Ibidem*, para. 64.

70 E.g. *Kamino...*, *op. cit.*, para. 39.

their direct applicability.⁷¹ Provisions of national law incompatible with EU fundamental rights or general principles may not constitute a legitimate legal base for a fining decision. Taking the principle of proportionality as an example, if a sanction in the form of a custodial sentence instead of a fine is disproportionate, such a sanction may not be imposed.⁷² Other sanctions provided for in national law may be levied instead (e.g. an additional fine, prohibition on engaging in certain activities). And what happens when national fining legislation specifies the amount of a fine strictly, without providing NAAs with the possibility of reducing it after considering the gravity of the infringement or the circumstances in which it was committed? Such legislation would be incompatible with the principle of proportionality. This incompatibility is, however, contextual: it depends on the circumstances of a specific case and the importance of the goals of the fining legislation for the EU. The provisions providing a similarly calculated fine, which will be considered disproportionate in one case, may be compatible with EU law in other fining proceedings.⁷³

However, in cases of such 'contextual' incompatibility of national fining provisions with EU fundamental rights, there is a problem with the remedy of the disapplication of national law, demonstrated by C-384/17 *Link Logistic*. The responsible Hungarian authority imposed an administrative fine of approximately EUR 532 on the vehicle owner, who entered a toll road without a valid ticket. Hungarian law did not allow the fining NAA to reduce the fine, violating the principle of proportionality. As a result, national provisions could not be applied; hence the vehicle owner could not be fined at all. However, a lower fine would be legitimate under EU law to secure the effectiveness of EU legislation concerning road tolls. Such a working of the remedy of disapplication of national provisions incompatible with EU fundamental rights or general principles (absolution from any sanctions) could be considered detrimental to the effectiveness of EU law. Infringements of EU law (implementing national legislation) would often go unpunished because of the failure of a Member State to implement EU law correctly. Concern for the effectiveness of EU law has recently led the CJ to depart from its longstanding position regarding the disapplication of national provisions as a whole.⁷⁴ In C-205/20 *NE vs. Bezirkshauptmannschaft*

71 Judgment of the CJ of 9 March 1978 on the case of *Simmenthal*, C-106/77. So far the CJ has confirmed the direct effect of Article 47 of the CFR in their judgments of 14 May 2022 on the case of *FMS and Others*, C-924/19 PPU and C-925/19 PPU, para. 140; of 17 April 2018 on the case of *Egenberger*, C414/16, para. 78; and of 29 July 2019 on the case of *Torubarov*, C556/17, para. 56; whilst a direct effect of Article 50 CFR was confirmed in the judgment on *Garlsson...*, *op. cit.*, para. 68.

72 *Maksimovic...*, *op. cit.*, paras 45–46.

73 Compare *Farkas...*, *op. cit.*, and *Grupa Warzywna...*, *op. cit.*, para. 37.

74 A. Sagan, Anmerkung zu EuGH, Urt. v. 8.3.2022 – C-205/20 – *NE vs. Bezirkshauptmannschaft Hartberg-Fürstenfeld II*, 'Zeitschrift für das Privatrecht der Europäischen Union' 2022, vol. 19, no. 6, pp. 283–286.

Hartberg-Fürstenfeld, when challenged with a repeated preliminary reference and the reasoning of *C-384/17 Link Logistic*, the CJ ruled that the principle of primacy imposes on national authorities the duty to disapply national legislation which is only partially incompatible with the principle of proportionality, namely exclusively to the extent 'necessary to enable the imposition of proportionate penalties'.⁷⁵ Hence since *C-205/20 NE vs. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, it is possible to disapply (omit) not only a whole provision of national law (an individual article, paragraph, point or section of an article) but also a more minor part of it, not distinguished as a separate editorial unit of provision – a word, set of words, a number, a sum, etc. – only to the extent that they prevent the imposition of proportionate penalties. As a result, the infringer does not go unpunished (as in *C-384/17 Link Logistic*) but is punished with a lower fine than provided for in national law. The CJ expects NAAs to omit only that particular part of a national provision that regulates the 'rigid' or 'minimal' character of a fine; this means that if a provision of national law under which a specific behaviour 'will be fined with a fine of PLN 5000' is considered to be incompatible with the principle of proportionality, the NAA will have to omit the final part of that provision concerning the amount of the fine (as only the penalty of PLN 5000 is disproportionate). Then the NAA, being left with a provision worded as 'will be fined with a fine' that is not specified, can impose a penalty below the threshold provided for originally in national law.

The examples discussed above show the effects of the EU's fundamental rights on the application of national substantive fining provisions. They work in the same manner towards national procedural rules. However, the failure of an NAA to observe the EU's procedural fundamental rights (e.g. the right to be heard) does not mean that its decision will always be incompatible with EU law. The decision taken at the end of the administrative procedure conducted without due respect to the Charter is defective only insofar as the procedure's outcome might have been different if a fundamental right was duly observed.⁷⁶

Conclusions

While EU secondary law impacts national fining proceedings in several ways and to various extents, the EU's fundamental rights and general principles of law tend to provide a uniform standard of protection for individuals that applies to all types of national fining proceedings falling within the scope of EU law. The EU's fundamental rights and general principles of law create specific legal norms of a binding char-

75 Judgment of the CJ of 8 March 2022 on the case of *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, *C-205/20*; judgment of the CJ of 19 December 2019 on the case of *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*, *C-654/18*.

76 *Kamino...*, *op. cit.*, paras 79–80.

acter which NAAs must observe in the course of national fining proceedings. The main objective of those norms is to protect individuals, providing them with legally enforceable rights already at the administrative proceedings stage. The EU's fundamental rights and general principles provide entrepreneurs party to fining proceedings with an additional European 'shield' against national fining provisions and their exaggerated (or even wrongful) application by NAAs. As a result, depending on the type of fundamental right or general principle and the circumstances of the case, the individual concerned may not be found responsible for the infringement and fined at all, or they may be found guilty of infringement. They still may not be fined, or they could be only fined with a significantly lower fine than provided for in the national legislation or envisaged in the practice of the NAA. From the practical point of view, European procedural fundamental rights offer a lesser degree of protection to individuals. To constitute a viable claim before a higher instance or court, their violations by NAAs must impact the outcome of the fining procedure.

REFERENCES

- Bockel van B., Wattel P., *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson*, 'European Law Review' 2013, vol. 38, no. 6.
- Brkan M., *The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core*, *European Constitutional Law Review* 2018, vol. 14, no. 2.
- De Moor-van-Vugt A., *Administrative Sanctions in EU Law*, 'Review of European Administrative Law' 2012, vol. 5, no. 1.
- Domańska M., *Swobody rynku wewnętrznego a prawa podstawowe – refleksje na tle orzecznictwa TS*, 'EPS' 2012, no. 1.
- Düsterhaus D., Safjan M., *Stosowanie prawa UE przez państwa członkowskie z perspektywy Trybunału Sprawiedliwości – od pełnej zgodności między Kartą i prawem UE do barier proceduralnych ją niweczających*, 'EPS' 2016, no. 8.
- Ehlermann C.-D., *The European Administration and the Public Administration of Member States with Regard to Competition Law*, 'European Competition Law Review' 1996, vol. 16, no. 8.
- Fontanelli F., *Implementation of EU Law through Domestic Measures after Fransson: The Court of Justice Buys Time and 'Non-Preclusion' Troubles Loom Large*, *European Law Review* 2014, vol. 39, no. 5.
- Gill-Pedro E., *Whose Freedom Is It Anyway? The Fundamental Rights of Companies in EU Law*, 'European Constitutional Law Review' 2022, vol. 18, no. 2.
- Górski M., *Prawo do skutecznego środka prawnego w Article 47 Karty Praw Podstawowych UE – znaczenie i deficyt*, 'Europejski Przegląd Sądowy' 2016, vol. 8.
- Grzeszczak R., Szmigielski A., *Sądowe stosowanie Karty Praw Podstawowych UE w odniesieniu do państw członkowskich – refleksje na podstawie orzecznictwa Trybunału Sprawiedliwości i praktyki sądów krajowych*, 'EPS' 2015, no. 10.
- Kowalik-Bańczyk K., *Prawo do obrony w unijnych postępowaniach antymonopolowych*, Warsaw 2012.

- Kral R., National Normative Implementation of EC Regulations: An Exceptional or Rather Common Matter? 'European Law Review' 2008, vol. 33, no. 2.
- Łacny J., Korekty finansowe nakładane przez Komisję Europejską na państwa członkowskie za niezgodne z prawem wydatkowanie funduszy UE, Warsaw 2017.
- Lang J.T., The Duties of Cooperation of National Authorities and Courts under Article 10 EC: Two More Reflections, 'European Law Review' 2001, vol. 26, no. 1.
- Lang J.T., The Duties of National Authorities under Community Constitutional Law, 'European Law Review' 1998, vol. 23, no. 2.
- Mádr P., Article 51 of the EU Charter of Fundamental Rights from the Perspective of National Judge, 'Review of European Administrative Law' 2020, vol. 13, no. 4.
- Mik C., Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki. Tom I, Warsaw 2000.
- Półtorak N., Zakres związania państw członkowskich Kartą Praw Podstawowych Unii Europejskiej, 'EPS' 2014, no. 9.
- Puchta R., Kognicja sądów administracyjnych w zakresie kontroli decyzji wydanych w sprawach wizowych przez konsulów. Glosa do postanowienia NSA z dnia 19 lutego 2018 r., II OSK 1346/16, 'Państwo i Prawo' 2019, vol. 8.
- Puchta R., Warunki dopuszczalności powołania się na ochronę wynikającą z Article 47 KPP – uwagi na tle wyroku TSUE z 13.12.2017 r. w sprawie El Hassani, 'Państwo i Prawo' 2019, vol. 4.
- Safjan M., Rządy prawa a przyszłość Europy, 'Europejski Przegląd Sądowy' 2019, vol. 8.
- Sagan A., Anmerkung zu EuGH, Urt. v. 8.3.2022 – C-205/20 – NE vs. Bezirkshauptmannschaft Hartberg-Fürstenfeld II, 'Zeitschrift für das Privatrecht der Europäischen Union' 2022, vol. 19, no. 6.
- Sołtys A., Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewnienia efektywności prawa Unii Europejskiej, Warsaw 2015.
- Sørensen K.E., Member States' Implementation of Penalties to Enforce EU Law: Balancing the Avoidance of Enforcement Deficits and the Protection of Individuals, 'European Law Review' 2015, vol. 40, no. 6.
- Szpunar M., Kilka uwag systematyzujących na temat zakresu zastosowania Karty Praw Podstawowych UE, 'EPS' 2015, no. 10.
- Szpyrka M., Europejskie standardy stosowania kar pieniężnych na przykładzie polskiego prawa telekomunikacyjnego, Warsaw 2020.
- Verhoeven M.J.M., The 'Costanzo Obligation' and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap? 'Review of European and Administrative Law' 2010, vol. 3, no. 1.
- Vetzo M., The Past, Present and Future of the Ne Bis in Idem. Dialogue between the Court of Justice of the European Union and the European Court of Human Rights: The Cases of Menci, Garlsson and Di Puma, Review of European Administrative Law 2018, vol. 11, no. 2.