Limitations of the Transnational ne bis in idem Principle in EU Law

Remarks on the ECJ's Diesel Scandal Volkswagen Case

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Article

ABSTRACT

The ne bis in idem principle is one of the most fundamental guarantees in criminal procedure law. It prohibits a second prosecution in cases that have already been concluded by a final decision. According to the traditional understanding, the principle excludes a duplication of proceedings only within the same jurisdiction. Art. 50 CFR, however, which was incorporated into primary EU law by Art. 6 TEU, extends the principle's scope to the transnational sphere to the effect that a final decision in one Member State constitutes a bar to new proceedings in other Member States of the EU as well. While this transnational ne bis in idem guarantee in principle allows for limitations, these must meet the requirements provided for by Art. 52 para. 1 CFR.

The pending Case C-27/22, which has its roots in the diesel scandal involving German automobile producer Volkswagen, gives the Court of Justice of the European Union an opportunity to set new standards in this regard, which might be of high relevance for the future understanding of the ne bis in idem guarantee in a single area of freedom, security, and justice. In particular, it offers the Court the chance to provide guidance on the conditions that an EU secondary law provision must meet in order to be qualified a legitimate legal basis for a limitation to the transnational ne bis in idem principle. Furthermore, it gives the Court the opportunity to clarify whether all of the specifications of the criteria for limitations to the intra-state ne bis in idem guarantee that have been developed in Menci and Garlsson Real Estate, and were elaborated in BV and bpost also apply at inter-state level.

This article sheds light on these questions by discussing the criteria for limitations of the ne bis in idem principle, including their specifications originally established for intra-state cases, against the background of the Volkswagen Case C-27/22, which is transnationally structured.

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I. Previous Relevant Case Law

To date, the Court of Justice of the European Union (ECJ) has recognised two kinds of limitations of the *ne bis in idem* guarantee as meeting the conditions set out by Art. 52 para. 1 CFR.

The first group of cases concerns limitations based on the Convention implementing the Schengen Agreement (CISA), which is a *sui generis* act of EU law of the same hierarchical order as secondary Union law.[1] In the *Spasic* judgment, the ECJ acknowledged that the enforcement condition enshrined in Art. 54 CISA constitutes a limitation of the individual right granted by Art. 50 CFR within the meaning of Art. 52 para. 1 CFR.[2] Furthermore, in *MR*, decided on 23 March 2023, the Court also recognised Art. 55 para. 1 lit. b) CISA as a valid limitation of the fundamental right guaranteed by Art. 50 CFR.[3]

A second group of cases concerns possible justifications for limitations of the intra-state *ne bis in idem* guarantee provided for by national legislation. In this regard, the ECJ made important specifications to the criteria set out in Art. 52 para. 1 CFR in *Menci*[4] and *Garlsson Real Estate*[5], which it further elaborated in *BV*[6] and in the *bpost* case[7]. These specifications will be discussed in detail in Section III.

The pending Case C-27/22 (*Volkswagen Group Italia and Volkswagen Aktiengesellschaft*) neither concerns an exception to the inter-state *ne bis in idem* guarantee based on the CISA nor an exception to the intra-state *ne bis in idem* principle based on provisions of national law. Instead, it deals with a possible limitation of the inter-state *ne bis in idem* guarantee which echoes the first group of cases but is based on a provision of regular EU secondary legislation contained in a directive, rather than the CISA. This notably raises two questions: First, what prerequisites apply for a regular EU secondary law provision to serve as a legal basis for a limitation to the *ne bis in idem* principle under Art. 52 para. 1 CFR? Second, to what extent may the specific conditions developed in *Menci* and *Garlsson Real Estate*, and further elaborated in *BV* and *bpost*, be transferred to inter-state level?

It should be noted that the *Nordzucker* case[8], decided on 22 March 2022, related to possible limitations of the transnational *ne bis in idem* guarantee as well. It does, however, concern the special area of competition law that has been harmonised in the EU to the point of allowing it to be treated nearly like a harmonious national system.[9] Therefore, *Nordzucker* is not predictive of the present case.

II. Case C-27/22: Facts, Procedure and Preliminary Questions Referred to the ECJ

In Case C-27/22, the ECJ is called to give a preliminary ruling on questions that arose in Italian administrative proceedings in the context of the diesel scandal.[10] The starting point of the dispute was a fine of € 5 million imposed on Volkswagen AG (VWAG) and Volkswagen Group Italy (VWGI) by the Italian Antitrust Authority (AGCM) on 4 August 2016 for an infringement of the Italian Consumer Code. The alleged infringement concerns the marketing of vehicles with manipulated systems for the measurement of pollutant emissions in Italy and advertisements emphasising the compliance of said vehicles with the Italian environmental regulatory criteria. VWGI and VWAG appealed against the decision. In 2018, while the appeal in Italy was still pending, the German public prosecutor's office of Braunschweig, Lower Saxony, imposed an administrative fine of € 1 billion on VWAG (based on the German Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz*)) for essentially the same facts as alleged by the Italian proceedings; however, the reasoning concerned VWAG's entire global marketing – including in Italy – instead of the Italian marketing only. Both the Italian and the German authorities ordered the maximum fine provided for by the respective national legislation.

While the German fine order became final in June 2018, the Italian appeal is still pending before the *Consiglio di Stato*. It was this court that lodged a request for preliminary ruling to the ECJ.

The Italian court's request is three-fold: For one, it aims to find out whether the penalties imposed for unfair commercial practices under Italian law implementing Directive 2005/29/EC[11] can be classified as *criminal* administrative penalties and, therewith, trigger the applicability of the *ne bis in idem* principle. In light of the ECtHR's and the ECJ's case law,[12] this question will presumably be answered in the affirmative.

A second question raised by the Italian court makes reference to the specific chronological order of the steps of the two proceedings. In particular, this question concerns the fact that while the Italian administrative penalty was imposed before the German penalty, a final decision has been made on the latter, whereas the appeal against the Italian penalty is still pending.[13] Prior case law of the ECJ and the ECtHR in this context, at least as far as intra-state constellations are concerned, indicates that the applicability of the *ne bis in idem* principle does not depend on a specific order of the steps of the proceedings in question, but rather requires any proceedings to be concluded whenever a decision concerning the same offence in the material sense becomes final.[14] There is no apparent reason why this should be different in a transnational setting.

The third and final question raised by the Italian court concerns the issue of possible limitations to the transnational *ne bis in idem* guarantee. Specifically, the referring court aims to find out whether the provisions laid down in Art. 3 para. 4 and Art. 13 para. 2 lit. e) of Directive 2005/29/EC justify a derogation from the *ne bis in idem* guarantee established by Art. 50 CFR and Art. 54 CISA. This question will be discussed in more detail in the following section.

III. Requirements for Limitations of the *ne bis in idem* Principle and Specifications in Intra-State Cases

In the relevant case law regarding possible justifications of limitations of the *ne bis in idem* principle at intra-state level, the ECJ has been consistently structuring its analyses the same way.

The judges in Luxembourg start off by reemphasising that, according to the *Spasic* judgment, a limitation of the *ne bis in idem* principle guaranteed by Art. 50 CFR may be justified on the basis of Art. 52 para. 1 CFR.[15] This is followed by a detailed analysis of the individual criteria of Art. 52 para. 1 CFR and their application to the respective case.

According to the first sentence of Art. 52 para. 1 CFR, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. The second sentence further provides that any limitations are subject to the principle of proportionality and may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

In accordance with the analyses regularly performed by the Court, Art. 52 para. 1 CFR may be broken down into five criteria. First, the limitation in question must be provided for by law. Second, it must respect the essence of the rights and freedoms it limits. Third, it has to meet an objective of general interest. Fourth, it must comply with the principle of proportionality. Fifth, it must be strictly necessary in order to achieve the objective of general interest it serves.

With regard to the first requirement (that any limitation on the exercise of fundamental rights, such as the one enshrined in Art. 50 CFR, must be provided for by law), the ECJ made it clear in *BV*[16] and reiterated in *MR*[17] that the legal basis which permits restricting a fundamental right must in turn define the scope of this

limitation. It follows that, according to the Court, the first requirement is broadly indissociable from the requirements of clarity and precision arising from the principle of proportionality. Accordingly, the clarity and preciseness of the rules establishing the limitation to the *ne bis in idem* guarantee, which the Court had identified as a sub-criterion of the requirement of strict necessity in *Menci*[18] and *Garlsson Real Estate*[19], is in fact a precondition in itself for those rules to be qualified as a legal basis for a limitation of Art. 50 CFR in the first place. Consequently, the respective law must establish rules clear and precise enough to allow individuals to predict which acts or omissions could give rise to a duplication of proceedings and penalties to meet the "provided for by law" criterion.[20]

On a similar note concerning the second criterion of respecting the essence of Art. 50 CFR, the ECJ regards a clear and comprehensive definition of the conditions that would lead to a duplication of proceedings and penalties as a precondition for ensuring that the right guaranteed by Art. 50 CFR is not called into question as such.[21] Whenever rules do not clearly, precisely, and exhaustively define the prerequisites for a limitation of the *ne bis in idem* principle, they leave room for abuse and at least carry the risk of the essence of Art. 50 CFR being brought into question per se.

Regarding the third criterion (requiring an objective of general interest to be served by the limitation of the *ne bis in idem* guarantee), the ECJ established in *Menci* and *Garlsson Real Estate* that, for the purposes of meeting such an objective of general interest, a duplication of criminal proceedings and penalties may be justified where they pursue complementary aims relating to, as the case may be, different aspects of the same unlawful conduct in question.[22] In *bpost*, the Court identified such a pursuit of complementary objectives by the different proceedings as a factor of relevance for the proportionality requirement as well and made it clear that this factor could justify the additional burden resulting from the cumulation of the different procedures and penalties.[23]

With regard to the principle of proportionality as such, which constitutes the fourth criterion set out by Art. 52 para. 1 CFR, the ECJ regularly provides a general explanation that the duplication of proceedings and penalties may not exceed what is appropriate and necessary in order to attain the legitimate objectives at issue. According to the Court, it goes without saying that given several appropriate measures, recourse must be had to the least onerous one, and that the disadvantages caused must not be disproportionate to the aims pursued.[24]

As far as the fifth and final criterion is concerned, the rules allowing for the duplication of proceedings and penalties have to be strictly necessary to achieve the objective of general interest. In this context, the Court made three important specifications in *Menci* and *Garlsson Real Estate*.[25] Firstly, it stated that the legislation limiting the *ne bis in idem* guarantee must provide for clear and precise rules which allow an individual to predict which acts and omissions are liable to be subject to such a duplication of proceedings and penalties.[26] As demonstrated above and suggested by the Court itself in *BV* and *MR*,[27] the issue of the clarity and preciseness of the rules does, however, already influence the question of whether a legal basis for a limitation of the *ne bis in idem* guarantee can be assumed at all. Conversely, the second and third strict necessity sub-criteria that the Court has identified have independent significance. As second sub-criterion, the ECJ specifically requires that the rules in question ensure coordination between the different authorities, allowing these authorities to offset the disadvantages resulting from the duplication of proceedings.[28] Furthermore, as a third sub-criterion, it is required that the rules oblige the competent authorities to take into account the first penalty already imposed in their assessment of the second penalty. This is to ensure that the severity of all penalties reflects the seriousness of the offences committed.[29] Finally, the Court made it explicit that the rules corresponding to these requirements must also be applied adequately by the competent authorities, meaning that, on the one hand, the two sets of proceedings must have been effectively

conducted in a sufficiently coordinated manner and within a proximate timeframe, and, on the other hand, that the overall penalties imposed must adequately correspond to the seriousness of the offences.[30]

IV. Application of Criteria for Limitations of the *ne bis in idem* Principle at the Inter-State Level in the Volkswagen Case

Having clarified the criteria for limitations of the *ne bis in idem* principle including their specifications established by the Court regarding intra-state cases, the question remains to be answered whether these criteria are met in the Volkswagen case (Case C-27/22). Given the transnational dimension of that case, it must be assessed whether the specifications of these criteria developed for intra-state scenarios also allow for an adequate assessment of the legitimacy of limitations of the *ne bis in idem* principle at inter-state level and should thus be applied to the Volkswagen case. These questions will be analysed in the following by discussing the limitation criteria in turn, against the background of Case C-27/22.

1. "Provided for by law"

It has to be noted that a discussion of Case C-27/22 might be cut short. In fact, it seems doubtful whether the very first criterion, stipulating that the limitation of the *ne bis in idem* guarantee must be provided for by law, is met in the present case.

a) Legal basis in EU law

An initial point that needs to be made in this regard is that the legal basis for any limitation of the transnational *ne bis in idem* principle, as enshrined in Art. 50 CFR and Art. 54 CISA, can only be found in EU law. This follows from the very fact that Art. 55 CISA itself defines the cases in which the contracting parties – when ratifying, accepting, or approving the Convention – may declare themselves exempt from being bound by the *ne bis in idem* principle. It clearly contradicts the logic of this provision to accept that Member States could, in principle, at any time and for any case, declare themselves not bound by the *ne bis in idem* guarantee by law. Moreover, any legislation allowing Member States to exempt themselves from being bound by the *ne bis in idem* guarantee whenever they deem it appropriate would affect the essence of that guarantee as such and would, consequently, be incompatible with Art. 52 para. 1 CFR. Accordingly, the Court based the two exceptions to the *ne bis in idem* guarantee that it has recognised so far on provisions of Union law.[31]

b) Legal basis in Case C-27/22?

In the Volkswagen case, the referring court, in its third question, identifies Art. 3 para. 4 and Art. 13 para. 2 lit. e) of Directive 2005/29/EC on unfair commercial practices[32] as possible legal bases for derogations from the transnational *ne bis in idem* principle.

However, it is not apparent to what extent Art. 3 para. 4 Directive 2005/29/EC could serve as a legal basis for such a derogation. The article stipulates that in case of conflict between the provisions of Directive 2005/29/EC and other Union rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects. So rather than making reference to *ne bis in idem* constellations, this provision aims at resolving conflicts between legal instruments. At best, an *argumentum e contrario* seems possible, stating that Directive 2005/29/EC prevails over every Union rule that does *not* regulate specific aspects of unfair commercial practices. However, this interpretation is extremely broad and not supported by the wording of the provision. In any case, Art. 3 para. 4 Directive 2005/29/EC does not clearly and precisely

define the conditions for possible limitations of the *ne bis in idem* principle and does thus definitely not meet the criteria for a limitation of the *ne bis in idem* guarantee to be provided for by law.

A similar conclusion can be drawn for Art. 13 para. 2 lit. e) Directive 2005/29/EC. This provision establishes that Member States, when imposing penalties for infringements of national provisions adopted in application of the Directive, shall take into account *inter alia* the criterion whether penalties have been imposed on the trader for the same infringement in other Member States in cross-border cases. However, this stipulation is limited to situations in which information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394[33]. This latter regulation deals with the cooperation between national authorities responsible for the enforcement of consumer protection laws. It thus specifically refers to administrative proceedings and penalties for unfair commercial practices which can be classified as criminal in the European sense[34] and normally trigger the applicability of the *ne bis in idem* guarantee. Against this background, it seems plausible, on the face of it, to assume that Art. 13 para. 2 lit. e) Directive 2005/29/EC envisages situations principally incompatible with the *ne bis in idem* guarantee and, therewith, implicitly establishes an exception to it.

However, when taking into account the Recitals of Regulation (EU) 2017/2394 and of Directive (EU) 2019/2161[35], introducing Art. 13 para. 2 lit. e) into Directive 2005/29/EC, such an understanding does not seem to have been intended by the European Union legislature. While Recital 29 of Regulation (EU) 2017/2394 explicitly states that the principle of *ne bis in idem* should be respected, Recital 8 of Directive (EU) 2019/2161 even provides that the non-exhaustive and only indicative criteria introduced by Art. 13 para. 2 Directive 2005/29/EC might not be relevant for the imposition of penalties for every infringement. Rather, Member States are explicitly called to also take account of other general principles of law applicable to the imposition of penalties, such as the principle of *non bis in idem*. In light of this, Art. 13 para. 2 lit. e) Directive 2005/29/EC should be understood as only allowing for a duplication of penalties falling outside the scope of application of the *ne bis in idem* guarantee due to their non-criminal nature.

2. Respect for the essence of Art. 50 CFR in Case C-27/22?

Notwithstanding the above, Art. 13 para. 2 lit. e) Directive 2005/29/EC should not be taken as a guarantor for the essence of Art. 50 CFR being duly respected. At the very minimum, it does not clearly and exhaustively define the conditions for a limitation of the *ne bis in idem* guarantee. Quite to the contrary, it forms part of a list of "non-exhaustive" and only "indicative" criteria that shall be taken into account when imposing penalties "where appropriate." Furthermore, Art. 13 para. 2 lit. e) Directive 2005/29/EC does not even specify the intended consequence of taking into account a penalty imposed in another Member State for the same infringement and could, therefore, even be understood as envisaging the Member State engaged in sentencing to completely refrain from imposing a second penalty whenever the *ne bis in idem* guarantee applies.

3. Interim result

It can be concluded that a legal basis for a limitation of the transnational *ne bis in idem* principle is lacking in Case C-27/22. The only provision that on the surface appears to be a candidate for such a legal basis (Art. 13 para. 2 lit. e) Directive 2005/29/EC) definitely does not guarantee that the essence of Art. 50 CFR is respected. It follows that the first criterion for a limitation of the *ne bis in idem* guarantee is not met at all, and compliance with the second criterion is at least not ensured.

4. Considerations on remaining criteria: validity of the ECJ's specifications at transnational level?

In light of the foregoing, the *Volkswagen* Case does not directly call for an analysis of the third, fourth, and fifth criteria for the legitimacy of limitations of the *ne bis in idem* guarantee. Nonetheless, given the utmost importance of the question of justifiability of such limitations at transnational level (in particular if one considers the context of the transnational *ne bis in idem* principle as an enabler of a single area of freedom, security, and justice, generally governed by the principles of mutual recognition and mutual trust),[36] it will be briefly commented on the question of whether the specifications relevant to these remaining criteria developed by the ECJ for intra-state settings should likewise be applied at the inter-state level.

a) The "complementary aims" criterion

Let us recall that, as the third criterion for limitations of the *ne bis in idem* guarantee, it is required that an objective of general interest is pursued in order to justify this limitation and that the ECJ has determined in this regard for intra-state settings that the different proceedings and penalties pursue complementary aims relating to different aspects of the same unlawful conduct for the purpose of achieving this overall objective of general interest.[37] However, at least to date, the Court has not further specified the term "complementary aims," making it very flexible and broad for the time being.[38] In any case, the aim being pursued by proceedings and by a penalty in relation to a specific conduct depends on the legal classification of the conduct in question by the respective Member State. However, given the still rather rudimentary degree of harmonisation of Member States' criminal laws, one and the same conduct will frequently be subsumed under differing provisions in different states. Therefore, it is largely left to chance whether the different national legislations that are applied to a specific conduct pursue the same or complementary objectives.

It follows that the criterion of the pursuit of complementary aims, which makes much sense in a single harmonious national legal system, loses its limiting potential for exceptions from the *ne bis in idem* guarantee when transferred to the still poorly harmonised transnational sphere. Instead, as this criterion is necessarily tied to the legal classification of the respective behaviour in the different Member States, applying it in transnational settings would run directly counter to the factual conception of the notion of "the same offence" in the sense of Art. 50 CFR and Art. 54 CISA, which is independent of the legal classification of the conduct.[39]

b) The coordination requirement and the holistic sentencing approach

Unlike for the "complementary aims" criterion, the specifications developed by the ECJ regarding the strict necessity of limitations of the *ne bis in idem* guarantee seem suitable in a transnational setting as well. In particular, effective and close coordination of the different proceedings should also be required in an inter-state context. Not making such coordination a prerequisite for any limitation of the *ne bis in idem* guarantee would run counter to the very idea of the EU as a single area of freedom, security, and justice. Indeed, every Member State could, provided the other conditions of the respective limitation of the *ne bis in idem* principle are met, simply refuse to cooperate with another Member State and conclude its own proceedings. This would result in a double burden for the suspect, in particular with respect to coercive measures, and could eventually lead to the imposition of penalties not taking into account penalties already imposed in another Member State for the same offence, and thus exceeding what would be proportionate.

Whether coordination has been in place in the Volkswagen case is not apparent from the documents publicly available. At any rate, hypothetically assuming that all the other prerequisites of a limitation of the *ne bis in idem* guarantee were met in this case, the Italian *Consiglio di Stato* would have to take into account the penalty imposed in Germany when determining their fine.

V. Conclusion

The foregoing analysis demonstrated that it seems suitable to apply nearly all specifications established by the ECJ with regard to limitations of the intra-state *ne bis in idem* principle at transnational level as well. The only exception is the requirement of "complementary aims" having to be pursued by the respective proceedings and penalties as it is ill-suited to the still poorly harmonised transnational criminal law setting.

However, Case C-27/22, involving the diesel scandal of Volkswagen, fails to even meet the very first criterion for a justification of limitations to the transnational *ne bis in idem* guarantee. There is no clear and precise legal basis for such a limitation and, even if Art. 13 para. 2 lit. e) of Directive 2005/29/EC were to be qualified as such, this provision does not ensure that the very essence of Art. 50 CFR is respected. Thus, the third question referred to the ECJ by the Italian *Consiglio di Stato* will have to be answered in the negative: The provisions laid down in Art. 3 para. 4 and Art. 13 para. 2 lit. e) of Directive EU/2005/29 do not justify a derogation from the *ne bis in idem* principle.

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1. ECJ, 27 May 2014, Case C-129/14 PPU, *Spasic*, para. 31.↩
2. ECJ, *Spasic*, *op. cit.* (n. 1), para. 55.↩
3. ECJ, 23 March 2023, Case C-365/21, *MR v Generalstaatsanwaltschaft Bamberg*.↩
4. ECJ, 20 March 2018, Case C-524/15, *Menci*, paras. 44 et seqq.↩
5. ECJ, 20 March 2018, Case C-537/16, *Garlsson Real Estate*, paras. 46 et seqq.↩
6. ECJ, 5 May 2022, Case C-570/20, *BV*, para. 31 and paras. 38 et seqq.↩
7. ECJ, 22 March 2022, Case C-117/20, *bpost*, paras. 49 et seq.↩
8. In *Nordzucker*, judgment of 22 March 2022, Case C-151/20, the ECJ departed from its former case law according to which, only in competition law, the *idem* criterion did not only require the same offender and the same facts, but also the same protected legal interest (see ECJ, 7 January 2004, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P, *Van Aalborg Portland*, and ECJ, 14 February 2012, Case C-17/10, *Toshiba Corporation and Others*). For the first time, the Court only focused on the material acts in competition law as well, as had been the case in all other areas of law since *Van Esbroek* (ECJ, 9 March 2006, Case C-436/04); on this, see M. Cappai and G. Colangelo, "Applying *ne bis in idem* in the aftermath of *bpost* and *Nordzucker*: the case of EU competition policy in digital markets", *SSRN paper*, posted 1 January 2023, <https://papers.ssrn.com/sol3/papers.cfm? abstract_id=4344075> (last visited on 21 March 2023), modified version *forthcoming* in Common Market Law Review.↩
9. Cf. ECJ, *Nordzucker*, *op. cit.* (n. 8), paras. 53 et seqq., making it clear that, in fact, both national authorities had to apply Art. 101 TFEU, i.e., one and the same provision.↩
10. See summary of the request for a preliminary ruling – Case C-27/22, available at <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=255661&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2595922> (last visited on 21 March 2023).↩
11. The full name of the Directive is as follows: Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), *O.J.* L 149, 11.6.2005, 22.↩
12. Whether a penalty is to be classified as criminal in nature is examined by the ECJ, following the so-called *Engel* criteria of the ECtHR (see ECtHR, 8 June 1976, Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, *Engel et al. v. the Netherlands*, para. 82), on the basis of the legal classification of the infringement in domestic law (which is, however, only the starting point), the nature of the infringement, and the nature and severity of the threatened sanction (see ECJ, 5 June 2012, Case C-489/10, *Bonda,* paras. 36 to 44; ECJ, 7 May 2013, Case C-617/10, *Åkerberg Fransson*, para. 35; ECJ, *Menci, op. cit.* (n. 4), paras. 26 et seqq.; ECJ, *Garlsson Real Estate*, *op. cit.* (n. 5), paras. 28 et seqq.).↩
13. Cf. summary of the request for a preliminary ruling – Case C-27/22, para. 16, *op. cit.* (n. 10).↩
14. Specifically, ECtHR, 27 November 2014, Application No. 7356/10, *Lucky dev v. Sweden*, para. 60; the sequence of procedurally relevant events in *Garlsson Real Estate* was very similar to the one in Case C-27/22 and did, according to the ECJ, not hinder the applicability of Art. 50 CFR (see ECJ, *Garlsson Real Estate*, *op. cit.* (n. 5), paras. 11 et seqq.).↩
15. See ECJ judgments in *Menci*, *op. cit.* (n. 4), para. 40; *Garlsson Real Estate*, *op. cit.* (n. 5), para. 42; and *bpost*, *op. cit.* (n. 7), para. 40.↩
16. ECJ, *BV*, *op. cit.* (n. 6), para. 31.↩
17. ECJ, *MR*, *op. cit.* (n. 3), para. 51.↩
18. ECJ, *Menci*, *op. cit.* (n. 4), para. 49.↩
19. ECJ, *Garlsson Real Estate*, *op. cit.* (n. 5), para. 51.↩
20. ECJ judgments in *Menci*, *op. cit.* (n. 4), para. 49; *Garlsson Real Estate*, *op. cit.* (n. 5), para. 51; and *bpost*, *op. cit.* (n. 7), para. 51. In *BV (op. cit.* (n. 6), para. 38), the Court specified that the criterion of a limitation being defined by law is also "satisfied where the individual is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, which acts and omissions will make him or her criminally liable."↩
21. ECJ, *Menci*, *op. cit.* (n. 4), para. 43; ECJ, *Garlsson Real Estate*, *op. cit.* (n. 5), para. 45; *BV*, *op. cit.* (n. 6), para. 32.↩
22. ECJ, *Menci*, *op. cit.* (n. 4), para. 44; ECJ, *Garlsson Real Estate*, *op. cit.* (n. 5), para. 46.↩

23. ECJ, *bpost*, *op. cit.* (n. 7), para. 49.↩
24. ECJ, *Menci*, *op. cit.* (n. 4), para. 46; ECJ, *Garlsson Real Estate*, *op. cit.* (n. 5), para. 48; ECJ, *bpost*, *op. cit.* (n. 7), para. 48.↩
25. See the summary of these three criteria for instance in ECJ, *BV*, *op. cit.* (n. 6), para. 36, referring to *Menci*.↩
26. ECJ, *Menci*, *op. cit.* (n. 4), para. 49; ECJ, *Garlsson Real Estate*, *op. cit.* (n. 5), para. 51.↩
27. See again ECJ, *BV*, *op. cit.* (n. 6), para. 31, and ECJ, *MR*, *op. cit.* (n. 3), para. 51.↩
28. ECJ, *Menci*, *op. cit.* (n. 4), para. 52; ECJ, *Garlsson Real Estate*, *op. cit.* (n. 5), para. 54; ECJ, *bpost*, *op. cit.* (n. 7), para. 51.↩
29. ECJ, *Menci*, *op. cit.* (n. 4), para. 55; ECJ, *Garlsson Real Estate*, *op. cit.* (n. 5), para. 56; see ECJ, *bpost*, *op. cit.* (n. 7), para. 51.↩
30. ECJ, *bpost*, *op. cit.* (n. 7), para. 51.↩
31. See ECJ, *Spasic*, *op. cit.* (n. 1), para. 57; ECJ, *Nordzucker*, *op. cit.* (n. 8), para. 53.↩
32. *Op. cit.* (n. 11).↩
33. Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, *O.J.* L 345, 27.12.2017, 1.↩
34. However, the Regulation cannot be understood to refer to criminal law *stricto sensu* – cf. for instance Recitals 21 and 29, Art. 2 para. 3, Art. 14 para. 2 lit. a) of Regulation (EU) 2017/2394, *op. cit.* (n. 33).↩
35. Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, *O.J.* L 328, 18.12.2019, 7.↩
36. See Opinion of Advocate General Spuznar, 20 October 2022, Case C-365/21, para. 55.↩
37. Again, see ECJ judgments in *Menci*, *op. cit.* (n. 4), para. 44; *Garlsson Real Estate*, *op. cit.* (n. 5), para. 46; and *bpost*, *op. cit.* (n. 7) para. 49; in Case C-27/22, the objective of general interest pursued would be the protection of European consumers (see summary of the request for a preliminary ruling – Case C-27/22, para. 19, *op. cit.* (n. 10)).↩
38. In *Menci*, for example, the differing degrees of severity of the penalties and the targeting of behaviours with different degrees of social harmfulness seemed to be decisive for the Court to affirm the complementarity of the aims pursued by the administrative penalties, on the one hand, and the criminal penalties, on the other hand (see ECJ, *Menci*, *op. cit.* (n. 4), para. 45). Generally, it would also be conceivable to make reference to the respective legal interests protected.↩
39. Standing case law since ECJ, *Van Esbroek*, *op. cit.* (n. 8), para. 42.↩

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