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Articles

Anna Maria Maugeri[*]

The Concept of Criminal Matter in the European Courts' Case Law – The Protection of Fundamental Principles v. Political Compromise

Abstract

I. The concept of criminal matter. – II. The Engel criteria. The first one: *classification of the offence under national law*. -1. The second one: the *nature of the infringement.* – 2. The third one: *the nature and the severity of the sanction*. – 3. Some conclusions about the concept of "criminal matter". – III. The ECtHR's case law about the concept of "criminal matter": security measure. – 1. Administrative sanctions. – 2. Disciplinary sanctions. – 3. Tax-surcharges. – 4. Extradition, arrest warrant and expulsion. – 5. Political proceeding. – 6. The different stages of criminal proceedings, ancillary proceedings and subsequent remedies. – IV. The ECJ case law about the concept of *criminal matter*. – V. The ECtHR case law about the nature of the confiscation. – 1. The nature of the preventive confiscation and of the civil forfeiture. – 2. The nature of the extended confiscation and other forms. – VI. Conclusions: the concept of criminal matter as basis of the *ius commune*.

I. The concept of criminal matter.

The European Court of Human Rights (EctHR) has always emphasized that, in order to avoid a surreptitious shift of individual safeguards that article 6 and 7 reserve criminal law, the distinction between the criminal nature of offences and the related sanction cannot be based on the criterion of legal-formal classification of the offence under national law, and has therefore developed an autonomous concept of "criminal matter" ("criminal charge") in relation to that of the national legal traditions and of the legislative-formal choices regarding the case from time to time examined.[1]

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1 Among the others *European Court of Human Rights* (ECtHR), *Öztürk v. Germany*, Judgement 21 February 1984, Série A, n. 73, p. 18, margin no 50 and Rivista italiana di diritto e pro-

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The adoption of the doctrine of the "interprétation autonome" of the concept of criminal matter represents a solution that has certainly been urged by the compulsory confrontation with a wide variety of legal systems. Yet it finds its ultimate reason in the need to subject to a critical-demonstrative judgment any determination of the public authority, which is capable of affecting the exercise of fundamental subjective prerogatives, thus overturning the theory that identifies in the legislator the "master" of legal qualifications.[2]

This approach is fundamental to guarantee the respect of the general principles applying in criminal matter as, first of all, the presumption of innocence (article 6, § 2 ECHR) and the principle of legality-no retroactivity (article 7 ECHR), and the ne bis in idem (article 4 of the Protocol n. 7).

The Court states that the Contracting States could not at their discretion classify an offence as disciplinary instead of criminal, or prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, as this would subordinate the operation of the fundamental principles of Article 6 to their sovereign will.[3]

The Convention is not opposed to the moves towards "decriminalisation" or the abolition of certain offenses among the Council of Europe Member States; however, offences classified as "regulatory" following decriminalisation may come under the autonomous concept of a "criminal" offence.[4] Thus leaving States the discretion to exclude these offences which might lead to outcomes incompatible with the object and purpose of the Convention.[5]

A little clarification is necessary: in using the terms "criminal charge" and "charged with a criminal offence", the three paragraphs of Article 6 refer to identical situations. It is therefore, that the test of applicability of Article 6 under its criminal head will be the same for the three paragraphs. For instance, to evaluate any complaint under Article 6 § 2 arising in the context of judicial proceedings, it is first of all necessary to ascer-

cedura penale (RIDPP) 1985, p. 894 et seq.; *Adolf v. Gov. Austria*, Judgement 26 March 1982, Publications de la Cour Européenne des Droits de l'Homme 1982, Série A, vol. 49, p. 15; *Padin Gestoso v. Espagne*, Judgement 8 December 1998, Recueil de Arrêts et Dêcisions 1999, II, p. 361 et seq.; *J.B. v. Switzerland*, Application no. 31827/96, Judgement 3 May 2001, margin no 44. See *R. Chenal*, in: S. Bartole/R. Bin (eds.), Commentario breve alla Costituzione, 2nd ed., 2008, Art. 6, p. 185; *C.E. Paliero*, "Materia penale" e illecito amministrativo secondo la Corte europea dei diritti dell'uomo: una questione "classica" a una svolta radicale, Rivista italiana di diritto e procedura penale (RIDPP) 1985, p. 894 et seq.

2 *F. Mazzacuva*, L'incidenza della definizione "convenzionale" di pena sulle prospettive di riforma del sistema sanzionatorio, Rivista trimestrale di diritto penale dell'economia (RTDPE) 2015, p. 6.

3 *ECtHR*, *Ezeh and Connors v. the United Kingdom*, Application no. 39665/98, 40086/98, Judgement 9 October 2003, margin no 100.

4 *ECtHR*, *Mikhaylova v. Russia*, Application no. 46998/08, Judgement 19 November 2015, margin no 53; *Öztürk v. Germany* (fn. 1), margin no 49; *S. Buzzelli*, in: G. Ubertis/F. Viganò (eds.), Corte di Strasburgo e giustizia penale, 2016, Art. 6, p. 132 et seq.

5 *ECtHR*, *Öztürk v. Germany* (fn. 1), margin no 49.

tain whether the impugned proceedings involved the determination of a "criminal charge", within the meaning of the Court's case-law.[6]

The "charge", as established in Deweer judgment, could, for the purposes of Article 6 par. 1 (article 6-1), be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.[7]

The autonomous concept of "criminal matter", to apply the guarantees provided by ECHR, is founded by the European Court on the parameters developed by Engel:[8] the *classification of the offence under national law*, – whether the provision belongs to criminal law according to national law –;[9] the *nature of the offence* with particular reference to its forms of characterization and the procedure adopted;[10] the *nature of the penalty* [11] and the *degree of penalty severity*[12] that the person concerned risked incurring, which are considered as a single criterion in Engel case.[13] The Court has established that the criterion of the nature of the infringement and that of the nature and severity of the penalty indicated in the Engel case (second and third respectively) are alternative and not necessarily cumulative.[14] For Article 6 to be held applicable, it suf-

6 *ECtHR* [GC], *Allen v. the United Kingdom*, Application no. 25424/09, Judgement 12 July 2013, margin no 95.

7 *ECtHR*, *Deweer V. Belgium*, Application no. 6903/75, Judgement 27 February 1980.

8 *ECtHR*, *Engel and others v. The Netherlands*, Application no. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgement 8 June 1976, Série A, vol. 22, margin no 82-83; *Adolf v. Gov. Austria* (fn. 1), margin no 15; *Albert et le Compte v. Belgium*, Application no. 7299/75, 7496/76, Judgement 10 February 1983, *ivi*, vol. 58, margin no 16; *Öztürk v. Germany* (fn. 1), margin no 50; *Weber v. Switzerland*, Judgement 22 May 1990, *ivi*, vol. 177, margin no 17-18; *Lutz*, *Englert and Nölkenbockhoff v. Germany*, Application no. 9912/82, 10282/83, 10300/83, Judgement 25 August 1987, *ivi*, vol. 123, margin no 22; *Demicoli v. Malta*, Application no. 13057/87, Judgement 27 August 1991, *ivi*, 1991, vol. 210, margin no 25; *Funke v. France*, Application no. 10828/84, Judgement 25 February 1993, *ivi*, vol. 256, margin no 30; *Benham v. Royaume-Uni*, Judgement 10 June 1996, Recueil de Arrêts et Dêcisions 1996, III, no. 10, p. 756; *Padin Gestoso v. Espagne* (fn. 1), p. 361 et seq.; *J.B. v. Switzerland* (fn. 1), margin no 44; *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 91.

9 *ECtHR*, *Engel and others v. The Netherlands* (fn. 8), margin no 36; *M. De Salvia*, Lineamenti di diritto europeo, 1991, pp. 140-141.

10 *ECtHR*, *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 91; *Engel and others v. The Netherlands* (fn. 8), pp. 34-35, margin no 82.

11 *ECtHR*, *Demicoli v. Malta* (fn. 8), margin no 25; *Weber v. Switzerland* (fn. 8), margin no 30; *Lutz, Englert and Nölkenbockhoff v. Germany* (fn. 8), margin no 22; *Campbell and Fell v. United Kingdom*, Application no. 7819/77, 7878/77, Judgement 28 June 1984, Rivista di diritto internazionale (RDI) 1986, p. 502; *Öztürk v. Germany* (fn. 1), p. 894; *Engel and others v. The Netherlands* (fn. 8).

12 *ECtHR*, *Engel and others v. The Netherlands* (fn. 8), margin no 36; *Benham v. Royaume-Uni* (fn. 8), p. 756; *Bendenoun v. France*, Application no. 12547/86, Judgement 24 February 1994, Série A, vol. 284, margin no 3; *Funke v. France* (fn. 8), vol. 256, margin no 30; *Demicoli v. Malta* (fn. 8), margin no 16; *Weber v. Switzerland* (fn. 8), margin no 17-18; *Albert et le Compte* (fn. 8), *ivi*, vol. 58, margin no 16.

13 *ECtHR*, *Engel and others v. The Netherlands* (fn. 8), margin no 82-83. See *W.A. Shabas*, The European convention on human rights: a commentary, 1st ed., 2015, Art. 1 Protection of Property, p. 960.

14 *ECtHR*, *Lutz, Englert and Nölkenbockhoff v. Germany* (fn. 8), margin no 55; *Campbell and Fell v. United Kingdom* (fn. 11), margin no 69-73.

fices that the offence in question is regarded as "criminal" in its nature from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere.[15] However, this does not exclude that a cumulative approach can be adopted where the separate analysis of each criterion does not allow a clear decision on the existence of a criminal charge.[16]

The following article is divided into four parts. First, the Court's jurisprudence about the Engel criterion is deeply analyzed (§ 2 and ff). Second, a series of controversial cases is examined in order to better understand the actual application of these criteria. This section will also focus on the real nature – on the basis of Engel parameters – of some types of problematic measures, like the security measures (§ 3 and ff). The third part analyses the European Court of Justice's jurisprudence about the concept of criminal matter and its resistance to recognise the punitive nature of EU sanctions (§ 4). The fourth part addresses the ECtHR's case law on confiscation, as an example of how difficult it is for the European Court to apply the Engel's criteria coherently (§ 5 and ff). In conclusion, the importance of this case law about the autonomous concept of "criminal matter" will be emphasized. As a matter of the fact, not only, has it been the basis for the recognition of the fundamental principles of the punitive legal order, but it has also significantly contributed to the harmonization of the punitive systems.

II. The Engel criteria. The first one: classification of the offence under national law.

Proceeding to the detailed analysis of the ECtHR's case law on each Engel criteria, it is important to consider, first of all, that the ECtHR does not consider the *first Engel criterion,* – whether the provision belongs to criminal law according to national law –, as decisive, but as merely providing a starting point for the consideration of the issue, a *ratio cognoscendi*. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examines the substantive reality of the procedure in question. "The indications so afforded have only a formal and relative value and must be examined in the light of the common de-

15 *ECtHR*, *Lutz, Englert and Nölkenbockhoff v. Germany* (fn. 8), margin no 55; *Öztürk v. Germany* (fn. 1), margin no 54.

16 *ECtHR*, *Bendenoun v. France* (fn. 12), p. 20, margin no 47; *Benham v. Royaume-Uni* (fn. 8), p. 756, margin no 56; *Garyfallou AEBE v. Greece,* Application no. 18996/91, Judgement 24 September 1997, Reports 1997-V, p. 1830, margin no 33; *Lauko v. Slovakia*, Application no. 26138/95, Judgement 2 September 1998, Reports 1998-VI, pp. 2504-05, margin no 57; *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 86.

nominator of the respective legislation of the various Contracting States".[17] In any case, there are judgments in which this criterion is used.[18]

1. The second one: the nature of the infringement.

In evaluating the second criterion, which is generally considered more important[19] (the "very nature of the offence is a factor of greater importance")[20] and to be the real first criterion, the *nature of the infringement*, the following factors can be taken into consideration: whether the legal rule in question is directed solely at a specific group or is of a generally binding character;[21] whether the legal rule has a punitive or deterrent purpose;[22] whether the proceedings are instituted by a public body with statutory powers of enforcement;[23] whether the imposition of any penalty is dependent upon a finding of guilt[24] and how comparable procedures are classified in other Council of Europe member States.[25]

This last reference is very significant in order to specify this second criterion, – comparative examination, that is, the qualification of similar proceedings in other European States which together with the structure of the precept, look at in particular whether it involves a duty with general character addressed to the community, and if it pursues a preventive and repressive purpose.[26]

In this context, the ECtHR first of all examines the group of persons addressed by a rule which penalises conduct of a certain kind. If a rule is not directed towards a given group possessing a special status — for example, in the manner of disciplinary law— but towards the general public, this points in favour of the criminal nature of the penalty. On the contrary the Court considers decisive that the offence consists in the failure to comply with "specific rules", but this is not enough to assess the disciplinary nature of an offence: it is only one of the relevant indicators, as explained in the case

17 *ECtHR*, *Engel and others v. The Netherlands* (fn. 8), margin no 82; *Benham v. Royaume-Uni* (fn. 8), p. 756; *Weber v. Switzerland* (fn. 8), margin no 17; *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 91.

18 *ECtHR*, *Putz v. Austria*, Application no. 18892/91, Judgement 22 February 1996, Recueil de Arrêts et Dêcisions, no. 4, 1996, I, p. 324; *Demicoli v. Malta* (fn. 8), margin no 25; *Öztürk v. Germany* (fn. 1), p. 894. See *De Salvia* (fn. 9), pp. 140-141.

19 *ECtHR* [GC], *Jussila v. Finland*, Application no. 73053/01, Judgement 23 November 2006, margin no 38.

20 *ECtHR*, *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 91; *Engel and others v. The Netherlands* (fn. 8), pp. 34-35, margin no 82.

21 *ECtHR*, *Bendenoun v. France* (fn. 12), margin no 47.

22 *Ibidem*; *ECtHR*, *Öztürk v. Germany* (fn. 1), margin no 53.

23 *ECtHR*, *Benham v. Royaume-Uni* (fn. 8), margin no 56.

24 *Ibidem*.

25 *ECtHR*, *Öztürk v. Germany* (fn. 1), margin no 53.

26 *ECtHR*, *Lutz, Englert and Nölkenbockhoff v. Germany* (fn. 8), margin no 22; *Öztürk v. Germany* (fn. 1); *C. Teitgen-Colly*, Garantien du procèséquitable et repression admistrative, in: M. Delmas-Marty (ed.), Quelle Politique Penale pour l'Europe?, 1993, p. 294.

Ezeh and Connors, in relation to the offences directed towards a group possessing a special status, namely prisoners, as opposed to all citizens.[27]

In the context of the *second Engel criterion,* the ECtHR considers also the *nature of the proceedings*, which may in fact have autonomous relevance as the determining criterion of the nature of an offence; relevant elements of the punitive nature are identified by the fact that, for example, the law concerning liability to pay the community charge and that the procedure upon non-payment was of general application to all citizens. Furthermore the proceedings in question were to be brought by a public authority under statutory powers of enforcement; or else the magistrates could only exercise their power of committal to prison on a finding of willful refusal to pay or of culpable neglect.[28]

In relation to that criterion, the nature of the offence, the gravity of it does not make a decisive importance because if its extreme gravity may be indicative of its criminal nature, as indicated in Campbell and Fell[29], however, this does not mean that the less serious nature of the offence can in itself exclude the application of Article 6. There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness. Some States distinguish among the most serious offences (crimes), lesser offences (délits) and petty offences (contraventions), whilst qualifying them all as criminal offences. Furthermore, it would be contrary to the object and purpose of Article 6, which guarantees to "everyone charged with a criminal offence" the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article a whole category of offences merely on the ground of regarding them as petty.[30] Seriousness, as it is stated, is highlighted as a third criterion in relation to the sanction and not the offence.[31]

In order to assess the nature of a measure, it is not only important the procedure involved in its making but also in its implementation.[32] The Court in its case-law has drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty": "where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7[33]".

27 *ECtHR*, *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 103; *Campbell and Fell v. United Kingdom* (fn. 11), margin no 71.
28 *ECtHR*, *Benham v. Royaume-Uni* (fn. 8), margin no 56.
29 *ECtHR*, *Campbell and Fell v. United Kingdom* (fn. 11), p. 502.
30 *ECtHR*, *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 104; *Öztürk v. Germany* (fn. 1), margin no 53.
31 *ECtHR*, *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 104.
32 *ECtHR* [GC], *Scoppola v. Italy (N° 2)*, Application no. 10249/03, Judgement 17 September 2009, margin no 97; *Welch v. United Kingdom*, Application no. 17440/90, Judgement 9 February 1995, Série A, vol. 307, margin no 28.
33 *ECtHR*, *Kafkaris v. Cyprus*, Application no. 21906/04, Judgement 12 February 2008, margin no 142; *ECtHR*, *Scoppola v. Italy (N° 2)* (fn. 32), margin no 98; *M. v. Germany*, Application no. 19359/04, Judgement 17 December 2009, Cassazione penale (CP) 2010, p. 3275, with the comment of *F. Rocchi*, La decisione della Corte di Strasburgo sulla misura di sicurezza deten-

2. The third one: the nature and the severity of the sanction.

The third criterion is the nature of the penalty[34] and the degree of its severity,[35] which are considered as a single criterion in Engel case.[36]

The severity is determined by reference to the maximum potential penalty for which the relevant law provides.[37]

The nature of the sanction must be specified with reference to the nature of the sanction and the aims pursued: "criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence".[38] In this respect, as mentioned above, the possibility of converting the pecuniary sanction into custody in case of non-payment was considered a decisive criterion.[39] However, the failure to provide a prison sentence is not decisive, as the degree of severity of the sanction cannot deprive the illicit of the criminal connotation.[40]

This criterion of the severity of the sanction is not always applied by the European Court[41], as it is considered unreliable or to use only as "subsidiary element of judgment".[42]

It has been applied in the Grand Stevens case where the Court has stressed that the sanction of the prohibition from administering, managing or supervising listed companies for periods ranging from two to four months "was such as to compromise the integrity of the persons concerned" and "the temporary loss of their honour for the

tiva tedesca della *Sicherungsverwahrung* e i suoi riflessi sul sistema del "doppio binario" italiano; see *F. Mazzacuva*, La materia penale e il "doppio binario" della Corte europea: le garanzie al di là delle apparenze, Rivista italiana di diritto e procedura penale (RIDPP) 2013, p. 1932.

34 *ECtHR*, *Demicoli v. Malta* (fn. 8), margin no 25; *Weber v. Switzerland* (fn. 8), margin no 30; *Lutz, Englert and Nölkenbockhoff v. Germany* (fn. 8), margin no 22; *Campbell and Fell v. United Kingdom* (fn. 11), p. 502; *Öztürk v. Germany* (fn. 1); *Engel and others v. The Netherlands* (fn. 8).

35 *ECtHR*, *Engel and others v. The Netherlands* (fn. 8), margin no 36; *Benham v. Royaume-Uni* (fn. 8), p. 756; *Bendenoun v. France* (fn. 12), margin no 3; *Funke v. France* (fn. 8), vol. 256, margin no 30; *Demicoli v. Malta* (fn. 8), margin no 16; *Weber v. Switzerland* (fn. 8), margin no 17-18; *Albert et le Compte* (fn. 8).

36 *ECtHR*, *Engel and others v. The Netherlands* (fn. 8), margin no 82-83. See *Shabas* (fn. 13), Art. 1 Protection of Property, p. 960.

37 *ECtHR*, *Campbell and Fell v. United Kingdom* (fn. 11), margin no 72; *Demicoli v. Malta* (fn. 8), margin no 34.

38 *ECtHR*, *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 102. See *ECtHR*, *Öztürk v. Germany* (fn. 1), 20-21, margin no 53; *Bendenoun v. France* (fn. 12), p. 20, margin no 47; *Lauko v. Slovakia* (fn. 16), margin no 58; *J.B. v. Switzerland* (fn. 1), margin no 48; *A. Heitzer*, Punitive Sanktionen im Europäischen Gemeinschaftsrecht, 1997, p. 38 et seq.

39 *ECtHR*, *Benham v. Royaume-Uni* (fn. 8), pp. 756-770.

40 *ECtHR*, *Lutz, Englert and Nölkenbockhoff v. Germany* (fn. 8), margin no 55; *Öztürk v. Germany* (fn. 1), margin no 54; *ECtHR*, *Grande Stevens v. Italy*, Application no. 18640/10, Judgement 7 July 2014, margin no 97.

41 See *ECtHR*, *Lutz, Englert and Nölkenbockhoff v. Germany* (fn. 8), margin no 23; *Campbell and Fell v. United Kingdom* (fn. 11), p. 502, margin no 35 et seq.; *Öztürk v. Germany* (fn. 1).

42 Così *Paliero*, RIDPP 1985, p. 919.

representatives of the companies involved". Furthermore, "the fine which the CONSOB was entitled to impose could go up to EUR 5,000,000 (see paragraph 20 above), and this ordinary maximum amount could, in certain circumstances, be tripled or fixed at ten times the proceeds or profit obtained through the unlawful conduct (see paragraph 53 above)…".[43]

This criterion risks to be, in any case, imprecise (not exact) and in practice it has contradictory outcomes for the difficulty of establishing the severity limit which represents the minimum threshold of the criminal relevance.[44]

The relative lack of seriousness of the penalty at stake cannot, in any case,divest an offence of its inherently criminal character.[45] For example, a relatively severe maximum penalty of three months' imprisonment for the non-payment of a fee was considered "relatively severe".[46] While "the minor nature of the penalty renders this case different from *Janosevic and Bendenoun* as regards the third Engel criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge".[47]

3. Some conclusions about the concept of "criminal matter".

In conclusion, the most important criterion is considered the aim of the sanction, which has to be punitive and deterrent, as affirmed from the *Öztürk* case and in many successive ones. As Jussila stated: "the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. The Court considers that this establishes the criminal nature of the offence".[48] Also in a very recent case the Court admits the criminal nature of "the surcharges imposed" because for "their nature served a penal purpose of deterring taxpayers from violating statutory obligations to report taxable income..".[49] In the same direction in the *Grand Stevens* case the Court considers that the fines imposed were essentially intended to punish, in order to prevent repeated offending; they had therefore

43 *ECtHR*, *Grande Stevens v. Italy* (fn. 41), margin no 97.

44 *M. Viering/Peter van Dijk*, Right to a fair ad public hearing, in: P. van Dijk/F. VanHoof/A. VanRiin/L. Zwaak (eds.), Theory and practice of the European Convention on Human Rights, 2006, pp. 547-552; *Paliero,* RIDPP 1985, p. 919; *M. Delmas Marty*, La jurisprudence de la Cour européenne des droits de l'homme et la logique du flou, Revue de droit pénal et de criminologie (RDP) 1992, p. 1041; *Mazzacuva*, RIDPP 2013, p. 1904.

45 *ECtHR*, *Öztürk v. Germany* (fn. 1), margin no 53; *Nicoleta Gheorghe v. Romania*, Application no. 23470/05, Judgement 3 April 2012, margin no 26.

46 *ECtHR*, *Benham v. Royaume-Uni* (fn. 8), pp. 756-770.

47 *ECtHR*, *Jussila v. Finland* (fn. 19), margin no 38.

48 *ECtHR*, *Jussila v. Finland* (fn. 19), margin no 38; *Paykar Yev Haghtanak ltd v. Armenia*, Application no. 21638/03, Judgement 2 June 2008, margin no 35: "The purpose pursued by these measures is to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. The penalties are thus both deterrent and punitive".

49 *ECtHR*, *Jóhannesson and Others v. Iceland*, Application no. 22007/11, Judgement 18 May 2017, margin no 32.

been based on rules whose purpose was both *deterrent*, namely to dissuade the applicants from resuming the activity in question, and *punitive*, since they punished unlawful conduct. Thus, they were not solely intended, the Court highlights, to repair damage of a financial nature. Lastly the penalties were imposed by the CONSOB on the basis of the gravity of the impugned conduct, and not on the basis of the harm caused to investors.[50]

This is a broad concept of "criminal matter" that includes all the afflictive measures that pursue general and special prevention purposes. Article 6 under its criminal head has been held to apply: to customs law;[51] to penalties imposed by a court with jurisdiction in budgetary and financial matters;[52] to proceedings resulting in the demolition of a house built without planning permission as the demolition could be considered a "penalty";[53] or, moreover, 'proceedings for recovery of an unpaid community charge', considered by the English law 'civil in nature'.[54]

A clarification is necessary at this point. The ECtHR requires the punitive and deterrent feature in order to include a measure in the concept of criminal matter and then to apply the connected safeguards. Notwithstanding that, the most recent ECtHR case law, in particular in relation to the imprisonment, has underlined that "while punishment remains one of the aims.., the emphasis in European penal policy is now on the rehabilitative aim".[55]

III. The ECtHR's case law about the concept of "criminal matter": security measure.

As far as the concept of criminal matter is concerned, the ECHR's jurisprudence offers interesting cases whose nature was debated. According to the national legal orders, these measures were not criminal, whereas the European Court classifies them as "criminal" in order to apply the safeguards of the Convention.

The first measure to be analyzed is the Sicherungsverwahnung, the German security measure, a form of detention without time limit in relation to responsible and dangerous convicted offenders (§ 66 StGB).

50 *ECtHR*, *Grande Stevens v. Italy* (fn. 41), margin no 97.
51 *ECtHR*, *Salabiaku v. France*, Application no. 10519/83, Judgement 7 October 1988, margin no 24.
52 *ECtHR*, *Guisset v. France*, Application no. 33933/96, Judgement 9 March 1998, margin no 59.
53 *ECtHR*, *Hamer v. Belgium*, Application no. 21861/03, Judgement 27 November 2007, margin no 60.
54 *ECtHR*, *Benham v. Royaume-Uni* (fn. 8), p. 756; *A. Ashworth*, (2) Article 6 and the Fairness of Trials, Criminal Law Review (CLR) 1999, p. 262.
55 *ECtHR* [GC], *Vinter and others v. the United Kingdom*, Application no. 66069/09, Judgement 9 July 2013, margin no 108-110.

In the opinion of the European Court[56], it constitutes in substance an additional "penalty", and is not a measure that concerns the "execution" or "enforcement" of the "penalty", which would not be covered by the criminal law safeguards.[57]
The German Criminal Code and the Federal Constitutional Court (no. 2 BvR 2029/01) consider *Sicherungsverwahnung* as a measure of correction and prevention, because it is not aimed at punishing criminal guilt, but at protecting the public from a dangerous offender. This clear finding is, in the Court's view, not called into question by the fact that preventive detention was first introduced into German criminal law by the Habitual Offenders Act of 24 November 1933. This took place during the Nazi regime, as the provisions on preventive detention were confirmed by the German legislator – on several occasions – after 1945.[58] The law of 1933 is at the origin of the twin-track system of sanctions in German criminal law ("*System der Zweispurigkeit*"): the penalty (*Strafe*) is intended to punish guilt, while the security measure (Maßregel der Besserung und Sicherung, Tit. VI, § 61 § StGB) ensures the defence of society from dangerous perpetrators (it has a "purely preventive nature" aimed at protecting the public from a dangerous offender"). The European Court stresses that, apart from Germany, at least seven other Convention States have adopted systems of preventive detention in respect of convicted offenders who acted with full criminal responsibility when committing their offence(s), and who are considered dangerous to the public as they are liable to reoffend. Nevertheless, it must be noted that the same type of measure may be qualified as an additional penalty in one State and as a preventive measure in another. Thus, the supervision of a person's conduct after release, for example, is an additional penalty under Articles 131-36-1 et seq. of the French Criminal Code and a preventive measure under Articles 215 and 228 of the Italian Criminal Code. The "placement at the Government's disposal" of recidivists and habitual offenders in Belgium, for instance, which is in many ways similar to preventive detention under German law, has been considered as a penalty under Belgian law.[59] The French Constitutional Council, for its part, found in its decision of 21 February 2008 (no. 2008-562 DC) that the preventive detention recently introduced into French law could not be qualified as a penalty, but could nevertheless not be ordered retrospectively, notably in view of its indefinite duration.
The Court highlights that the "measure of preventive detention" (§ 66 StGB), just like a prison sentence, entails a deprivation of liberty. Moreover, having regard to the manner in which preventive detention orders are executed in practice in Germany, compared to ordinary prison sentences, it is striking that persons subject to preventive de-

56 See *ECtHR*, *M. v. Germany* (fn. 34), p. 3275. See *A.M. Maugeri*, La nozione e i principi della "materia penale" nella giurisprudenza delle Corti Europee, in: B. Montanari (ed.), La costruzione dell'identità europea: sicurezza collettiva, libertà individuali e modelli di regolazione sociale, 2013, p. 325.
57 *ECtHR*, *M. v. Germany* (fn. 34), margin no 125 et seq.
58 *Ibidem*, margin no 125.
59 See *ECtHR*, *Van Droogenbroeck v. Belgium*, Application no. 7906/77, Judgement 24 Jun 1982, European Human Rights Reports (EHRR) 1982, 4, p. 443, margin no 19.

tention are detained in ordinary prisons, albeit in separate wings. Minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order. This is further illustrated by the fact that there are very few provisions in the Execution of Sentences Act dealing specifically with the execution of preventive detention orders and that, apart from these, the provisions on the execution of prison sentences apply mutatis mutandis (sections 129 to 135 of the said Act).[60] Furthermore, having regard to the realities of the situation of persons in preventive detention, the Court notes that, pursuant to Article 66 of the CriminalCode, preventive detention orders may be made only against persons who have repeatedly been found guilty of criminal offences of a certain gravity. It observes, in particular, that there appear to be no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present and thus at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences.[61]

The Court agrees with the findings of both the Council of Europe's Commissioner for Human Rights (§ 206 of his report) and the CPT (§ 100 of its report) that persons subject to preventive detention, in view of its potentially indefinite duration, are in particular need of psychological care and support. The achievement of the objective of crime prevention would require, as stated convincingly by the CPT (ibid.), "a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option". Nevertheless the Court finds that there is currently an absence of additional and substantial measures – other than those available to all long-term ordinary prisoners serving their sentence for punitive purposes – to secure the prevention of offences by the persons concerned.[62] Moreover, the aims of the penalties and of the preventive detention partly overlap; pursuant to sections 2 and 129 of the Execution of Sentences Act, the execution of both penalties and measures of correction and prevention serves two aims, namely to protect the public and to help the detainee to become capable of leading a socially responsible life outside prison. Furthermore, given its unlimited duration, preventive detention may well be understood as an *additional punishment* for an offence by the persons concerned and entails a clear deterrent element. In any event, as the Court has previously found (*Welch* case[63]), the aim of prevention can also be consistent

60 *ECtHR*, *M. v. Germany* (fn. 34), margin no 127.
61 *Ibidem*, margin no 128.
62 *Ibidem*, margin no 129.
63 *ECtHR*, *Welch v. United Kingdom* (fn. 32).

with a punitive purpose and may be seen as a constituent element of the very concept of punishment.[64]

In relation to the second Engel criterion and in particular the procedures involved in the making and implementation of orders for preventive detention, the Court observes that preventive detention is ordered by the (criminal) sentencing courts. Its execution is determined by the courts responsible for the execution of sentences, that is, courts also belonging to the criminal justice system, in a separate procedure.[65]

Finally regarding the third Engel criterion, the severity of preventive detention, the Court observes that this measure entails detention which, following the change in the law in 1998, no longer has any maximum duration. Moreover, the suspension of preventive detention on probation is subject to a court's finding that there is no danger that the detainee will commit further (serious) offences (Article 67d of the Criminal Code), a condition which may be difficult to fulfil (also the Commissioner for Human Rights' report, § 203, has stressed that it was "impossible to predict with full certainty whether a person will actually reoffend"). Therefore, the Court cannot but find that this measure appears to be among *the most severe* – if not the most severe – which may be imposed under the German Criminal Code. It notes in this connection that the applicant faced more far-reaching detriment as a result of his continued preventive detention – which to date has been more than three times the length of his prison sentence – than as a result of the prison sentence itself.[66] In view of the foregoing the Court, looking behind appearances and making its own assessment, concludes that preventive detention under the German Criminal Code is to be qualified as a "*penalty*" for the purposes of Article 7 § 1 of the Convention.[67]

This ruling will impose a serious review of the relevant discipline on every legal order which include a twin-track system of sanctions (penalties plus security/preventive measures), such as the Italian one, in order to ensure compliance with the fundamental guarantees of criminal law – the principle of legality and non-retroactivity, the proportionality principle and of guilt – which are often violated by the security (preventive) measures. In the Italian system, for example, these measures, which are applicable to responsible and dangerous persons who are already under penalty, are becoming, as in the case examined by the EDU Court, additional penalties imposed in breach of the principle of legality and proportionality. This will continue as long as a maximum term of time or compensation mechanisms, or different structures for their execution, are not provided for, as well as in violation of non-retroactivity principle, because the irretrospective application is allowed (Article 200 cp) (the maximum term has been introduced by the recent legislative decree 81/2014).

64 *ECtHR*, *M. v. Germany* (fn. 34), margin no 129.
65 *Ibidem*, margin no 131.
66 *Ibidem*, margin no 132.
67 *Ibidem*, margin no 133.

1. Administrative sanctions.

According to the ECtHR's case law, many administrative offences may fall within the scope of the criminal head of Article 6.

The European Court has considered "criminal" some road-traffic offences punishable by fines or driving restrictions, such as penalty points, disqualifications[68] or the withdrawal of a driving licence, classified as administrative under Roman law. In the Court's opinion, the seriousness of this kind of measure lent it a punitive and deterrent character which made it comparable to a criminal sanction.[69] In these cases, actually, the Court adopts a very broad concept of criminal matter, maybe bringing the protection of safeguards a step too far.

Furthermore, the Court has classified as *criminal*: some minor offences which cause a nuisance or a breach of the peace;[70] offences against social security legislation (failure to declare employment, despite the modest nature of the fine imposed);[71] an administrative offence of promoting and distributing material instigating ethnic hatred, punishable by an administrative warning and the confiscation of the publication in question.[72]

Finally some punitive administrative offenses are qualified criminal by the European Court. Some examples are: the *Ordnungswidrigkeiten* of German law;[73] the *Verwaltungsstrafverfahren* of Austrian law;[74] the administrative proceeding in front of the Italian CONSOB, which applies sanctions so to protect the competition.[75]

68 *ECtHR*, *Lutz, Englert and Nölkenbockhoff v. Germany* (fn. 8), margin no 182; *Schmautzer v. Autriche*, Application no. 15963/90, Judgement 23 October 1995, Série A 1996, vol. 328; *Malige v. France*, Application no. 27812/95, Judgement 23 September 1998.

69 *ECtHR*, *Maszni v. Romania*, Application no. 59892/00, Judgement 21 September 2006.

70 *ECtHR*, *Lauko v. Slovakia* (fn. 16); *Nicoleta Gheorghe v. Romania* (fn. 46), margin no 25-26.

71 *ECtHR*, *Hüseyin Turan v. Turkey*, Application no. 11529/02, Judgement 4 June 2008, margin no 18-21.

72 *ECtHR*, *Balsytė-Lideikienė v. Lithuania*, Application no. 72596/01, Judgement 4 November 2008, margin no 61.

73 *ECtHR*, *Öztürk v. Germany* (fn. 1).

74 *ECtHR*, *Mauer v. Austria*, Application no. 35401/97, Judgement 18 February 1997, Recueil de Arrêts et Dêcisions 1997, I, n. 28, p. 76; *Palaoro v. Austria*, Application no. 16718/90, Judgement 23 October 1995, Série A, vol. 329, pp. 38-47; *Pramstaller v. Autriche*, Application no. 16713/90, Judgement 23 October 1995, *ivi* 1996, vol. 329, margin no 2; *Pfarrmeier v. Autriche*, Application no. 16841/90, Judgement 23 October 1995; *Schmautzer v. Autriche* (fn. 68), margin no 13; *Umlauft v. Austria*, Application no. 15527/89, Judgement 23 October 1995, *ivi*, 1996, vol. 328, margin no 37; *Gradinger v. Austria*, Application no. 15963/90, Judgement 23 October 1995, *ivi*, 1996, vol. 328, margin no 61.

75 *ECtHR*, *Grande Stevens v. Italy* (fn. 41), margin no 96; *Guisset v. France* (fn. 53), margin no 59; *Didier v. France,* Application no. 58188/00, Judgement 27 August 2002; *Lilly France S.A. v. France,* Application no. 53892/00, Judgement 14 October 2003; *Messier v. France,* Application no. 25041/07, Judgment 19 May 2009; *Dubus S.A. v. France*, Application no. 5242/04, Judgement 11 June 2009, margin no 38; *Menarini Diagnostics S.r.l.,* Application no. 43509/08, Judgement 27 September 2011, margin no 44.

The possibility to include in the definition of "criminal matters" an administrative punitive sanction against the competition was explicitly endorsed by the European Court of Human Rights in the case *Menarini v. Italy;* the Court considered that the fine imposed on the applicant company was a criminal penalty, so the criminal limb of Article 6 § 1 was applicable.

The ECtHR recognizes that anticompetitive practices, alleged in this case to the applicant company, do not constitute a criminal offence under Italian law because they are not sanctioned on the basis of criminal law, but law n. 287 of 10 October 1990 (the protective rules of the competition and the market). This law is designed to protect free market competition and the Competition Authority, an independent administrative authority, and have the objective to control the restrictive agreements and abuses of dominant positions. These are general interests of society, normally protected by criminal law. The sanction is mostly aimed to punish in order to avoid the recurrence of incriminating behavior. Inferring, in conclusion, "the sanction was based on norms pursuing both preventive and repressive goal (*mutatis mutandis, Jussila*, § 38)». In relation to the last criterion, the nature and severity of the sanction "which may be imposed" on the applicant, the Court highlights that although this sanction could not be replaced by a detention order for non-payment, it is still a "six millions euro sanction for repressive purpose, as it pursues the aim of punishing an irregularity, and preventive purpose in order to dissuade the company from reiterating its conduct".

Article 6 of the Convention does not exclude that in an administrative proceeding a "penalty" can be imposed by an administrative authority, so long as a posteriori control by a judicial body, having full jurisdiction, is provided for in this case. The applicant company had been able to challenge the penalty before the administrative court and to appeal against that court's decision to the Consiglio di Stato. According to the Court's case-law, these bodies met the standards of independence and impartiality required of a court. The administrative courts had examined the applicant company's various allegations, in fact and in law. They had thus examined the evidence produced by the AGCM. The Consiglio di Stato had also pointed out that where the administrative authorities had discretionary powers, even if the administrative court did not have the power to substitute itself for an independent administrative authority, it was able to verify whether the administration had made proper use of its powers. As a result, the role of the administrative courts had not been limited simply to verifying lawfulness. They had been able to verify whether, in the particular circumstances of the case, the AGCM had made proper use of it powers. They had been able to examine whether its decisions had been substantiated and proportionate, and even to check its technical findings. Moreover, the review had been carried out by courts having full jurisdiction, in so far as the administrative court and the Consiglio di Stato were able to verify that the penalty fits the offence, and they could have changed it if necessary. In particular the Consiglio di Stato had gone beyond a "formal" review of the logical coherency of the AGCM's reasoning and made a detailed analysis of the appropriateness of the penalty, having regard to the relevant parameters, including its proportionality. The decision of the AGCM had thus been reviewed by judicial bodies having full jurisdiction.

The ECtHR had already stated that Article 6, in its criminal aspect, is applied to the Competition Council decisions, with reference to some French administrative authorities competent in economic and financial law and having sanction powers[76], the Financial Markets Council[77] and banking Committee[78].

2. Disciplinary sanctions.

In the opinion of the ECtHR, furthermore, disciplinary sanctions can be included in the "criminal matter" when those sanctions "deserve the guarantees inherent in the criminal procedure".[79] For example offences against military discipline, carrying a penalty of committal to a disciplinary unit for a period of several months, fall within the ambit of the criminal head of Article 6 of the Convention.[80] On the contrary, strict arrest for two days has been held to be of too short a duration to belong to the "criminal law" sphere.[81] With regard to professional disciplinary proceedings, the Court has often considered it unnecessary to give a ruling on the applicability of Article 6 under its criminal head, having concluded that the proceedings fell within its civil head.[82]

However, in the case of disciplinary proceedings resulting in the compulsory retirement of a civil servant, the Court has found that such proceedings were not "criminal" within the meaning of Article 6, inasmuch as the domestic authorities managed to keep their decision within a purely administrative sphere.[83]

It also excluded from the criminal head of Article 6 a dispute concerning the discharge of an army officer for breaches of discipline,[84] disciplinary proceedings against a police investigator resulting in her dismissal[85] and disciplinary proceedings for professional misconduct against a judge of the Supreme Court resulting in his dismissal.[86]

While making "due allowance" for the prison context and for a special prison disciplinary regime, Article 6 may apply to offences against prison discipline, on account of the nature of the charges and the nature and severity of the penalties: charges of threat-

76 *ECtHR*, *Lilly France S.A. v. France* (fn. 76).
77 *ECtHR*, *Didier v. France* (fn. 76).
78 *ECtHR*, *Dubus SA v. France* (fn. 76).
79 *ECtHR*, *Campbell and Fell v. United Kingdom* (fn. 11), p. 502; *Engel and others v. The Netherlands* (fn. 8), margin no 36; see *A. Bernardi*, "Principi di diritto" e diritto penale europeo, Annali dell'Università di Ferrava (Ann. Un. Ferr.) 1988, p. 131 et seq.
80 *ECtHR*, *Engel and others v. The Netherlands* (fn. 8), margin no 85.
81 *Ibidem*.
82 *ECtHR*, *Albert and Le Compte v. Belgium* (fn. 8), margin no 30; *Harabin v. Slovakia*, Application no. 58688/11, Judgement 20 November 2012, margin no 124.
83 *ECtHR*, *Moullet v. France*, Application no. 27521/04, Judgement 13 September 2007.
84 *ECtHR*, *Sukütv. Turkey*, Application no. 59773/00, Judgement 12 January 2000.
85 *ECtHR*, *Nikolova and Vandova v. Bulgaria*, Application no. 20688/04, Judgement 17 December 2013, margin no 59.
86 *ECtHR*, *Oleksandr Volkov v. Ukraine*, Application no. 21722/11, Judgement 9 January 2013, margin no 92-95.

ening to kill a probation officer and assaulting a prison officer, resulting in forty and seven additional days' custody.[87]

However, proceedings concerning the prison system as such do not in principle fall within the ambit of the criminal head of Article 6.[88] Thus, for example, a prisoner's placement in a high-supervision unit does not concern a criminal charge; access to a court to challenge such a measure and the restrictions liable to accompany it should be examined under the civil head of Article 6 § 1.[89]

Measures ordered by a court under rules concerning disorderly conduct in proceedings before it (contempt of court) are considered to fall outside the ambit of Article 6 because they are akin to the exercise of disciplinary powers.[90] However, the nature and severity of the penalty can make Article 6 applicable to a conviction for contempt of court classified in domestic law as a criminal offence[91] or a regulatory offence.[92] As regards breach of confidentiality of a judicial investigation, a distinction must be made between, on the one hand, persons who above all others are bound by the confidentiality of an investigation, such as judges, lawyers and all those closely associated with the functioning of the courts, and, on the other hand, the parties, who do not come within the disciplinary sphere of the judicial system.[93]

With regard to contempt of Parliament, the Court distinguishes between the powers of a legislature to regulate its own proceedings for breach of privilege applying to its members, on the one hand, and an extended jurisdiction to punish non-members for acts occurring elsewhere, on the other hand. The former might be considered disciplinary in nature, whereas the Court regards the latter as criminal, taking into account the general application and the severity of the potential penalty which could have been imposed (imprisonment for up to sixty days and a fine in Demicoli v. Malta[94]).

3. Tax-surcharges.

Article 6 has been held to apply to tax-surcharges proceedings, on the basis of the following elements: (1) that the law setting out the penalties covered all citizens in their capacity as taxpayers; (2) that the surcharge was not intended as pecuniary compensa-

87 Respectively in *Ezeh and Connors v. the United Kingdom* (fn. 3), margin no 82; conversely, see *Štitić v. Croatia*, Application no 29660/03, Judgement 9 November 2006, margin 51-63.
88 *ECtHR* [CG], *Boulois v. Luxembourg*, Application no. 37575/04, Judgement 3 April 2012, margin no 85.
89 *ECtHR* [CG], *Enea v. Italy*, Application no. 74912/01, Judgement 17 September 2009, margin 98.
90 *ECtHR* [CG], *Ravnsborg v. Sweden*, Application no. 14220/88, Judgement 23 March 1994, margin no 34; *Putz v. Austria* (fn. 18).
91 *ECtHR* [CG], *Kyprianou v. Cyprus*, Application no. 73797/01, Judgement 15 December 2005, margin no 61-64, concerning a penalty of five days' imprisonment.
92 *ECtHR*, *Zaicevs v. Latvia*, Application no. 65022/01, Judgement 31 July 2007, margin no 31-36, concerning a penalty of three days' administrative detention.
93 *ECtHR*, *Weber v. Switzerland* (fn. 8), margin no 33-34.
94 *Ibidem*, margin no 32.

tion for damage but essentially as a punishment to deter reoffending; (3) that it was imposed under a general rule with both a deterrent and a punitive purpose; and (4) that the surcharge was substantial.[95]

The proceeding for imposing a fine for the offence of tax evasion falls, without doubt, under the concept of criminal law, as in the case of *A.P., M.P. And T.P. v. Switzerland* and in the case of *J.B. v. Switzerland.*[96]

The criminal nature of the offence may suffice to render Article 6 applicable, notwithstanding the low amount of the tax surcharge (10% of the reassessed tax liability in *Jussila v. Finland*[97]). Tax surcharges applicable to a restricted group of persons who pursue a specific economic activity may also qualify as "criminal" in the autonomous sense of Article 6 § 1, inasmuch as they are aimed at adapting the general obligation of paying taxes and other contributions due as a result of economic activities to specific circumstances.[98]

However, Article 6 does not extend either to "pure" tax-assessment proceedings or to proceedings relating to interest for late payment, inasmuch as they are intended essentially to afford pecuniary compensation for damage to the tax authorities rather than to deter reoffending.[99]

4. Extradition, arrest warrant and expulsion.

The extradition procedure, in the ECTHR's view, does not fall within the scope of criminal matter[100], and it does not involve the determination of a criminal charge against the applicant or his civil rights and obligations within the meaning of Article 6 of the Convention.[101]

The same consideration for the European arrest warrant procedure, which replaces the standard extradition procedure between member States of the European Union and pursues the same aim. The Court has established that the execution of a European arrest warrant is, in fact, practically automatic; the judicial authority does not carry out a

95 *ECtHR*, *Bendenoun v. France* (fn. 12).
96 *ECtHR*, *J.B. v. Switzerland* (fn. 1), margin no 44; *A.P.*, *M.P. and T.P. v. Switzerland*, Judgement 29 August 1997, Reports of Judgments and Decisions 1997-V, pp. 1487-88, 1519-20; *Mieg de Boofzheim v. France*, Application no. 52938/99, Judgement 3 December 2002; *Bendenoun v. France* (fn. 12), margin no 52 et seq.
97 *ECtHR*, *Jussila v. Finland* (fn. 19), margin no 38.
98 *ECtHR*, *Steininger v. Austria*, Application no. 21539/07, Judgement 17 April 2012, margin no 33-38.
99 *ECtHR*, *Mieg de Boofzheim v. France* (fn. 97).
100 *ECtHR*, *Trabelsi v. Belgium*, Application no. 140/10, Judgement 4 September 2014, margin no 159 et seq.: *Cipriani v. Italy*, Application no. 22142/07, Judgement 30 March 2010; *Raf v. Spain,* Application no. 53652/00, Judgement 21 November 2000; *Peñafiel Salgado v. Spain*, Application no. 65964/01, Judgement 16 April 2002; *Sardinas Albo v. Italy*, Application no. 56271/00, Judgement 17 February 2005, 2004-I; *Sarria v. Poland*, Application no. 80564/12, Judgement 12 December 2012; *Amrollahi v. Denmark*, Application no. 56811/00, Judgement 28 June 2011.
101 See *ECtHR*, *Peñafiel Salgado v. Spain* (fn. 101).

fresh examination of the warrant in order to check that it conforms to its own domestic law, and will only refuse its execution for reasons laid down by the Law.[102]

Furthermore, the procedures for the expulsion of aliens do not fall under the criminal head of Article 6, notwithstanding the fact that they may be brought in the context of criminal proceedings.[103]

On the contrary, the replacement of a prison sentence by deportation and exclusion from national territory for ten years may be treated as a penalty on the same basis as the one imposed at the time of the initial conviction.[104]

5. Political proceeding.

Article 6 has been held not to apply in its criminal aspect to proceedings concerning electoral sanctions;[105] the dissolution of political parties;[106] parliamentary commissions of inquiry;[107] and towards impeachment proceedings against a country's President for a gross violation of the Constitution.[108]

With regard to lustration proceedings, the Court has held that the predominance of aspects with criminal connotations (nature of the offence – untrue lustration declaration – and nature and severity of the penalty – prohibition on practising certain professions for a lengthy period) could bring those proceedings within the ambit of the criminal head of Article 6 of the Convention.[109]

6. The different stages of criminal proceedings, ancillary proceedings and subsequent remedies.

The European Court has established that the measures adopted for disorder or crime prevention are not covered by the guarantees of Article 6.[110] Similarly, the criminal

102 *ECtHR*, *Monedero Angora v. Spain*, Application no. 41138/05, Judgement 7 October 2008.
103 *ECtHR* [GC], *Maaouia v. France*, Application no. 39652/98, Judgement 5 October 2000, margin no 39.
104 *ECtHR*, *Gurguchiani v. Spain*, Application no. 16012/06, Judgement 15 December 2009, margin no 40 and 47-48.
105 *ECtHR*, *Pierre-Bloch v. France*, Application no. 24194/94, Judgement 21 October 1997, margin no 53-60.
106 *ECtHR* [GC], *Refah Partisi and Others v. Turkey*, Application no. 41340/98, 41342/98, 41343/98 et al, Judgement 13 February 2003.
107 *ECtHR*, *Montera v. Italy*, Application no. 64713/01, Judgement 9 July 2002.
108 *ECtHR* [GC], *Paksas v. Lithuania*, Application no. 34932, Judgement 6 June 2011, margin no 66-67.
109 *ECtHR*, *Matyjek v. Poland*, Application no. 38184/03, Judgement 24 September 2007; conversely, see *Sidabras and Džiautas v. Lithuania*, Application no. 55480/00, 59330/00, Judgement 27 July 2004.
110 Special supervision by the police: *ECtHR*, *Raimondo v. Italy*, Application no. 12954/87, Judgement 22 February 1994, Série A, vol. 281, margin 43; or a warning given by the police to a juvenile who had committed indecent assaults on girls from his school: *R. v. the United Kingdom*, Application no. 44875/98, Judgement 22 January 2003.

limb of Article 6 § 1 does not, in principle, come into play in proceedings concerning applications for legal aid.[111]

As regards the pre-trial stage (inquiry, investigation), the Court considers criminal proceedings as a whole. A person must be considered under charge since the suspects start to have significant repercussions on his/her situation[112] (a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected") even in the absence of any notification or prior to the date on which a jurisdictional authority is involved. The concept of "accused" of Article 6 also includes the suspect when the domestic authorities have plausible reasons for suspecting that person's involvement in a criminal offence.[113] Thus, for example, admissions made by a suspect during a roadside spot check "substantially affected" his situation although he was not formally accused of any criminal offence.[114] The Court has also held that a person in police custody who was required to swear an oath before being questioned as a witness was already the subject of a "criminal charge" and had the right to remain silent.[115]

The Court, in fact, recognizes the right of defence also in the preliminary investigation procedures that may lead to the acquisition of decisive evidence for the affirmation of the responsibility; and it has pronounced on the possibility of using evidence obtained in an investigative or administrative proceeding in a criminal trial.[116] For instance, Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.[117] Accordingly, Article 6 § 1 may be held to be applicable to the in-

111 *ECtHR*, *Gutfreund v. France*, Application no. 45681/99, Judgement 12 September 2003, margin no 36-37.

112 *ECtHR*, *Shabelnik v. Ucraina*, Application no. 16404/03, Judgement 19 February 2009, margin no 57; *Nuvoli v. Italy*, Application no. 41424/98, Judgement 16 May 2002, margin no 19; *Öztürk v. Germany* (fn. 1), margin no 50; *Foti v. Italy*, Application no. 7604/76, 7719/76, 7781/77, 7913/77, Judgement 10 October 1982, margin no 52; *Eckle v. Germany*, Application no. 8130/78, Judgement 15 July 1982, margin no 73; *Buzzelli* (fn. 4), p. 133.

113 *ECtHR*, *Brusco v. France*, Application no. 1466/07, Judgement 14 October 2010, margin no 47; *Bandaletov v. Ukraine*, Application no. 23180/06, Judgement 31 October 2010, margin no 56 and 61, where the applicant made a confession during the interview as a witness, and it was only after that confession that the police considered him a suspect.

114 *ECtHR*, *Aleksandr Zaichenko v. Russia*, Application no. 39660/02, Judgement 18 February 2010, margin no 43.

115 *ECtHR*, *Brusco v. France* (fn. 114), margin no 46-50.

116 *ECtHR*, *Funke v. France* (fn. 8), margin no 22; *Sanders v. United Kingdom,* Application no. 34129/96, Judgement 9 May 2000, p. 2066; *Schenk v. Switzerland*, Application no. 10862/84, Judgement 12 July 1988, Série A, vol. 140, margin no 29. See *A.M. Maugeri*, Il sistema sanzionatorio comunitario dopo la Carta europea dei diritti fondamentali, in: G. Grasso/R. Sicurella (eds.), Lezioni di diritto penale europeo, 2007, p. 234 et seq.

117 *ECtHR*, *Salduz v. Turkey*, Application no. 36391/02, Judgement 27 November 2008, margin no 55; see also *Dayanan v. Turkey*, Application no. 7377/03, Judgement 13 October 2009, margin no 31-32.

vestigation procedure conducted by an investigating judge, although some of the procedural safeguards envisaged by Article 6 § 1 might not apply.[118]

Therefore, some requirements of Article 6, such as, firstly, the right of defence or the reasonable time requirement (the concept of accusation affects the calculation of the dies to quo, the day from which it begins to measure the reasonableness of the length of the trial),[119] may also be relevant at this stage of proceedings in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.[120]

Moreover, Article 6 § 1 is applicable throughout the entirety of proceedings for the determination of any "criminal charge", including the sentencing process.[121]

However, it is not applicable to proceedings for bringing an initial sentence into conformity with the more favourable provisions of the new Criminal Code.[122]

Proceedings concerning the execution of sentences, such as proceedings for the application of an amnesty,[123] parole proceedings,[124] transfer proceedings under the Convention on the Transfer of Sentenced Persons,[125] or exequatur proceedings relating to the enforcement of a forfeiture order made by a foreign court,[126] do not fall within the ambit of the criminal head of Article 6.

Article 6 guarantees to apply in principle in relation to appeals on points of law[127] and to constitutional proceedings[128] when such proceedings are a further stage of the relevant criminal proceedings and their results may be decisive for the convicted persons. Article 6 does not apply to proceedings for the reopening of a case because a person whose sentence has become final and who applies for his or her case to be reopened is not "charged with a criminal offence" within the meaning of that Article.[129]

118 *ECtHR*, *Vera Fernández-Huidobro v. Spain*, Application no. 74181/01, Judgement 6 January 2010, margin no 108-14, concerning the applicability of the impartiality requirement to an investigating judge.

119 *Buzzelli* (fn. 4), p. 133.

120 *ECtHR*, *Imbrioscia v. Switzerland*, Application no. 13972/88, Judgement 24 November 1993, margin no 36.

121 *ECtHR*, *Phillips v. the United Kingdom*, Application no. 41087, Judgement 12 December 2001, margin no 39.

122 *ECtHR*, *Nurmagomedov v. Russia*, Application no. 30138/02, Judgement 7 June 2007, margin no 50.

123 *ECtHR*, *Montcornet de Caumont v. France*, Application no. 59290/00, Judgement 13 May 2003.

124 Commission decision, *Aldrian v. Austria*, 15 December 1987, no. 10532/83; see also *ECtHR*, *Macedo da Costa v. Luxembourg*, Application no. 26619/07, Judgement 5 June 2012.

125 *ECtHR*, *Szabó v. Sweden*, Application no. 28578/03, Judgement 27 June 2006; but see, for a converse finding, *Buijen v. Germany*, Application no. 27804/05, Judgement 1 April 2010, margin no 40-45, in view of the particular circumstances of the case.

126 *ECtHR*, *Saccoccia v. Austria*, Application no. 69917/01, Judgement 18 December 2008.

127 *ECtHR* [GC], *Meftah and Others v. France*, Application no. 32911/96, 35237/97, 34595/97, Judgement 26 July 2002, margin no 40.

128 *ECtHR*, *Gast and Popp v. Germany*, Application no. 29357/95, Judgement 25 February 2000, margin no 65-66; *Caldas Ramírez de Arrellano v. Spain*, Application no. 68874/01, Judgement 28 January 2003.

129 *ECtHR*, *Fischer v. Austria*, Application no. 37950/97, Judgement 29 August 2001.

Only the new proceedings, after the request for reopening has been granted, can be regarded as concerning the determination of a criminal charge.[130] Similarly, Article 6 does not apply to a request for the reopening of criminal proceedings following the Court's finding of a violation.[131] However, supervisory review proceedings resulting in the amendment of a final judgment do fall under the criminal head of Article 6.[132]

Lastly, Article 6 § 2 of the Convention (presumption of innocence) may apply to subsequent proceedings following the conclusion of criminal proceedings. Where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected.[133] However, in order to establish the applicability of Article 6 § 2 to the subsequent proceedings, the applicant must demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings.[134] Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt (ibid.). Following this approach, the Court held that Article 6 § 2 was applicable to compensation proceedings for a miscarriage of justice.[135]

IV. The ECJ case law about the concept of criminal matter.

In the European legal order, the determination of the scope of the concept of "criminal matter" is important in order to apply the fundamental principles and safeguards, which must be respected by the European authorities in the exercise of their punitive power, but also by the States Parties in the application of EU law and in all cases where there is a connecting element requiring compliance with a minimum threshold of protection of certain rights. They must not coincide with the least common denominator, but with the standard of the prevalent legal order and of the general trend.

130 *ECtHR*, *Löffler v. Austria*, Application no. 30546/96, Judgement 3 October 2000, margin no 18-19.
131 *ECtHR*, *Öcalan v. Turkey*, Application no. 46221/99, Judgement 12 May 2005.
132 *ECtHR*, *Vanyan v. Russia*, Application no. 53203/99, Judgement 15 December 2005, margin no 58.
133 *ECtHR* [GC], *Allen v. the United Kingdom* (fn. 6), margin no 103.
134 *Ibidem*, margin no 104.
135 *Ibidem*, margin no 106-08; see also margin no 98 for other examples where the Court examined the issue of the applicability of Article 6 § 2.

The European Court of Justice and the General Advocate for their opinions adopt the Engel criterions in order to establish the punitive nature of a sanction and the extension of the relative safeguards. For example in the case *Åklagaren v Hans Åkerberg Fransson* with the aim to apply the *ne bis in idem* as a general principle of European Union law in a case of accumulation of administrative and criminal penalties;[136] or in the case *Kapnoviomichania Karelia AEv. YpourgosOikonomikon*, in order to establish the punitive nature of a tax penalty.[137]

The European Legislature, first of all, does not consider remedial measures to be punitive. In the Regulation n. 2988/'95, in fact, which disciplines the European punitive power is specified in article 4, n. 4 that " The measures provided for in this Article shall not be regarded as penalties." In that article is imposed only the "withdrawal of the wrongly obtained advantage" as consequence of any irregularity. In the recent case *Bacău*[138], the ECJ has specified that the obligation to give back an advantage improperly received by means of an irregularity is not a penalty, but simply the consequence of a finding that the conditions required to obtain the advantage derived from EU rules have not been observed, so that advantage becomes an advantage wrongly received.[139]

The EU legal order also knows the traditional pecuniary sanctions imposed by the EU authorities and envisaged in many regulations adopted by the Council in the area

136 Opinion of Advocate General *Cruz Villalón*, 12.6.2012, case 617/10, margin no 72; Advocate General Campos *Sánchez-Bordona*, 12.1.2017, *Massimo Orsi*, cases 217/15 and 350/15, margin no 30/15 et seq..

137 Advocate General *Bot*, 28.1.2016, case 81/15; notwithstanding "the liability is classified in Greek law as a 'civil liability' which 'does not constitute an administrative penalty', and the Greek Government observes that the liability in question is in the nature not of a penalty but of a guarantee of payment of the amounts charged, there is no getting away from the fact that the customs offence referred to in Article 89 (2) of the Customs Code, under which an increased charge is to be levied on the persons responsible for such an offence, is defined in identical terms to the criminal offence of smuggling defined in Article 67(5) of law 2127/1993. Consequently, there is no watertight separation between customs penalties and criminal offences, especially as the joint and several liability of the authorised warehousekeeper is based on the application, 'by analogy', of Article 108 of the Customs Code, which allows the criminal court, when passing sentence, to declare the owner of the smuggled products to be jointly and severally liable with the person sentenced under criminal law for payment of the fine. Furthermore, unlike excise duties properly so-called, the increased charge imposed on the authorised warehousekeeper is both punitive, in that it penalises the warehousekeeper's failure to exercise adequate vigilance and diligence, and preventive, in that, according to the referring court, it seeks to guarantee the effectiveness of the fines imposed and to ensure that traders who profit from the activity in the context of which the smuggling was committed take all possible measures to prevent the commission of acts of smuggling. Those two objectives of punishment and deterrence of excise duty evasion are characteristic of criminal penalties. Finally, the tax penalties for which the authorised warehousekeeper may be declared jointly and severally liable can be substantial, amounting to up to 10 times the tax due" (margin no 45).

138 *European Court of Justice* (ECJ) 26.5.2016 (*Județul Neamț, Bacău*) joined cases 260/14 and 261/14, margin no 50.

139 See, to that effect, judgments of: *ECJ* 4.6.2009, case 158/08 (*Pometon*), margin no 28; 17.9.2014, case 341/13 (*Cruz & Companhia*), margin no 45 and the case-law cited, and 18.12.2014, case 599/13 (*Somvao*), margin no 36.

of competition on the basis of article 83 TEC (now 103 TFEU).[140] The jurisprudence of the Court of Justice and its largely prevalent doctrine affirm theirs non-criminal nature in the strict sense.[141] There are numerous arguments that support this interpretation: EU regulations explicitly provide for the non-criminal nature of the decisions to impose such sanctions; the fines are imposed by the EU Commission and not by a court; the inconvertibility to imprisonment in case of non-payment; not giving expression to social or ethical disapproval and the fact that they do not apply only to natural persons in contravention of the principle, still in force in criminal matters in some European countries, "societas delinquere non potest".[142] Furthermore, article 299 (ex Article 256 TEC) establishes that the acts of the Council and the Commission, which impose a pecuniary obligation on persons other than States, shall be enforceable; and the enforcement shall be governed by the rules of civil procedure in force in the State, where the sanction is carried out. This shows the non-criminal nature of the sanctions in question, because the execution of penalties would not be possible in accordance with the rules of the civil procedure code.[143]

The ECJ has, nevertheless, emphasised that these sanctions "are meant to suppress illegal activities and to prevent any recurrence", and that "they have repressive and deterrent purposes, going beyond the mere reimbursement of amounts unduly paid".[144] Furthermore, they can be considered administrative punitive and included in the broad concept of ECtHR's criminal matter.[145] The scholars stress the undoubtedly repressive

140 *U. Sieber*, Unificazione europea e diritto penale europeo, Rivista trimestrale di diritto penale dell'economia (RTDPE) 1991, pp. 974-975; *T. Oppermann*, Europarecht, 1991, p. 222; *R. Rinaldi*, Il regolamento del consiglio n. 1/2003: un primo esame delle principali novità e dei punti aperti della riforma sull'applicazione delle regole comunitarie in tema di concorrenza, Diritto del Commercio Internazionale (Dir. comm. internaz.) 2003, p. 143.

141 *F. Sgubbi*, voce Diritto penale comunitario, Digesto Discipline Penalistiche (DPP) 1990, p. 95; *L. Arnaudo,* Le sanzioni della disciplina comunitaria della concorrenza: natura, limiti, prospettive di riforma, Rivista italiana di diritto pubblico comunitario (RIDPC) 1998, p. 617.

142 *K. Tiedemann*, Das Kautions Recht der EWG – ein verdecktes Strafrecht?, Neue Juristische Wochenschrift (NJW) 1983, p. 2727; *contra C. Haguenau*, Sanctions pénales destinées à assurer le respect du droit communautaire, Revue du marché commun et de l'union européenne (Rev. marché commun et de l'Union eur.) 1993, p. 352 et seq.

143 *G. Grasso*, Comunità europee e diritto penale, 1989, p. 48 et seq.; *Id*., Nuove prospettive in tema di sanzioni amministrative comunitarie, Rivista italiana di diritto pubblico comunitario (RIDPC), 1994, p. 863.

144 *ECJ* 27.9.1992, case 240/90 (*Germany v. Commission*); *ECJ* 15 July 1970, case 41/69 (*Acf-Chemiefarma*), Racc. 1970; *H. Hamann*, Das Unternehmen als Täter im europäischen Wettbewerbsrecht, 1992, p. 182; see *G. Grasso*, Recenti sviluppi in tema di sanzioni amministrative comunitarie, Rivista trimestrale di diritto penale dell'economia (RTDPE) 1993, p. 742.

145 *K. Tiedemann*, Reform des Sanktionwesen auf dem Gebiete des Agrarmarktes der Europäischen Wirtschaftsgemeinschafts, Festschrift für G. Pfeiffer, 1988, pp. 114-115; *G. Grasso*, Comunità europee e diritto penale (fn. 144), pp. 54-55; *Id*., RIDPC 1994, p. 865; *Sgubbi*, DPP 1990, pp. 96-97; *Heitzer* (fn. 39), p. 21.

effectiveness of financial penalties imposed by the Commission for very important quantities.[146]

Even if in the absence, as observed by the Advocate Jacobs, of social disapproval (stigma) is not possible to consider these sanctions criminal in strictu sensu: "inasmuch as the sanction in question is primarily intended to have a deterrent effect and does not give expression to social or ethical disapproval, it cannot be considered to be penal in nature".[147]

The Advocate General Sharpston's opinion in the case C-272/09 P, KME Germany AG is very interesting in this subject. First of all the Advocate, quoting the three '*Engel* criteria', stresses that the formal classification in the legal system concerned is 'no more than a starting point', and in relation to the second and third criteria (the nature of the offence and the degree of severity of the penalty), he considers, in accordance with the ECtHR, whether the penalty is imposed under a general rule addressed to all citizens rather than to a group possessing special status and whether it is intended essentially as a punishment to deter re-offending rather than as pecuniary compensation for damage.[148] In light of those criteria, he concludes that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article 81(1) EC falls under the 'criminal head' of Article 6 ECHR as progressively defined by the European Court of Human Rights. The prohibition and the possibility of imposing a fine are enshrined in primary and secondary legislation of general application. The offence involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails a clear stigma; a fine of up to 10% of annual turnover is undoubtedly severe, and may even put an undertaking out of business; and the intention is explicitly to punish and deter, with no element of compensation for damage.

This Advocate General Sharpston's opinion is particularly interesting for the reason that the Advocate affirms that if the fining procedure in the present case falls within the criminal sphere for the purposes of the ECHR (and the European Charter), it differs from the hard core of criminal law. Consequently, the criminal-head guarantees will not necessarily apply with their full stringency'. That implies, in particular, that it may be compatible with Article 6(1) ECHR for criminal penalties to be imposed, in the first instance, not by an 'independent and impartial tribunal established by law' but by *an administrative or non-judicial body* which does not itself comply with the requirements of that provision, provided that the decision of that body is subject to sub-

146 See *H.H. Jescheck*, Possibilità e limiti di un diritto penale per la protezione dell'Unione Europea, Indice penale (IP) 1998, p. 232; *K. Ligeti*, European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law, Acta Juridica Hungarica 2004, p. 206 et seq.

147 In the case *ECJ*, *Germany v. Commission* (fn. 145); the same Advocate *Stix-Hackl*, 27.11.2001, case 210/00 (*Käserei Champignon Hofmeister GmbH & Co. KG contro Hauptzollamt Hamburg – Jonas*).

148 Advocate *Sharpston*, 10.2.2011, case C-272/09 P (*KME Germany AG*), margin no 63.

sequent control by a judicial body that has full jurisdiction and does comply with those requirements. This is affirmed by the ECtHR in the examined *Menarini* case[149]; and moreover the available forms of appeal make it possible to remedy any deficiencies in the proceedings at first instance. That Court has described 'full jurisdiction' in that sense as including "the power to quash in all respects, on questions of fact and law, the decision of the body below"[150]. In the Advocate's opinion the 'unlimited jurisdiction', conferred upon the General Court by Article 229 EC and Article 17 of Regulation N. 17, meets those requirements as regards appeals against the amount of the fine imposed, even if it is, as the Commission submits, a different concept from the 'full jurisdiction' criterion of the European Court of Human Rights. It must be taken to cover also appeals against, for example, the actual finding of an infringement; unlimited jurisdiction to cancel, reduce or increase the amount, with no restriction as to the type of grounds (of fact or law) on which it can be exercised, must necessarily been subjected to the guarantee required by Article 6 of the ECHR.[151]

Furthermore, the Engel's criteria have been used by the Advocate General Bot[152] in the *ThyssenKrupp Nirosta GmbH v European Commission* case. In the Advocate's opinion the fines referred to in Article 23 of Regulation No 1/2003 are comparable in nature and size to criminal penalties and the Commission's role, given its investigatory, examination and decision-making functions, can be assimilated to the one of investigating authorities in criminal proceedings against undertakings. "In my view, the procedure is therefore covered by 'criminal' within the meaning of Article 6(1) of the European Convention for the protection of human rights and fundamental freedoms and must therefore be subject to the guarantees provided for by the criminal justice component of that provision".[153]

The Advocate emphasises that in consideration of the competition law's aim (namely to protect economic public policy), the nature of the fines (both preventive and punitive in effect, with no element of compensation for damage) and their size (financial penalty of a high amount), such proceedings must, according to the European Court of Human Rights be subject to the guarantees provided for in Article 6 ECHR. Noting the special nature of litigation in competition cases, the Court applies elementary principles of criminal law and the fundamental principles enshrined in Article 6 ECHR. Thus, in *Commission* v *Anic Partecipazioni*, the Court recognised the applicability of the principle of personal liability to the competition rules. Then in *Hüls* v *Commission* the Court referred to the principle of the presumption of innocence enshrined in Article 6(2) ECHR. In that case, the Court held that, given the nature of the

149 See margin no 6.1.

150 Advocate General *Bot*, 21.6.2012, case 89/11 (*PE.ON Energie AG v European Commission*), margin no 63 et seq.

151 In the same direction *ECJ* 18.6.2013, case 501/11 P (*Schindler Holding Ltd and others*), margin no 30 et seq.

152 Advocate General *Bot*, 26.10.2010, case 352/09 P (*ThyssenKrupp Nirosta GmbH v European Commission*).

153 Margin no 49.

infringements in question and the nature and severity of the ensuing penalties, the principle of the presumption of innocence applies to procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments. Moreover, the Advocate highlights that particular attention should be paid to observance of the fundamental safeguards in Articles 47 to 49 of the Charter of Fundamental Rights of the European Union and to Article 6 ECHR.

This approach that allows applying the safeguards of the criminal matter to the EU punitive sanctions is consistent with the principle of the rule of law, which wants to limit any punitive power.

The second type of EU sanctions presents a *sui generis* content, which is difficult to classify in traditional sanctioning types, such as "total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage", "exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity, and so on. These penalties are considered by the Commission's Legal Service "administrative sanctions", a definition shared by the doctrine and by the Advocate Stix-Hackl in the case *Käserei Champignon*[154].

They cannot be considered criminal penalties in view of the arguments already made in relation to the centralized sanctions, and in particular on the basis of the nominalist criterion and the fact that criminal penalties are typical and formal in some jurisdictions and therefore these sanctions *sui generis* cannot be considered *penalties*; moreover the European legislator is not, in principle, competent to impose criminal sanctions.[155] These sanctions, furthermore, do not express any social disapproval.[156] Therefore it is only logical that its level should depend on the reprehensibility of the act only in so far as a distinction is made between an intentional infringement and other cases. Finally, it should also be noted that the sanction in question, unlike a penal sanction, is not dependent on personal fault, since the exporter is at liberty to pass on the burden of the sanction under a corresponding agreement with interested third parties such as the manufacturer, as for example in the main proceedings, by way of recovery.[157]

In the opinion of the Advocate within the overall context "the exporter should be regarded as a partner in the administration of benefits who has to be induced to fulfil his special obligations in relation to the granting of export refunds under threat of penalty. Seen against this background, the penalty rule in question is the legal consequence of his status as guarantor of the correctness of the refund application, which

154 Advocate Christine *Stix-Hackl* (fn. 148).

155 *Ibidem*, margin no 30; *Grasso*, RTDPE 1993, p. 741 et seq.; *H. Otto*, Die Strafbarkeit von Unternehmen und Verbänden, 1993, p. 27; *S. Manacorda*, Profili politico-criminali della tutela delle finanze delle Comunità europee, Cassazione penale (CP) 1995, p. 237; *T. Ballarino*, Lineamenti di diritto comunitario e dell'Unione europea, 1997, p. 229; *M. Böse,* Strafen und Sanktionen im Europäischen Gemeinschaftsrecht, 1996, p. 253 et seq.

156 Advocate *Stix-Hackl*, *Käserei Champignon Hofmeister GmbH & Co. KG contro Hauptzollamt Hamburg – Jonas* (fn. 148), margin no 34; see *Böse* (fn. 156), p. 337.

157 *Ibidem*, margin no 32 et seq..

would appear to be more akin to the civil law institution of a contractual penalty than to a penal sanction. In this connection, the national court rightly draws attention to the voluntary nature of participation in the export refund system". In this direction, scholars stress that these sanctions are linked to the exercise of a sort of administrative function relating to the discipline of a certain scheme of aid or subsidies, in order to ensure compliance with the conditions for granting benefit.[158]

In conclusion, however, the position of the Advocate is not so clear because she stresses that "finding a sanction to be non-criminal in nature does not have the effect of leaving the person subject to the regulation without legal protection….. the Court has always emphasised that fundamental rights are an integral part of the general principles of Community law which it is called upon to enforce. Finally, it is settled law... that the provisions of Community law must comply with the principle of proportionality".[159]

In relation to these kind of EU sanctions, the criteria elaborated by the ECTHR have been adopted also by the ECJ in the case C-489/10, Łukasz Marcin Bonda[160] in order to establish their nature.[161] The ECJ has particularly evaluated the nature of the measures provided for in the second and third sub paragraphs of Article 138(1) of Regulation n. 1973/2004; the Court affirms that the administrative nature of this sanction is not called into question by an examination of the case-law of the European Court of Human Rights on the concept of "criminal proceedings". On the basis of the first criterion, it is affirmed that the examined measures are not regarded as criminal in nature by European Union law, which must in the present case be equated to 'national law' within the meaning of the case-law of the European Court of Human Rights.

As regards the second criterion, in the opinion of the Court, it must be ascertained whether the purpose of the penalty imposed on the farmer is punitive. In the present case, the analysis in paragraphs 28 to 32 above shows that the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 are to apply only to economic operators who have recourse to the aid scheme set up by that regulation, and that the purpose of those measures is not punitive, but is essentially to protect the management of European Union funds by temporarily excluding a recipient who has made incorrect statements in his application for aid.

The Court highlights that the reduction of the amount of aid that may be paid to the farmer for the years following that in which an irregularity has been found is subject to the submission of an application in respect of those years; thus if the farmer makes no application for the following years, the penalty which may be imposed on him under Article 138(1) of Regulation No 1973/2004 becomes ineffective. That is also the case if

158 *Haguenau*, Rev. marché commun et de l'Union eur. 1993, p. 355.

159 Advocate *Stix-Hackl*, *Käserei Champignon Hofmeister GmbH & Co. KG contro Hauptzollamt Hamburg – Jonas* (fn. 148), margin no 42, which quotes "Judgment in Case 137/85 (cited in footnote 19, paragraph 13). See also the Opinion of Advocate General Léger in Case C-63/00 *Schilling and Nehring* [2002] ECR I-4483, paragraphs 40 ff.".

160 *ECJ* [GC] 5.6.2012, case 489/10 (*Łukasz Marcin Bonda*).

161 *Ibidem.*

the farmer no longer satisfies the conditions for the grant of the aid. Finally, the penalty also becomes partly ineffective where the amount of aid the farmer can claim in respect of the following years is lower than the amount of aid to be withheld pursuant to the measure reducing the aid wrongly paid. It follows that the second criterion mentioned in paragraph 37 above does not suffice to make the measures provided for in Article 138(1) of Regulation No 1973/2004 criminal in nature.[162]

Those penalties cannot be equated to criminal penalties on the basis of the third criterion (§ 44), in the opinion of the court, because the sole effect of the penalties provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004 is to deprive the farmer in question of the prospect of obtaining aid (§ 43).

The approach of this judgment is correct, but rather *formalistic*, because while recognizing that it is not a criminal sanction in the strict sense, the ECJ also denies the possibility to include the examined administrative sanctions in the wide concept of "criminal matter", drawn up by the European Court which also covers punitive administrative sanctions or even disciplinary if they have a punitive content, pursuing the general and specific deterrence purposes. The sanction entails the deprivation of "aid" (after application) and, therefore, the deprivation of something which is not a legal right or a recipient's interest, as emphasized by the ECJ in the examined case. One must, however, remember that in the agriculture and fishery this kind of aid is vitally important for the survival of many economic activities which base their own existence and development on these resources. This is so much so that Regulation No. 2988 / '95 has been elaborated to regulate, firstly, the EU punitive powers in the field of agriculture and fishery (although now this regulation assumed a general value). Article 5 of the Regulation No. 2988/'95 demands the guilt to apply sanctions which don't have a mere reparative character (governed by article 4), but, like the one involved in this case, assume a punitive character when they deny the possibility to obtain economic aids (over the imposition of any increases..). In conclusion, going beyond the appearances, it would be better to apply the safeguards of criminal matter to these *sui generis sanctions*.

V. The ECtHR case law about the nature of the confiscation.

In the following, the ECtHR's case law on confiscation will be examined as an example in order to highlight the difficulty of coherently applying the Engel's criteria by the European Court; some decisions are based on mere political choices or, at least, criminal political choices.

162 *Ibidem*, margin no 41-42.

1. The nature of the preventive confiscation and of the civil forfeiture.

The Court E.C.H.R. has always denied, since the *Marandino* (in this case the Commission) and the *Raimondo* cases, the punitive nature of the confiscation under article 2-ter law n. 575/1965 and, subsequently, article 24 d.lgs n. 159/2011, on the basis, as affirmed in the Supreme Court case law,[163] of the recognition of its preventive nature which is founded on the evaluation that the recipient represents a social danger.

The Court, already in the *Labita* case[164], has recognized the compatibility of preventive measures with ECHR only because they are based on an assessment of the recipient's social dangerousness. From the recognition of the preventive and non-punitive nature of the anti-mafia confiscation derive the consistency of this measure with the right to property (Article 1 of the 1st Additional Protocol to the Cedu) and the presumption of innocence (Article 6 § 2) and the principle of legality (Article 7) (retroactive application is permitted).[165]

The measure of prevention, in the opinion of the Court, cannot be compared to a criminal sanction according to the three criteria established in the Engel case.[166]

The Court, accepting the arguments of the Italian Government, recognizes that antimafia confiscation is a measure of prevention which has a distinct function and nature from that of criminal sanction. While the latter tends to repress the violation of a criminal law and hence its application is subordinate to the determination of an offense and the guilt of the defendant, the measure of prevention does not presuppose a crime and a conviction[167], but it seeks to prevent the commission from people who are considered dangerous. By accepting the case law of the Court of Cassation, the European Court denied that the respondent assumes the status of the accused and that confiscation constitutes substantially a criminal sanction, relevant to the purposes of the Convention, and stresses that the preventive proceeding is independent of the criminal pro-

163 Italian Supreme Court, United Sections, 25 March 2010, no. 13426, Cagnazzo, www.dejure.it; see Corte cost., 11 (12) July 1996, no. 275.

164 *ECtHR* [GC], *Labita v. Italy*, Application no. 26772/95, Judgement 1 March-6 April 2000, www.coe.int..

165 European Commission, 15.4.1991, no. 12386/86 (Marandino), Decisions et Rapports (DR) 70, p. 78; *ECtHR*, *Raimondo v. Italy* (fn. 111), vol. 281, margin no 7; *Prisco v. Italy*, Judgement 15 June 1999, Requeten. 38662/97, Decision as to the admissibility; *Madonia v. Italy*, Application no. 55927/00, Judgement 25 March 2003; *Andersson v. Italy*, Application no. 55504/00, Judgement 20 June 2002; *Arcuri and others v. Italy*, Application no. 52024/99, Judgement 5 July 2001; *Riela v. Italy*, Application no. 52439/99, Judgement 4 September 2001; *Bocellari and Rizza v. Italy*, Application no. 399/02, Judgement 13 November 2007. See *A.M. Maugeri*, Le moderne sanzioni patrimoniali tra funzionalità e garantismo, 2001, p. 530 (449 et seq.); *Id*., The criminal sanctions against the illicit proceeds of criminal organisations, New Journal of European Criminal Law (NJECL) 2012, p. 288; *Mazzacuva*, RIDPP 2013, p. 1928.

166 *ECtHR*, *Engel and others v. The Netherlands* (fn. 8), margin no 36.

167 *ECtHR*, *Madonia v. Italy* (fn. 166), margin no 4; *Andersson v. Italy*, Application no. 55504/00, Judgement 20 June 2002, margin no 4; *Arcuri and others v. Italy* (fn. 166), margin no 5; *Riela v. Italy* (fn. 166), margin no 6; *Bocellari and Rizza v. Italy* (fn. 166), margin no 8.

ceedings and does not involve a finding of guilt (a conviction). The anti-mafia confiscation presupposes only a preliminary statement of social dangerousness, based on suspicion of belonging to a mafia-type association of the affected person (and was subject to the application of a personal preventive measure) and therefore does not have any repressive function, but preventive, aimed at preventing the illicit use of the goods.[168]

In the opinion of the Court, the severity of the measure is not a sufficient criterion for determining whether it is a criminal sanction, emphasizing that confiscation is not an exclusive measure of criminal law but is widely used, for example, in administrative law. The legal order of the Council of Europe Member States shows that very strict measures, but necessary and appropriate to protect the public interest, are also provided for outside criminal law.[169]

In the *Gogitidze* case, the European Court does not qualify as "punishment" a form of non-conviction based confiscation, – civil proceeding in rem –, provided for in Georgia's order to subtract the proceeds of public corruption, without involving determination of a criminal charge. The Court considers this form of confiscation a measure of control of the use of property within the meaning of Article 1 of Protocol N. 1, which "is not of a punitive but of a preventive and/or compensatory nature", citing the case law about the Italian preventive confiscation.[170]

The compensatory aspect consisted in the obligation to restore the injured party in civil proceedings to the status which had existed prior to the unjust enrichment of the public official in question, by returning wrongfully acquired property either to its previous lawful owner or, in the absence of such, to the State.[171]

The Court, however, also highlights a deterrent aim of the civil proceedings in rem, in order to prevent unjust enrichment through corruption as such. It does so by sending a clear signal to public officials already involved in corruption or who are considering getting involved that their wrongful acts, even if they passed unscaled by the criminal justice system, would nevertheless not procure pecuniary advantage either for them or for their families.[172]

Actually, the European Court of Human Rights comes to conclusions in the judgments in question, that contradict its own elaborations on the autonomous concept of "criminal matter". It does so in order to justify the legitimacy of measures considered necessary to combat serious criminal phenomena, such as with the mafia in Italy.

168 *Ibidem*.

169 *ECtHR*, *Prisco v. Italy* (fn. 166); *Raimondo v. Italy* (fn. 111), margin no 16-17; *Madonia v. Italy* (fn. 166), margin no 4; *Bocellari and Rizza v. Italy* (fn. 166), margin no 6; *Riela v. Italy* (fn. 166), margin no 4-5; *Arcuri and others v. Italy* (fn. 166), margin no 3; Commission Eur., *Marandino* (fn. 166), p. 78.

170 *ECtHR*, *Gogitidze and other v. Georgia*, Application no. 36862/05, Judgement 12 May 2015, margin no 126; *AGOSI v. The United Kingdom*, Application no. 9118/80, Judgement 24 October 1986, margin no 65; *Riela v. Italy*, (fn. 166); *Arcuri and others v. Italy* (fn. 166).

171 *ECtHR*, *Gogitidze and other v. Georgia* (fn. 171), margin no 102.

172 *ECtHR, ibidem*; see, mutatis mutandis, *Raimondo v. Italy* (fn. 111), margin no 30; *Veits v. Estonia*, Application no. 12951/11, Judgement 10 April 2012, margin no 71; *Silickienė v. Lithuania*, Application no. 20496/02, Judgement 10 April 2012, margin no 65.

Against this position of the Court, it is possible to claim the punitive character of, first of all, the preventive confiscation, assuming that the anti-mafia confiscation is not based on the danger for the future commission of crimes, but on the suspicion of the owner's present membership to a mafia association or in any case of the perpetration of other crimes, which cannot be demonstrated (nature of the infringement). The measure is not turned away in the case of cessation of the alleged dangerousness of the indicted, but it is a definitive measure, applicable also in the case of the owner's death or in relation to the dead's heirs or even in the lack of current social dangerousness(article 2-bis, § 6-bis, Law No. 575/1965 now Article 18 anti-mafia code);[173] this measure includes also the stigmatisation of the recipient as "mafioso" or as "habitual authors of crimes", or, at least, in some way involved in criminal activities (nature of the sanction). The confiscation may affect all the assets, even if formally referred to other subjects, provided that these are in the real availability of the suspected, as well as the entire enterprise (severity of the penalty).[174]

2. The nature of the extended confiscation and other forms.

The European Court had affirmed the criminal nature of "confiscation", the extended form of ablation of illicit proceeds, of the English system of law in the *Welch* case, on the basis of some features from which the punitive nature of this sanction would come out, in addition to the preventive one.[175]

First of all, the confiscation is connected with a criminal offence and "before an order can be made under the 1986 Act the accused must have been convicted of one or more drug-trafficking offences.....".

Regarding the nature and scope of the measure, the European Court stresses that the sanction in question was introduced by the 1986 Act to overcome the inadequacy of the previous means of confiscation by allowing the courts to subtract profits that had been converted into other assets; a law that confers such extended powers also pursues the purpose of punishing the offender. Preventive and repairing purposes can coexist with the punitive one and can be considered as elements of a genuine punishment.

In several judgments of the British courts, this sanction is considered a penalty, although this criterion is not considered decisive, like the severity of the sanction.

173 Italian Supreme Court, 14 February 1997, *Nobile*, Cassazione penale (CP) 1997, p. 3170; Italian Supreme Court, United Sections, 3 July 1996, *Simonelli* ed altri, *ivi*, 1996, p. 3609; Cass., 17 July 1995, *D'Antoni*, Rivista penale (RP) 1996, p. 526; Italian Supreme Court, 2 May 1995, *Adelfio*, Cassazione penale (CP) 1996, p. 1601.

174 *A.M. Maugeri*, Una parola definitiva sulla natura della confisca di prevenzione? Dalle Sezioni Unite Spinelli alla sentenza Gogitidze della Corte Edu sul civil forfeiture, Rivista italiana di diritto e procedura penale (RIDPP) 2015, p. 945; *Id.*, La tutela della proprietà nella C.e.d.u. e la giurisprudenza della Corte europea in tema di confisca, in: M. Montagna (ed.), Sequestro e confisca nel sistema penale, 2017, p. 16; see *A. Arcieri*, Irretroattività della legge civile e rapporto tra gli art. 6 e 13 della Convenzione, in: P. Gianniti (ed.), La C.e.d.u. e il ruolo delle Corti, Commentario Scialoja/Branca/Galgano, 2015, p. 1531.

175 *ECtHR*, *Welch v. United Kingdom* (fn. 32), margin no 27 et seq. – 34.

Decisive features of the criminal nature are: the sweeping statutory assumptions in section 2 (3) of the 1986 Act that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise. The fact that the confiscation order is directed to the proceeds involved in drug-dealing and is not limited to actual enrichment or profit; the discretion of the trial judge in fixing the amount of the order, taking into consideration the degree of culpability of the accused; and the possibility of imprisonment in default of payment by the offender. These are all elements which, when considered together, provide a strong indication of, inter alia, a regime of punishment. "Taking into consideration the combination of punitive elements outlined above, the confiscation order amounted, in the circumstances of the present case, to a penalty".[176]

However in the *Phillips* case *c. Royaume-Uni*[177] and correspondingly in the *Grayson & Barnham* case[178], the European Court makes a complicated and complex reasoning. On the one hand, it recognizes that the confiscation provided by the Drug Trafficking Act 1994 represents a "penality" for the purpose of Convention relating to the right to property (article 1 prot. N. 1), as it is an interference under the second paragraph of that rule,[179] yet on the other hand the Court has denied, for certain profiles, the criminal nature of the proceedings. In regards the first of the above criteria – the classification of the proceedings under domestic law – the Court affirms that such an application does not involve the commission of a crime under Article 6, § 2, C.e.d.u. or a "new charge" in terms of the criminal law; confiscation orders are part of the sentencing process which follow upon the conviction of the defendant.[180] Turning to the second and third relevant criteria – the nature of the proceedings and the type and severity of the penalty at stake –, the Court recognizes that the assumption provided for in the 1994 Act, – that all property held by the applicant within the preceding six years are proceeds of drug trafficking –, requires the national court to assume that he had been involved in other unlawful drug-related activities prior to the offence of which he was convicted. This means a reversal of the burden of proof on the defendant (to prove, on the balance of probabilities, the legal origin of his assets) and substitute detention penalty in case of failing to pay the amount, established in the confiscation order. However, in the Court's opinion, the purpose of this procedure was not the conviction or acquittal of the applicant for any other drug-related offence, but to enable the national court to assess the amount at which the confiscation order should properly be fixed at. This procedure was analogous to the determination by the court of the amount of a fine or the length of a period of imprisonment.

176 *ECtHR*, *Welch v. United Kingdom* (fn. 32), margin no 29 et seq..
177 *ECtHR*, *Phillips v. the United Kingdom* (fn. 122).
178 *ECtHR*, *Grayson & Barnham v. The United Kingdom*, Application no. 19955/05 e 15085/06, margin no 37.
179 *Ibidem*.
180 Conforme *ECtHR*, *Piper v. the United Kingdom*, Judgement 21 July 2015, Application n. 44547/10, margin no 51.

Similarly, the Court has decided in the case of *Van Offeren* – the Netherlands, in relation to a form of extended confiscation provided for in article 36 of the Dutch Criminal Code,[181] pointing out in this case that the procedure for applying the confiscation only concerns the measure of the sanction and does not concern the guilt, judged in the main proceedings.

This change of evaluation by the European Court in relation to the British "confiscation" which, among other aspects, includes the possibility of imprisonment in default of payment by the offender, testifies the *lack of coherence* of the European Court, in order to support the national and international enthusiasm for this weapon against organised and economic crime, represented by the confiscation.

In the same direction, for example, the European Court has affirmed that a form of confiscation of the crime instrument, can be represented by a bus which is used for clandestine immigration, against a third innocent (the owner) (the Italian confiscation ex art. 12 of Legislative Decree no. 286 of 25 July 1998) and can be considered consistent with the Convention. This is due to the fact that it is not considered a penalty,[182] even if the confiscation of the instrument has also punitive nature because it subtracts something which is legally owned, affecting the property right.

More convincingly in the *Sud Fondi* case[183] the European Court has established that the confiscation against unlawful land development, and in particular of the land and the illegally built buildings, is a *penalty*. It found that the enforcement of the confiscation despite the decision to acquit the applicant companies had been unfounded and arbitrary and breached Article 7 of the Convention (no punishment without law) and of Article 1 of Prot. No. 1. In that regard, it is possible to stress that the confiscation against unlawful land development, without considering the various theories on its legal nature,[184] is applied as a consequence of the perpetration of a crime (nature of the infringement) and it has undoubtedly afflicting character for the landowner (the nature of the sanction). In addition to the penalty for the offense, he or she will lose their property right on the land with its value. If the landowner has already sold the lots, the Court can confiscate the sale proceeds meaning the owner will have to repay buyers,

181 *ECtHR*, *Van Offeren c. the Netherlands*, Application no. 19581/04, Judgement 5 July 2005.

182 *ECtHR*, *Yldrim v. Italy*, Application no. 38602/02, Judgement 10 April 2003, Cassazione penale (CP) 2004, p. 1413.

183 *ECtHR*, *Sud Fondisrl and Others v. Italy*, Application no. 75909/01, Judgement 20 January 2009; see also *Varvara v. Italy*, Application no. 17475/09, Judgement 29 October 2013; *G. v. United Kingdom*, Application no. 37334/08, Judgement 30 August 2011; *G.I.E.M. s.r.l. and others v. Italy*, Application no. 1828/06 and 2 others, Judgement 28 June 2018. *D. Pulitanò*, Personalità della responsabilità: problemi e prospettive, Rivista italiana di diritto e procedura penale (RIDPP) 2012, p. 1244 et seq.

184 *A. Albamonte*, Demolizione dell'opera abusiva e poteri del giudice penale, Cassazione penale (CP) 1988, p. 428; *A. Marini*, Commento all'art. 19 L. 28/2/1985 N. 47(Condono Edilizio), Legislazione penale (LP) 1985, p. 623; *S. Monaldi*, Commento all'art. 19, Leggi civili commentate (Leggi civ. comm.) 1985, p. 1093.

and will no longer have the property rights.[185] This overwhelmingly afflictive nature, with obvious pursuit of general and special prevention purposes, requires respect for safeguards of criminal law in the light of the ECTHR's case law (starting with the guilt principle), regardless of the fact that this form of confiscation is qualified as an administrative sanction,[186] or a criminal sanction in the strict sense of the term.[187]

VI. Conclusions: the concept of criminal matter as basis of the ius commune.

This case law on the autonomous concept of "criminal matter" has significantly contributed to the harmonisation of the punitive systems of law, including criminal ones, in Europe, because it has been the basis for the recognition of the fundamental principles and safeguards of the punitive legal order and rule of law.

Despite the ambiguities and uncertainties of the case law of the European Courts, which at times are bent on mere political compromise, the autonomous concept of "criminal matter" and the extension of the legal safeguards provided by articles 6 and 7 (as well as Article 4 of Protocol n. 7, *ne bis in idem*) EHR Convention have significantly contributed to the more general harmonisation of punitive systems,[188] including the criminal ones (both substantive and procedural). Harmonisation is realised by the application in national systems of the fundamental principles and rights recognized by the European Convention, even through the EHR Court control and its dynamic and evolutionary interpretation.[189]

Part of scholars, in fact, tends today to relativize the distinction between criminal sanctions and punitive administrative sanctions, as the same principles apply to both.[190]

Some resistance also emerged in the European Court of Justice's case law to recognise the punitive nature of EU sanctions. In any case the Court of Justice has the merit of having elaborated the principles of the punitive power since, in the European legal

185 Neither can we speak of mere restorative purpose because it would have been sufficient for that purpose the cessation of the unlawful land development, the confiscation of the profit and the demolition of the building already built.

186 See Italian Supreme Court, 24 February 1999, *Iacoangeli*, Rivista penale (RP) 1999, p. 543.

187 See *A.M. Maugeri*, Le moderne sanzioni patrimoniali tra funzionalità e garantismo, 2001, p. 142 et seq.; *Id*., (fn. 175), p. 23; *A. Balsamo*, La speciale confisca contro la lottizzazione abusiva davanti alla Corte Europea, Cassazione penale (CP) 2008, p. 3504 et seq.

188 *Bernardi*, Ann. Un. Ferr. 1988, p. 114 et seq. and 134-135; *Id*., Europeizzazione del diritto penale e progetto di Costituzione europea, Diritto penale e processo (DPP) 2004, p. 188; *Teitgen-Colly* (fn. 26), p. 312.

189 See, neverthless, *P. Lafarge*, Les garanties du procès équitable, in: Delmas-Marty (fn. 26), p. 283; *A. Weber*, Sviluppi nel diritto amministrativo europeo, Rivista italiana di diritto pubblico comunitario (RIDPC) 1998, p. 589 et seq.

190 *J. Vervaele*, Procédures communautaires: enquête et mise en œuvre des sanctions, in: Delmas-Marty (fn. 26), p. 256; see *J. Biancarelli*, L'ordre juridique communautaire a-t-il compétence pour instituer des sanctions?, in: Delmas-Marty (fn. 26), p. 272; *A. Tesauro*, La sanction des infractions au droit communautaire, Rivista di diritto europeo (RDE) 1992, p. 506.

order (previously the "Communities'), there was no explicit provision for the protection of these principles. According to the Court, the sources of these human rights principles were the constitutional traditions common to the Member States and international treaties upon which Member States have collaborated or to which they have acceded.[191] The European Convention of Human Rights (ECHR) played a key role in this. After, the EU's Charter of Fundamental Rights of 7 December 2000, as adapted at Strasbourg on 12 December 2007 ("which shall have the same legal value as the Treaties", article 6 TEU) has expressly recognised these principles. Chapter VI was devoted to the issue of justice, dealing with the right to an effective remedy and to a fair trial. Furthermore it looked at the presumption of innocence, the rights of the defense in due process, the principles of legality[192] and proportionality of penalties with respect to offenses, and finally the right not to be tried or punished twice for the same offense(*ne bis in idem*).[193]

The Court of Strasbourg, together with the Court of Justice of the European Union and the national Constitutional Courts, thus participates in the *pretoria* activity of "Europeanization of the guarantees" in criminal matters in the context of this so-called multilevel constitutionalism, which feeds and nourishes the constitutional traditions common to the Member States of the European Union (Article 6 of the Lisbon Treaty).[194] Scholars talk of *ius commune* in relation to fundamental rights or to the set of principles derived from the EHR Court's jurisprudence.

In conclusion, from the European Courts' case-law, it is possible to infer that a "punitive legal order" emerged at the European level. It appears to be tailored on the

191 See *ECJ* 26.6.2007, case 305/05 (*Ordre des barreaux francophones et germanophone/ Conseil des ministres*), margin no 29; 3.5.2005, cases 387/02, 391/02 and 403/02 (*Silvio Berlusconi and a.*), margin no 67; 20.6.2003, cases 20/00, 64/00 and 12.6.2003, case 112/00 (*Booker Aquaculture Ltd, Marine Harvest Mc Connell, Hydro Seafood GSP Ltd and the Scottish Ministers, Schmidberger*), Racc. I-5659, margin no 71; 15.10.2002, case 238/99 (*Lymburgse Vinyl Maatschappij NV (LVM) and others*), margin no 167; 29.1.1998, case 113/96 (*Dubois*), *ivi*, margin no 125; 29.5.1997, case 299/95 (*Friedrich Kremzow v. Repubblica d'Austria), ivi,* p. I-2629; 13.12.1979, case 44/79 (*Hauer*), *ivi*, 1979, p. 3727; 18.10.1975, case 36/75 (*Rutili*), *ivi*, p. 1219; 14.5.1974, case 4/73 (*Nold)*, *ivi*, p. 491; 17.12.1970, case 11/70 (*Internationale Handel gesellschaft*), *ivi,* p. 1125; 12.11.1969, case 29/69 (*Stauder*), *ivi*, p. 1969, margin no 419; 5.2.1963, case 26/62 (*Van Gend& Loos*), *ivi*, p. 1963, 1; Tribunal, 30.3.2000, case 51/96 *Miwon Co. Ltd*. c. *Consiglio dell'Unione europea*, margin no 19.

192 *Inter alia ECJ* 10.11.2011, case 405/10, reference for a preliminary ruling under Article 267 TFEU from the Amtsgericht Bruchsal (Germany), made by decision of 26 July 2010, received at the Court on 10 August 2010, in criminal proceedings against *Özlem Garenfeld*, margin no 48..

193 *M. Saulle*, La Carta europea dei diritti fondamentali, Affari sociali internazionali 2001, p. 104. See *Maugeri* (fn. 117), p. 131 et seq. – 217 et seq.

194 *V. Manes*, La lunga marcia della Convenzione europea ed i nuovi "vincoli" per l'ordinamento (e per il giudice) penale interno, in: V. Manes/G. Zagrebelsky (eds.), La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano, 2011, p. 8; see *A. Von Bogdandy*, Grundrechts Gemeinschaft als Integrations Ziel?, Juristen Zeitung (JZ) 2001, p. 157 et seq.; *Id.,* Comunità di diritti fondamentali come meta dell'integrazione? I diritti fondamentali e la natura dell'Unione Europea, Diritto pubblico (DP) 2001, p. 849 et seq.

teleological interpretation of the Courts, an interpretation that is increasingly imposing especially with respect to initiatives taken by individual States in the context of the decriminalizing tendency, and aimed at developing alternative models for protecting legal interests (in accordance with the principle of extrema ratio). Beyond the formal labeling of statutory punitive mechanisms, these alternative models can be taken from the European Convention or European Charter only if there is a "real rebuke of the sanctioning response and its effects, if not even a different conformation of the structure of the offence".[195]

195 *Bernardi*, Ann. Un. Ferr. 1988, p. 114 et seq. and 134-135; *Id.*, DPP 2004, p. 188; see *Teitgen-Colly* (fn. 26), p. 312; *S. Manacorda*, L'efficacia espansiva del diritto comunitario sul diritto penale, Foro italiano (FI) 1995, c. 70; *M. Darmon*, The Task of the Court of Justice and the System of the Brussels Convention, in: H. Duintjer Tebbens/T. Kennedy/C.H. Kohler (eds.), Civil Jurisdiction and Judgments in Europe, 1992, p. 8.