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Four Dimensions of *Nulla Poena Sine Culpa*: The Principle of Individual Culpability in Contexts of Criminal and Quasi-criminal Law Enforcement in Europe

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Wenn der Stein aus der Hand ist, ist er des Teufels.[1]

I. Introduction

The aim of this contribution is to describe in broad outlines the extent to which the classical criminal law principle of *nulla poena* (or *nullum crimen*) *sine culpa*, or of individual culpability, fulfils a structuring function in constraining liability in European criminal law and in a limited number of adjacent fields within European law which can, and will henceforth, be referred to with the term 'quasi-criminal law'. For the purposes of this chapter, this term is taken to denote legal domains with a European law pedigree that are not formally or officially classified as criminal law, but that are imbued with potentially very severe punitive measures, which qualify as 'penalties' within the meaning of Articles 6 and 7 of the European Convention of Human Rights and Fundamental Freedoms (ECHR). In what follows, examples will be drawn mainly from European competition law, but also from a number of other fields of punitive administrative law. The doctrinal status and the structuring efficacy of the principle of *nulla poena sine culpa* are rather unclear within these quasi-criminal law domains.

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[1] German saying; cp GWF Hegel, *Grundlinien der Philosophie des Rechts*, H Reichelt (ed) (Frankfurt am Main, Ullstein, 1972 [1821]) para 119 (*Zusatz*) 112: 'Ein altes Sprichwort sagt mit Recht: der Stein, der aus der Hand geworfen wird, ist des Teufels. Indem ich handle, setze ich mich selbst dem Unglück aus: dieses hat also ein Recht an mich, und ist ein Dasein meines eigenen Wollens.' ('An old proverb correctly says: a stone flung from one's hand belongs to the devil. When I act, I expose myself to bad luck; consequently, this bad luck has a right over me and is a manifestation of my own will.')

However, the principle is doctrinally underdeveloped within European criminal law as well, despite its long-standing and deep-seated position within most national systems of criminal law. As is well-known, the Lisbon Treaty has abolished the so-called 'pillar structure' that was introduced in the Maastricht Treaty. All policy areas of the European Union (EU) – including that of judicial cooperation in matters of criminal law in the 'Area of Freedom, Security and Justice' (AFSJ) – were thereby merged into one institutional framework. According to paragraphs 1 and 2 of Article 83 of the Treaty on the Functioning of the European Union (TFEU):

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension …
2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.[2]

Numerous measures that include provisions on definitions of offences and on appertaining sanctioning levels have meanwhile been adopted on the basis of this provision.[3] However, with regard to the *general part* of substantive criminal law – that is, the concepts and principles that apply to all criminal offences or to broad categories of these – the EU has up to now shown considerably less legislative diligence. European legislation generally only *refers* to general concepts such as intention, attempt, or participation, without providing definitions of these concepts. According to Jeroen Blomsma, the general part of substantive criminal law has so far remained 'a blind spot in a Union that focuses predominantly on the special part of substantive criminal law'.[4] This is not to deny that the EU has dealt with aspects of the general part on some occasions. And the Court

[2] The legislative competence created by Art 83(1) TFEU is subject to a *numerus clausus* system, which means that legislative initiatives may only concern offences belonging to one of the offence categories listed. Art 83(2) TFEU provides for an ancillary legislative competence for criminalisation based on considerations of *effet utile*; see V Franssen, 'EU Criminal Law and *Effet Utile*: A Critical Examination of the Union's Use of Criminal Law to Achieve Effective Enforcement' in JB Banach-Gutierrez and C Harding (eds), *EU Criminal Law and Policy. Values, Principles and Methods* (Abingdon, Routledge, 2017) 114–46. It is still unsettled whether Art 325 TFEU contains a separate basis for legislation with respect to fraud and other illegal activities that affect the EU's financial interests; see A Klip, *European Criminal Law. An Integrative Approach*, 3rd edn (Cambridge, Intersentia, 2016) 180–90.

[3] An overview of these measures is provided by J Ouwerkerk and W Geelhoed, 'EU Criminal Law' in PJ Kuijper, F Amtenbrink, D Curtin, B De Witte, A McDonnell and S Van den Bogaert (eds), *The Law of the European Union* (Deventer, Kluwer Law International, 2018) 696–701; and by K Ambos, *European Criminal Law* (Cambridge, Cambridge University Press, 2018) 317–86.

[4] See J Blomsma, *Mens Rea and Defences in European Criminal Law* (Cambridge, Intersentia, 2012) 6. The rather modest or even reluctant attempts at contributing to the forming of a general part of European substantive criminal law can presumably (at least partly) be explained by the respect for the diversity of national criminal law traditions. See V Reding, 'On Substantive Criminal Law of the European Union' in A Klip (ed), *Substantive Criminal Law of the European Union* (Antwerp, Maklu, 2011) 12: 'Criminal law is an area where diversity within Europe is great, and these differences are bound to stay. This is because, like no other area of law, criminal law reflects the basic values, customs and choices of any given society'. The sensitive nature of this diversity is reflected in the so-called 'emergency brake procedure' of Arts 82(3) and 83(3) TFEU; see Klip, *European Criminal Law* (n 2).

of Justice of the European Union (CJEU) has in some cases expressed its view on the meaning of certain concepts from the general part. All in all, however, the general part of substantive EU criminal law can currently at best be said to have a fragmentary and nascent character.[5]

This is saliently exemplified by the main topic of the present contribution: the principle of *nulla poena sine culpa*. According to a critical 'Manifesto on European Criminal Policy' that was published in 2009 by a group of scholars in the field of European criminal justice – united in a 'European Criminal Policy Initiative' – certain aspects of the principle of *nulla poena sine culpa* appear sometimes, erroneously, to be not (or insufficiently) adhered to by the European legislature.[6] The Manifesto identifies six 'fundamental principles' of substantive criminal law policy, the third of which is denoted as 'the principle of guilt (mens rea)'. This principle, according to the Initiative, serves as 'a guarantee that human dignity will be respected by criminal law' and 'is in conformity with the generally accepted perception of guilt within the system of administrative Community sanctions'. Moreover, the principle stipulates that the imposition of penalties must correspond to 'the guilt of the individual' and be 'not disproportionate to the criminal offence'.[7] The Manifesto makes reference to a number of legal acts within the broad field of European criminal law that, according to the members of the Initiative, either respect or fail to respect certain aspects of the principle of guilt. The Manifesto primarily focuses on two aspects: the requirement that offence definitions contain a subjective fault element or mens rea element (typically that of intention), and the requirement that penalties are commensurate with the offender's culpability and the seriousness of his or her offence.

Both these requirements are indeed highly important. It must be noted, however, that these aspects clearly do not provide an exhaustive description of the substance of the principle; its ambit is considerably wider. In this contribution, the principle of guilt – that will hereinafter be referred to as the principle of individual culpability or as the principle of *nulla poena sine culpa* – will be dissected into four normative dimensions. It will be argued that the principle demands that the attribution of criminal liability and the imposition of a criminal sanction are subject to (i) the condition that the liable subject can legitimately be considered the 'author' of the offence,[8] (ii) the condition that the offence was committed intentionally, recklessly, or at least negligently, (iii) the condition that it

[5] See A Klip, 'Towards a General Part of Criminal Law for the European Union' in A Klip (ed), *Substantive Criminal Law of the European Union* (Antwerp, Maklu, 2011) 15–33; Klip, *European Criminal Law* (n 2) 195–96; Ambos, *European Criminal Law* (n 3) 324; Ouwerkerk and Geelhoed, 'EU Criminal Law' (n 3) 695.

[6] European Criminal Policy Initiative, 'A Manifesto on European Criminal Policy' (2009) 12 *Zeitschrift für internationale Strafrechtsdogmatik* 707. The other five principles referred to are: 'the requirement of a legitimate purpose', 'the *ultima ratio* principle', 'the principle of legality', 'the principle of subsidiarity', and 'the principle of coherence'. The group also published a 'Manifesto on European Criminal Procedure Law' (2013) 11 *Zeitschrift für internationale Strafrechtsdogmatik* 430.

[7] European Criminal Policy Initiative, 'A Manifesto on European Criminal Policy' (n 6) 707–08. The Manifesto makes a reservation with regard to legal entities; according to the Initiative, whether or not they can act culpably and be held criminally liable is not to be determined at the European level but should be dealt with at the national level. See sections III.A. and III.C. below.

[8] Vanessa Franssen considers this dimension to be an aspect of a related but separate principle: the principle of 'personal punishment'. See V Franssen, 'Corporate Criminal Liability and Groups of Corporations. Need for a More Economic Approach?' in K Ligeti and S Tosza (eds), *White Collar Crime. A Comparative Perspective* (Oxford, Hart Publishing, 2018) 277–305, 288–89.

can reasonably be assumed that the liable subject could have avoided his or her wrongful action (and that unavoidability must be assumed in cases where generally recognised exculpatory defences apply that annul criminal liability), and lastly (iv) the condition that criminal penalties imposed are proportionate to the liable subject's culpability and to the gravity of his or her offence.

These four dimensions of the principle of individual culpability form the focal points of this contribution. To what extent do these dimensions fulfil a structuring function in constraining liability in both European criminal law and European quasi-criminal law? And to what extent may the principle of *nulla poena sine culpa* be said to constitute a *distinguishing* feature between criminal law, on the one hand, and quasi-criminal law, on the other?[9] A satisfactory answer to these questions requires some preliminary explanation. This is offered in section II, which starts with a discussion of the main historical and philosophical background of the principle of individual culpability, followed by a rough comparative account of the ways in which the principle is incorporated in different contemporary criminal law systems in the EU.[10]

The following sections deal with the different dimensions of the principle of individual culpability individually. Section III addresses the abstract and general issue of who can qualify as a liable person in a punitive context. In this connection, attention is paid to the notions of personal agency and individual responsibility.[11] Section IV is devoted to the important concept of mens rea. It discusses the central subjective fault requirements of intention, recklessness, and (serious) negligence.[12] Section V addresses the concept of personal blameworthiness, which is grounded in the presupposition that the defendant was able to avoid his or her misconduct. In this connection, attention is drawn mainly to two types of exculpatory defences: duress or *force majeure* and mistake of law.[13] Section VI deals with the fourth and last dimension of the principle of *nulla poena sine culpa*: the condition that (criminal or administrative) penalties imposed are proportionate to the liable subject's culpability and to the gravity of his or her wrongdoing.[14]

[9] See Franssen, 'Corporate Criminal Liability' (n 8) 288.

[10] In this connection reference will be made predominantly to the criminal law systems of Germany and the Netherlands as examples of systems from the continental tradition, and to the criminal law system of England and Wales as an example of a system from the Anglo-American tradition (in the realisation that it is still highly uncertain what will be the effects of Britain leaving the EU, on whatever terms are eventually agreed upon, for the content of the criminal law of England and Wales.)

[11] In particular with reference to the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) of 28 June 2018, *GIEM Srl et al v Italy* (App No 1828/06) and the cases of CJEU 7 January 2004, C-204/00 P *Aalborg-Portland A/S et al v Commission* (EU:C:2004:6) and CJEU 10 September 2009, C-97/08 *Akzo Nobel NV et al v Commission* (EU:C:2009:536).

[12] It does so in view of three cases in particular: CJEU 13 December 2018, C-412/17 and C-474/17 *Touring Tours und Travel GmbH and Sociedad de Transportes SA v Bundesrepublik Deutschland* (EU:C:2018:1005), CJEU 23 December 2009, C-45/08 *Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen* (EU:C:2009:806), and CJEU 3 June 2008, C-308/06 *Intertanko et al v Secretary of State for Transport* (EU:C:2008:312).

[13] With reference respectively to CJEU 11 July 2002, C-210/00 *Käserei Champignon Hofmeister GmbH and Co KG v Hauptzollamt Hamburg-Jonas* (EU:C:2002:440), and CJEU 18 June 2013, C-681/11 *Bundeskartellanwalt v Schenker and Co AG* (EU:C:2013:404).

[14] This discussion is based on a reading of, inter alia, ECtHR [GC] 15 November 2016, *A and B v Norway* (App Nos 24130/11, 29758/11) [2016] ECHR 987, and CJEU 20 March 2018, C-537/16 *Garlsson Real Estate SA et al v Commissione Nazionale per le Società e la Borsa (Consob)* (EU:C:2018:193).

II. Origins and Ramifications of *Nulla Poena Sine Culpa*

A. Introduction: The Concept of a Principle

According to a famous Latin phrase, *actus non facit reum nisi mens sit rea*, which is to say: an act does not make one guilty unless one's mind is (also) guilty.[15] As will be seen in the next subsection, the requirement of a 'guilty mind' can be explained from a historical perspective as a safeguard against basing criminal liability solely on the harmful character of the action performed or of its outcomes. A person may be held criminally liable only if it can be proved, or at least be reasonably assumed, that he or she was able to exercise a sufficient degree of control over his or her actions, in other words: that he or she could have *avoided* the prohibited conduct. As robust as this may sound, different legal traditions have developed rather differing ways of assimilating the principle of individual culpability into the main structure of general conditions for criminal liability. This is hardly surprising, considering that we are dealing here with a *principle* of criminal law. Principles, according to Jeremy Horder and Andrew Ashworth, differ from 'ordinary' legal standards 'in that they have a "supervisory" function. The role of principles is to provide a guide to making, and a critical standard for judging, the shape and character of rules and standards in the rest of criminal law.'[16]

This 'supervisory' function necessarily lends principles a certain measure of generality and abstractness. The Dutch criminal law scholar Antonie Peters emphasised that legal principles are essentially *non-instrumental* in that their meaning may not be made dependent on official state policy, and in that their main purpose is to protect the less powerful or vulnerable legal subjects vis-à-vis the state.[17] Peters argued furthermore that principles are *open-ended* and therefore open to a variety of interpretations, which implies that their normative purport can never be exhaustively captured by any given set of positive regulations.[18] This partially explains why the principle of individual culpability functions in differing ways in different criminal law jurisdictions. It also partially explains why different meanings have been ascribed to the principle in different times. The notion of culpability has certainly not always occupied a (central) position among the conditions for criminal liability. In fact, the principle of individual culpability is a rather modern feature of the criminal law's doctrinal make-up.

[15] See AP Simester, JR Spencer, F Stark, GR Sullivan and GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 7th edn (Oxford, Hart Publishing, 2019) 9.

[16] J Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford, Oxford University Press, 2016) 65.

[17] AAG Peters, *Het rechtskarakter van het strafrecht* (Deventer, Kluwer, 1972). A Spanish translation of this lecture is included in the volume: WPJ Pompe and AAG Peters, *La Escuela Penal de Utrecht*, (trans C Estela Teseira and G Hofman) (Buenos Aires, Ediar, 2016) 63–88. See on the non-instrumental nature of principles also J Gardner, 'Ashworth on Principles' in L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice. Essays in Honour of Andrew Ashworth* (Oxford, Oxford University Press, 2012) 12–14. And see in the same volume N Lacey, 'Principles, Policies, and Politics of Criminal Law', 19–35.

[18] Peters, *Het rechtskarakter* (n 17). See on Peters' views on principles as non-instrumental and open-ended phenomena: AA Franken and PTC van Kampen, 'Law Like Love' in F de Jong (ed), *Overarching Views of Crime and Deviancy. Rethinking the Legacy of the Utrecht School* (The Hague, Eleven International Publishing, 2015) 183–201; and see in the same volume F de Jong and C Kelk, 'Overarching Thought: Criminal Law Scholarship in Utrecht', 60–66.

Before we can embark on the endeavour of accounting for the ways in which, and the degree to which, the principle of *nulla poena sine culpa* structures issues of accountability in contexts of (quasi-)criminal law enforcement within the EU, it is necessary, therefore, to address a number of preliminary issues. This is what the present section sets out to do. Subsection II.B will discuss the main historical and philosophical origins of the principle of individual culpability in criminal law. To this end, three fields of meanings within the rather labyrinthine notion of 'guilt' will be discerned and discussed, following which attention will be focused on the question: who can qualify as a subject to whom criminal liability may be imputed? Subsection II.C, subsequently, offers a succinct comparative topology of some aspects of the culpability principle in contemporary Anglo-American and continental criminal law systems. The focus in this subsection will be on the doctrinal framework of conditions for criminal liability and on the classification of, and the relations between, the most common fault or mens rea elements in contemporary Anglo-American and continental criminal law systems.

B. Historical and Philosophical Origins: Reception and Development of the Culpability Principle

It is a truism that the notion of culpability plays a pivotal role in determining a person's accountability in criminal law. And one may safely maintain that the principle of individual culpability is firmly entrenched in the contemporary criminal law systems of both the Anglo-American and the continental traditions.[19] Present-day Western criminal law systems are 'culpability-based' in the sense that, for criminal liability to be established, an examination is required not only of the bare facts, actions and/or the results thereof, but also of more complex, internal phenomena, such as the subjective mental state of the defendant at the material time of the offence charged. This feature of contemporary criminal law can safely be regarded as a cultural asset, the origin of which can be traced back to the beginning of the modern era.[20] Dutch philosopher and forensic psychiatrist Antoine Mooij has offered a thought-provoking and highly illuminating analysis of the interdependent positions of the notion of guilt or culpability within the domains of, inter alia, criminal law, psychopathology, our culture, and ultimately the human condition.[21] Following a philosophical tradition stemming from classical antiquity, Mooij distinguishes three basic fields of meanings within the semantically labyrinthine notion of guilt.

Within the first field of meanings, the notion of guilt or culpability is closely tied to the notions of cause and action. Mooij speaks here of culpability in the sense of 'guilt of

[19] GP Fletcher, *Basic Concepts of Criminal Law* (Oxford, Oxford University Press, 1998) 81–85, 99–100; HL Packer, *The Limits of the Criminal Sanction* (Stanford, CA, Stanford University Press, 1968) 103–08.

[20] See eg ER Dodds, *The Greeks and the Irrational* (Berkeley, CA, University of California Press, 2004) 28–64; J Rowbotham, M Muravyeva and D Nash (eds), *Shame, Blame, and Culpability. Crime and Violence in the Modern State* (London, Routledge, 2013).

[21] AWM Mooij, *Intentionality, Desire, Responsibility. A Study in Phenomenology, Psychoanalysis and Law* (Leiden, Brill, 2010) 253–75.

cause' or 'guilt of action'. The ancient Greek term for this type of guilt is *αἰτία* (*aitia*; its Latin equivalent being *causa*). A person is responsible for a certain action or result on account of the fact that he or she has performed that action or has brought about that result. The second field of meanings digs a bit deeper. Here, guilt is intimately connected with a shortfall, default, or failure in relation to a certain objective, aim, or standard (that can, but need not be, of a moral nature). It is not the acting or the causing *as such* that grounds the ascription of guilt, but the finding that a person's action or omission fails to meet a certain standard or to achieve a certain aim. Mooij terms this notion 'guilt by default' (Greek: *ἁμαρτία*, *hamartia*; Latin: *culpa*). The third field of meanings, lastly, is referred to as 'guilt of settlement' (*ὀφειλόμενον*, *opheilomenon*; *debitum*) and concerns guilt in a relational dimension. In this connection, guilt refers to circumstances in which something is owed to another, which is to say: situations in which some form of compensation or settlement (in economic, emotional, spiritual or still other terms) is due.

Without much difficulty, these three basic fields of meaning of the notion of guilt can be traced and identified in the doctrinal make-up of substantive criminal law.[22] Paradigmatically, the main elements of a criminal offence are harm and fault. Offence definitions accordingly and typically[23] comprise two basic ingredients or sets of ingredients, referred to as the actus reus (or in German: *objektiver Tatbestand*) and the requisite mens rea (*subjektiver Tatbestand*) respectively. The requirement of mens rea ('guilty mind') attaches the external and objective actus reus to an internal and subjective, mental condition. This mental condition qualifies an action or an omission subjectively, indicating how an action is performed or how a result is brought about: intentionally, knowingly, recklessly, negligently. Mens rea, in other words, represents a form of guilt that is closely connected to the sphere of actions and results, and that therefore belongs to the semantic domain of 'guilt of action' or 'guilt of cause'. Mens rea denotes an internal quality of a performed action, but this internal quality is generally inferred from, or established on the basis of, the outward appearance of the conduct and the accompanying circumstances.[24]

This is exactly why proof of mens rea is compatible with the idea that a defendant, on further consideration, may not be blameworthy for his or her action or omission. After all, someone who has fulfilled the elements of an offence could have done so under conditions which satisfy the demands of a legally recognised exculpatory defence (such as insanity, duress, or excessive self-defence).[25] In such cases, the law acknowledges

[22] See Mooij, *Intentionality, Desire, Responsibility* (n 21) 257–60; for an application of the three fields of meaning of the notion of guilt within the domains of psychopathology and philosophical anthropology, see 260–64 and 264–66 respectively.

[23] So-called strict liability offences form an important exception; these contain no fault or mens rea requirement. See subsection II.C. below.

[24] See F de Jong, *Daad-schuld. Bijdrage aan een strafrechtelijke handelingsleer met bijzondere aandacht voor de normativering van het delictsbestanddeel opzet* (The Hague, Boom Juridisch, 2009); F de Jong, 'Theorizing Criminal Intent: A Methodological Account' (2011) 1 *Utrecht Law Review* 1.

[25] When an exculpatory (or a justificatory) defence applies, this normally leaves the proof of mens rea untouched. In Dutch criminal law, however, the mens rea element of negligence (*culpa*) forms an exception: an exculpatory defence negates the subjective component of the concept of negligence, which renders the proof of negligence impossible. See Blomsma, *Mens Rea and Defences* (n 4) 195–98; De Jong, *Daad-schuld* (n 24) 388–99; cp Simester et al, *Criminal Law: Theory and Doctrine* (n 15) 168–69, 176; see also n 75 below.

that the defendant cannot reasonably be blamed for not having complied with the behavioural standard that the criminal law expects persons to adhere to in normal circumstances. What is lacking in these exceptional cases is personal *blameworthiness*, which is precisely what Mooij's term 'guilt by default' refers to. Finally, the relational notion of 'guilt of settlement' is at issue at the sentencing stage: in the imposition of a criminal sanction the offender's relational guilt towards society is assuaged.[26] This type of guilt is rather difficult to delineate, since it is generally a composite aggregate of the magnitude of the offender's subjective culpability (in the sense of mens rea and in the sense of personal blameworthiness) and objective factors such as the seriousness of the offence including its negative impact on society.

Now, under what conditions may a criminal law system be said to fully comply with the principle of individual culpability or, in other words, to be truly 'culpability-based'? As appears from the foregoing, the labyrinthine notion of guilt finds expression on at least three levels in criminal law. This explains why the principle of individual culpability is such a multifaceted and consequently complex legal concept. On the level of the furnishing of proof, guilt is manifested in the subjective fault elements or mens rea elements that form part of offence definitions. On this first level, criminal law is a 'culpability-based' system only in a relatively weak sense: mens rea is intimately connected with the actus reus, and proof of mens rea still leaves open the possibility that the defendant, on a deeper level, is not blameworthy. This deeper level of culpability concerns the legally recognised grounds for exemption from punishment. Here the principle of individual culpability is manifested in the stronger sense of 'no punishment without blameworthiness'.

And, finally, it could be argued that a given system of criminal law would be *genuinely* culpability-based if the principle of individual culpability were also to operate undilutedly at the level of sanctioning – which is to say, if the system fully submitted to the 'rule' that a penalty inflicted on a defendant may not exceed the extent of this person's individual blameworthiness.[27] For many, if not all, existing criminal law systems, an unqualified subjection to such a rule is not acceptable, however, as this would imply a too far-reaching curtailment of the court's discretionary powers to determine an appropriate sentence.[28] After all, the inherently 'relational' notion of guilt that is at play in the determination of appropriate penalties is not limited to the rather strict notion of personal blameworthiness; instead, as was mentioned above, it typically encompasses different aspects of subjective culpability, in addition to more objective aspects, like the seriousness of the offence.

[26] Mooij, *Intentionality, Desire, Responsibility* (n 21) 259; see also RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford, Hart Publishing, 2007) 23–30.

[27] Mooij, *Intentionality, Desire, Responsibility* (n 21) 260; JF Nijboer, 'Schuldbegrip en schuldbeginsel als oriëntatiepunten in het strafrecht' (1989) 4 *Recht en Kritiek* 363, 366–69.

[28] Which is most probably why the Dutch Supreme Court has consistently taken the view that no rule of criminal law precludes the infliction of a severer punishment than is justified by the measure of the offender's individual culpability. See C Kelk and F de Jong, *Studieboek materieel strafrecht*, 7th edn (Deventer, Wolters Kluwer, 2019) 577–78; see also sub-section VI.A. below. It should be noted, however, that this view is perfectly compatible with the view that the principle of individual culpability demands that the measure of individual culpability or (even) personal blameworthiness is at least always *taken into account* in the determination of the penalty.

The three levels on which guilt finds – or may find – expression in criminal law largely correspond to three dimensions of the principle of individual culpability. These three dimensions will be further discussed in sections IV to VI respectively. At the basis of these dimensions lies an additional, fourth dimension that has not yet been introduced. It concerns the very condition on account of which persons are taken to be *susceptible* to the attribution of culpability (or to any moral judgement). This dimension is directly related to the historical roots of the general concept of responsibility. According to Paul Ricoeur, the concept of responsibility is rooted in the notion of attribution or, by a more technical, Kantian term: 'imputation'.[29] Immanuel Kant famously defined the concept of imputation as follows:

> *Zurechnung* (imputatio) in moralischer Bedeutung ist das *Urteil*, wodurch jemand als Urheber (causa libera) einer Handlung, die alsdann *Tat* (factum) heißt und unter Gesetzen steht, angesehen wird; welches, wenn es zugleich die rechtlichen Folgen aus dieser Tat bei sich führt, eine rechtskräftige (imputatio iudiciaria, s. valida), sonst aber nur eine *beurteilende* Zurechnung (imputatio diiudicatoria) sein würde. Diejenige (physische oder moralische) Person, welche rechtskräftig zu zurechnen die Befugnis hat, heißt der *Richter* oder auch der Gerichtshof (iudex s. forum).[30]

In a very general sense, the criminal law is oriented towards imputing criminal liability to culpable persons. And the very thing that grounds a person's criminal liability is his or her individual culpability. It is on account of his or her individual culpability that an offender can legitimately be said to 'deserve' the infliction of punishment.[31] But the notion of culpability is itself grounded in a very basic human capacity: the capacity to choose and act *freely*. This capacity was placed at the centre of much Enlightenment philosophy and may be regarded as the primal factor to account for the fact that the principle of individual culpability serves as 'a guarantee that human dignity will be respected by criminal law'.[32] It was Kant who most pointedly accentuated the conceptual relation between culpability and freedom. Within Kant's theory of criminal law, crime is essentially a manifestation of a wilfully or inadvertently caused infringement

[29] P Ricoeur, *The Just*, trans D Pellauer (Chicago IL, University of Chicago Press, 2000) 13–19.

[30] I Kant, *Die Metaphysik der Sitten* in *Akademieausgabe. Band VI* (Berlin, De Gruyter, 1968 [1797]) 223 (online: https://korpora.zim.uni-duisburg-essen.de/kant/verzeichnisse-gesamt.html). English translation (taken from I Kant, *The Metaphysics of Morals*, L Denis (ed), trans M Gregor (Cambridge, Cambridge University Press, 2017 [1797]) 22): '*Imputation* (*imputatio*) in the moral sense is the *judgment* by which someone is regarded as the author (*causa libera*) of an action, which is then called a *deed* (*factum*) and stands under laws. If the judgment also carries with it the rightful consequences of this deed, it is an imputation having rightful force (*imputatio iudiciaria s. valida*); otherwise, it is merely an imputation appraising the deed (*imputatio diiudicatoria*). The (natural or moral) person that is authorised to impute is called a *judge* or a court (*iudex s. forum*).' See further A Aichele, 'Grüße von Sam. Zum Verhältnis von Zurechnungsfähigkeit und Menschheitsbegriff am Paradigma der Rechtsphilosophie Kants' in M Kaufmann and J Renzikowski (eds), *Zurechnung als Operationalisierung von Verantwortung* (Frankfurt am Main, Peter Lang, 2004) 247–62; J Hruschka, 'Imputation' (1986) 3 *Brigham Young University Law Review* 669; F de Jong, *Symbolic and Diabolic Forces in Criminal Law* (The Hague, Boom Juridisch, 2016) 3–12.

[31] A Norrie, *Crime, Reason and History. A Critical Introduction to Criminal Law*, 3rd edn (Cambridge, Cambridge University Press, 2014) 20–22, 346–47. In this book, Norrie offers a critical and historical analysis of a persistent ideology of individualism that, according to the author, serves as a façade behind which numerous injustices hide within the criminal law and within the administration of criminal justice. See also Duff, *Answering for Crime* (n 26) 191–93.

[32] See the 'Manifesto on European Criminal Policy' (n 6) that was mentioned in the Introduction.

of the public freedom of one or more citizens. Punishment can only be justified on condition that an offence can be morally imputed to the offender, that is to say, on condition that the offender has freely chosen to perform the criminal act. Only a free human being can possibly *choose* to do evil. This is what Kant has termed the 'demonic side' of freedom: man's '*Hang zum Bösen*' springs from human freedom itself.[33] By virtue of his or her freedom, an acting subject may be regarded as 'author' or *Urheber* of the performed act.[34]

The ability to choose and act freely depends on certain subjective, mental capacities. These capacities – which a subject must be presupposed to possess in order that he or she may be *susceptible* to the attribution of culpability – are described by HLA Hart as 'those of understanding, reasoning and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made.'[35] According to Hart, these 'most important criteria of moral liability-responsibility' have been given only a partial or tardy recognition as general criteria of legal responsibility in most legal systems.[36] This certainly holds true with regard to criminal law systems during the heyday of the so-called Classical School of criminal law. This School dates back to the eighteenth century work of Cesare Beccaria and strongly emphasised the importance of codification, of the principle of legality as a safeguard for human equality and freedom vis-à-vis the state, and of retrospective retribution.[37] In the rather metaphysical tradition of the Classical School of criminal law, individual culpability and the *freie Willkür* that grounds it were considered indispensable conditions for the imputation of criminal liability, but these notions were generally treated rather abstractly: as a rule, culpability and freedom were rather unproblematically presupposed and not called into question in individual cases.[38]

It was the Modern School (or Positivist School) of criminal law that introduced a far more substantial and 'interiorised'[39] treatment of the notion of individual culpability and its relation to the idea of freedom. The Modern School dates back

[33] I Kant, *Die Religion innerhalb der Grenzen der bloßen Vernunft* in *Akademieausgabe. Band VI* (Berlin, De Gruyter, 1968 [1793/1794]) 28–32 (online: https://korpora.zim.uni-duisburg-essen.de/kant/verzeichnisse-gesamt.html); an elaboration of Kant's notion of human fragility is provided by P Ricoeur, *Fallible Man*, trans CL Kelbley (New York, Fordham University Press, 1986 [1960]). See Mooij, *Intentionality, Desire, Responsibility* (n 21) 330–33.

[34] Kant, *Die Metaphysik der Sitten* (n 30) 223.

[35] HLA Hart, *Punishment and Responsibility. Essays in the Philosophy of Law*, J Gardner (ed), 2nd edn (Oxford, Oxford University Press, 2008 [1968]) 227. See also Mooij, *Intentionality, Desire, Responsibility* (n 21) 305–08.

[36] Hart, *Punishment and Responsibility* (n 35) 227.

[37] C Beccaria, *On Crimes and Punishments*, trans GR Newman and P Marongiu (New Brunswick, NJ, Transaction Publishers, 2009 [*Dei delitti e delle pene*, 1764]). The notion of legality is directly related to that of culpability in that culpability can only be imputed to a person on condition that he or she was previously acquainted with the law by virtue of which a certain action is to be regarded as illicit.

[38] See Norrie, *Crime, Reason and History* (n 31) 21, 26–29; and WPJ Pompe, 'De persoon des daders in het strafrecht' in C Kelk (ed), *Gedachten van Willem Pompe over de mens in het strafrecht* (The Hague, Boom Juridisch, 2008 [1928]) 9–24. A Spanish translation of this lecture is included in the volume: Pompe and Peters, *La Escuela Penal de Utrecht* (n 17) 21–39.

[39] Mooij, *Intentionality, Desire, Responsibility* (n 21) 338–40.

to the work of, among others, Cesare Lombroso, and had its heyday in the late nineteenth and early twentieth century.[40] In its wake, the concrete individual offender and the differing endogenous and exogenous factors that (allegedly) predispose individuals to criminality became the centre of interest. On the one hand, this has led to a subtler and more nuanced approach to the concept of culpability. The idea took hold that culpability or blameworthiness is not something that is either completely present, or completely absent due to exceptional exculpating circumstances; culpability can also be diminished to a certain degree, for example on account of a mental disorder that reduces the offender's culpability without eliminating it completely. On the other hand, the classical emphasis on proportionate retribution was lessened to the advantage of a more prospective focus on prevention of crime and the protection of society against 'dangerous individuals'.[41]

This shift in focus was far-reaching but has not detracted from the classical, Kantian postulate that moral or legal culpability can solely be attributed to the moral phenomenon of a 'person' with certain mental capacities which enable this person to act and choose, at least to some extent, freely – and hence not to a 'thing'.[42] As will be seen in subsection III.A. below, this notion of a liable 'person' has undergone a considerable expansion, particularly during the twentieth century. Many contemporary criminal law systems accept that not only natural persons but also legal or corporate entities can in principle assume criminal liability.

C. A Quasi-Comparative Topology of Aspects of the Culpability Principle

As was mentioned earlier, different legal traditions have developed rather differing ways of assimilating the principle of individual culpability into the main structure of general conditions for criminal liability. Of course, this in no way implies that nothing definite may be said with regard to the contents of the principle. As will be seen in the present subsection, different jurisdictions clearly also *share* a good deal when it comes to the way in which they interpret the principle of *nulla poena sine culpa* and implement the various aspects of this principle within their respective criminal law systems. In what follows, attention will be paid first and foremost to the doctrinal framework of conditions for criminal liability and to the classification of the most common fault or mens rea elements. A crude distinction will be made between the Anglo-American law

[40] C Lombroso, *Criminal Man*, trans M Gibson and N Hahn Rafter (Durham, NC, Duke University Press, 2006 [*L'uomo delinquente*, 1876/1878]). On the Modern or Positivist School, see C Fijnaut, *Criminology and the Criminal Justice System. A Historical and Transatlantic Introduction* (Cambridge, Intersentia, 2017); JR Lilly, FT Cullen and RA Ball, *Criminological Theory. Context and Consequences*, 7th edn (Los Angeles, CA, Sage Publications, 2019) 18–30.

[41] See M Foucault, 'About the Concept of the "Dangerous Individual" in 19th Century Legal Psychiatry' (1978) 1 *International Journal of Law and Psychiatry* 1.

[42] Kant, *Die Metaphysik der Sitten* (n 30) 223. See also Ricoeur, *The Just* (n 29) 16; Hruschka, 'Imputation' (n 30) 674 and 682–84.

tradition that is (partly) based on the common law, on the one hand, and the civil or continental law tradition, on the other.[43]

In the civil law tradition, the conditions for criminal liability are generally structured in a tripartite framework. For criminal liability to obtain it is necessary to establish that the defendant has fulfilled the offence definition, that the defendant's act or omission is wrongful, and that the defendant is personally blameworthy.[44] This three-tiered framework exhibits a neat doctrinal distinction between the conditions for criminal liability that are captured by the elements of the statutory offence definition (including the requirements of both actus reus and mens rea) on the one hand, and two important additional conditions for criminal liability that are (normally)[45] non-statutory and hence unwritten, on the other: the wrongfulness of the defendant's act or omission (German: *Rechtswidrigkeit*; Dutch: *wederrechtelijkheid*), and the defendant's personal blameworthiness (German: *Schuld*; Dutch: *verwijtbaarheid*). When it is established that a defendant has fulfilled an offence definition, it is presumed that he or she has acted wrongfully and that he or she is personally blameworthy. These presumptions can be challenged, however, by invoking a defence. Certain defences, when accepted, cancel the presumption of wrongfulness and *justify* the defendant's act or omission. Other defences, when accepted, leave the presumed wrongfulness of the act or omission intact but cancel the presumption of the defendant's blameworthiness, in other words: they *excuse* or *exculpate* the defendant.[46]

The foregoing means that the fault elements that form parts of mens rea (most commonly arranged under the headings of 'intention', 'recklessness' and 'negligence' – see below) need to be distinguished from the more fundamental notion of 'blameworthiness' (referring to the avoidability of the act or omission that is prohibited by the offence definition).[47] Whereas the mens rea requirements form parts of what Antoine Mooij has termed 'guilt of cause' or 'guilt of action' (*αἰτία*; *causa*), the notion of personal blameworthiness refers to what he has termed 'guilt by default' (*ἁμαρτία*; *culpa*).[48] And while

[43] The distinction is crude in the sense that with regard to the civil law or the continental tradition, reference will be had primarily to the criminal law of Germany and the Netherlands, and with regard to the Anglo-American tradition, reference will be had primarily to the criminal law of England and Wales. The term 'common law' will be mostly avoided, because criminal law in England and Wales is nowadays primarily enacted through parliamentary statutes and subordinate regulations. See Simester et al, *Criminal Law* (n 15) 48–50.

[44] U Kindhäuser, *Strafgesetzbuch. Lehr- und Praxiskommentar*, 7th edn (Baden-Baden, Nomos, 2017) 89–94; Kelk and De Jong, *Studieboek* (n 28) 61.

[45] Sometimes wrongfulness figures as an express element of an offence definition; and the fault element of negligence (culpa) is an exception since (at least according to Dutch criminal law doctrine) it conceptually presupposes both wrongfulness and blameworthiness; see Blomsma, *Mens Rea and Defences* (n 4) 175–79, 193–98; F de Jong, 'Facetten van schuld en gronden voor strafuitsluiting' in MM Boone, CM Pelser and T Boekhout van Solinge (eds), *Discretie in het strafrecht* (The Hague, Boom Juridisch, 2004) 139–58. The principle of 'no punishment without blameworthiness' is, however, codified in the Dutch General Administrative Law Act (*Algemene Wet Bestuursrecht*); see M Feenstra and A Tollenaar, 'Kruisbestuiving tussen straf- en bestuursrecht: de ontwikkeling van de verwijtbaarheid in het bestuursrecht' (2017) 10 *Nederlands Tijdschrift voor Bestuursrecht* 351.

[46] Examples of generally recognised justificatory defences are self-defence and necessity. Examples of exculpatory defences are legal insanity, duress, excessive self-defence, and forms of mistake of law or mistake of facts. See for Germany, Kindhäuser, *Strafgesetzbuch* (n 44) 195–201, 205–07, 213–22, 284–328; and for the Netherlands, see Kelk and De Jong, *Studieboek* (n 28) 323–410.

[47] See Blomsma, *Mens Rea and Defences* (n 4) 46–48.

[48] See subsection II.B; and cp, with regard to the fault element of negligence, n 75 below.

the mens rea requirements, like all 'express' elements of an offence definition, have to be positively proved according to the generally applicable standard of proof ('beyond a reasonable doubt') and are governed by the presumption of innocence, the fulfilment of the 'implied' element of blameworthiness – like that of wrongfulness – is presupposed. As soon as the actus reus of an offence and the requisite mens rea are proved, one can conclude that the defendant has committed a prima facie offence. Typically, this conclusion will lead to a conviction, unless the defendant has a recognised defence. In this connection, a probative onus is generally placed on the defendant. The supposition of blameworthiness can only be rebutted when the defendant can establish ('on the balance of probabilities') that an excusatory defence applies.[49]

The three-tiered framework of conditions for criminal liability that was succinctly discussed above is firmly entrenched in most of the continental criminal law systems within the EU. And although Anglo-American law has for a long time not acknowledged a neat doctrinal distinction between fault or mens rea on the one hand and personal blameworthiness on the other,[50] the three-tiered framework has meanwhile gained footing in the Anglo-American criminal law traditions too, at least in the criminal law system of England and Wales.[51] The prevailing view among writers in England and Wales is that (justificatory or exculpatory) defences are superimposed on – and do therefore not coincide with – the different express elements of offence definitions. Correspondingly, next to the old main elements of harm (or actus reus) and fault (or mens rea), the third basic element of every crime is the absence of a valid defence.[52] Notable differences between both legal traditions do remain, however, with regard to the ways in which different dimensions of the culpability principle are inscribed in the structure of the offence. In Anglo-American criminal law systems, for example, the doctrinal classification of legally recognised defences into the categories of justificatory and exculpatory defences is far less common, and much more controversial, than in the continental criminal law systems.[53]

[49] Hence, one may submit that, in contrast to the different mens rea elements, the fundamental notion of personal blameworthiness is subject to a *presumptio nocentiae*; see Mooij, *Intentionality, Desire, Responsibility* (n 21) 259. See further eg Simester et al, *Criminal Law* (n 15) 712; Kindhäuser, *Strafgesetzbuch* (n 44) 91–92; Kelk and De Jong, *Studieboek* (n 28) 67, 72 and 323–27.

[50] See GP Fletcher, *The Grammar of Criminal Law. American, Comparative, and International. Vol I: Foundations*, (Oxford, Oxford University Press, 2007) 312; Fletcher, *Basic Concepts* (n 19) 99–100; A Eser, 'Justification and Excuse: A Key Issue in the Concept of Crime' in A Eser and GP Fletcher (eds), *Rechtfertigung und Entschuldigung. Rechtsvergleichende Perspektiven*, vol I (Freiburg im Breisgau, Max Planck Institut für ausländisches und internationales Strafrecht, 1988) 17–65; J Keiler, 'Actus Reus and Mens Rea: The Elements of Crime and the Framework of Criminal Liability' in J Keiler and D Roef (eds), *Comparative Concepts of Criminal Law* (Cambridge, Intersentia, 2015) 33–36; Blomsma, *Mens Rea and Defences* (n 4) 46–50.

[51] Simester et al, *Criminal Law* (n 15) 9–12, 18–20 and 709–12.

[52] ATH Smith, 'On Actus Reus and Mens Rea' in P Glazebrook (ed), *Reshaping the Criminal Law. Essays in Honour of Glanville Williams* (London, Sweet and Maxwell, 1978) 98; Simester et al, *Criminal Law* (n 15) 18–20.

[53] See Duff, *Answering for Crime* (n 26) 263–98; V Tadros, *Criminal Responsibility* (Oxford, Oxford University Press, 2005) 265–347; J Horder, *Excusing Crime* (Oxford, Oxford University Press, 2004); J Gardner, *Offences and Defences. Selected Essays in the Philosophy of Criminal Law* (Oxford, Oxford University Press, 2007) 91–139; GP Fletcher, 'The Individualization of Excusing Conditions' (1974) *Southern California Law Review* 1269; J Blomsma and D Roef, 'Justifications and Excuses' in J Keiler and D Roef (eds), *Comparative Concepts of Criminal Law* (Cambridge, Intersentia, 2015) 133–77.

And another important difference concerns the issue of whether or not strict liability offences (that do not contain any fault requirement) are permitted and, if so, to what extent valid defences are available to rebut culpability for these offences. In Germany and Finland, for instance, strict liability offences are permitted neither in criminal law nor in regulatory (quasi-criminal or administrative) law, although some exceptions do exist.[54] Contrarily, strict liability offences are well entrenched, for example, in English and in Dutch criminal law.[55] In these jurisdictions, strict liability is generally limited to minor criminal offences (or misdemeanours) and/or to regulatory offences that attract (relatively) moderate penalties. In accordance with minimum requirements that the ECtHR deduces from the presumption of innocence enshrined in Article 6, paragraph 2 ECHR, strict liability offences must not preclude the availability of generally recognised defences.[56]

Important differences between countries exist, furthermore, with regard to the classification of, and the relations between, the (most common) fault or mens rea elements. In this connection it is first of all noteworthy that a tripartite division is adhered to in Anglo-American criminal law, whereas a bipartite division prevails in continental criminal law systems. In the Anglo-American criminal law tradition offence definitions can harbour a wide variety of terms to refer to specific fault requirements or culpable mental states.[57] Clearly, however, there are three mens rea states that are most commonly required by offence definitions and thus represent the most important fault elements in the Anglo-American law systems. These are, in order of decreasing degrees of moral censure: intention, recklessness, and negligence. In this tripartite framework, the mens rea state of recklessness bridges the interval between the concepts of intention and negligence. In the continental criminal law tradition, by contrast, only two main types of fault are distinguished: intention (*dolus*) and negligence (*culpa*). Between these, no interval is in place.[58]

[54] See for Germany: Kindhäuser, *Strafgesetzbuch* (n 44) 210–13; M Mansdörfer, 'The Treatment of Mere Regulatory Offences in German Criminal Law. Historical Developments, Today's Concepts and General Criticisms' in M Ulväng and I Cameron (eds), *Essays on Criminalisation and Sanctions* (Uppsala, Iustus Förlag, 2014) 103–04. For Finland, see J Rankinen, 'Positive Fault Requirements in EU Criminal Law' (2016) 6(2) *European Criminal Law Review* 117.

[55] See for England and Wales: Simester et al, *Criminal Law* (n 15) 191–215; Horder, *Ashworth's Principles* (n 16) 180–88. See for the Netherlands: Kelk and De Jong, *Studieboek* (n 28) 296–399; EHA van Luijk, *Het schuldbeginsel in het Nederlandse strafrecht. Een verkenning aan de hand van de geschiedenis van het Nederlandse strafrecht, de kentekenaansprakelijkheid en het EVRM* (Groningen, Rijksuniversiteit Groningen, 2015) 212–27.

[56] See ECtHR 7 October 1998, *Salabiaku v France* (App No 10519/83), [1988] ECHR 19; ECtHR 29 June 2007, *O'Halloran and Francis v the United Kingdom* (App Nos 15809/02 and 25624/02), [2007] ECHR 545; Van Luijk, *Het schuldbeginsel* (n 55) 319–65; Blomsma, *Mens Rea and Defences* (n 4) 210 and 224–28. In English criminal law it is controversial whether all generally recognised (common law) defences are available with respect to strict liability offences. See Simester et al, *Criminal Law* (n 15) 205–06; Horder, *Excusing Crime* (n 53) 237–76; Duff, *Answering for Crime* (n 26) 229–69.

[57] Simester et al, *Criminal Law* (n 15) 138, mention: 'purpose', 'intention', 'recklessness', 'wilfulness', 'knowledge', 'belief', 'suspicion', 'reasonable cause to believe', 'maliciousness', 'fraudulence', 'dishonesty', 'corruptness', and 'negligence'.

[58] As a matter of course, among the different legal orders that employ the same basic (bipartite or tripartite) system, smaller and larger variances can be observed with regard to how individual manifestations of a fault element are interpreted and how individual fault elements are demarcated from other fault elements. These differences will be largely ignored here. The following exposition merely seeks to sketch in broad outlines the meaning and substance of the most prevalent fault elements that are distinguished within the Anglo-American tradition and the continental tradition.

In both the Anglo-American and the continental tradition, intention is considered the central and generally also the gravest form of mens rea.[59] The two traditions differ with regard to the ambit that is ascribed to the concept of intention. In criminal law systems of the Anglo-American tradition (only) two varieties of intention are generally recognised. The core variety is termed 'direct intention'; this paradigm version of intention is virtually equivalent to the mens rea gradation referred to as *dolus directus* in the continental criminal law tradition. One speaks of direct intention in cases where it can be established that the defendant downrightly wanted or desired to bring about the criminally relevant outcome or to perform the prohibited action (or to omit the criminally prescribed action). And one equally speaks of direct intention in cases where it can be proved that the defendant has acted in the belief that fulfilling the actus reus of an offence would lead to a certain result which the defendant wished to achieve; in these cases, committing the offence serves as a means to a desired end. In either type of cases, the notion of direct intention presupposes that the defendant has acted *because of* a certain desire or a certain belief.[60]

This is supposed to hold true also for a second and separate[61] variety of intention, which is termed 'indirect' or 'oblique intention'; this gradation is often referred to as *dolus indirectus* in the continental criminal law tradition. Indirect intention obtains when a criminally relevant consequence is foreseen by the defendant as certain or virtually certain to occur as a result of his or her action, and thus not merely as a possible or even probable side-effect.[62] HLA Hart has famously offered the following definition: we speak of intention when a foreseen outcome

> is so immediately and invariably connected with the action done that the suggestion that the action might not have that outcome would by ordinary standards be regarded as absurd, or such as only a mentally abnormal person would seriously entertain.[63]

This is where the Anglo-American criminal law tradition draws the line as far as the fault element of intention is concerned. In the bipartite framework of fault elements that prevails in the continental criminal law tradition, by contrast, intention encompasses an additional, third variety, situated underneath the gradation of indirect intention. Next to *dolus directus* and *dolus indirectus*, the continental criminal law systems typically acknowledge as a third layer within the fault element of intention the concept of *dolus eventualis* (in German: *bedingter Vorsatz*; in Dutch: *voorwaardelijk opzet*).[64]

[59] See MS Moore, 'Intention as a Marker of Moral Culpability and Legal Punishability' in RA Duff and SP Green (eds), *Philosophical Foundations of Criminal Law* (Oxford, Oxford University Press, 2011) 179–205.

[60] See Simester et al, *Criminal Law* (n 15) 141–44.

[61] A question subject to doctrinal controversy is whether indirect or oblique intention can be seen as a separate variety of intention, or that it should rather be seen as an evidential construction that merely facilitates the inference that a certain harm was (directly) intended. See Simester et al, *Criminal Law* (n 15) 146–47. Cp Blomsma, *Mens Rea and Defences* (n 4) 9 and 70–72.

[62] See Simester et al, *Criminal Law* (n 15) 145–50.

[63] Hart, *Punishment and Responsibility* (n 35) 120.

[64] *Dolus eventualis* is often translated as 'conditional intention'. However, in English law the term 'conditional intention' refers to a notion quite different from *dolus eventualis*, namely the idea that a 'real' or 'full-blooded' intention to perform a certain action is conditional upon there being circumstances in place that make it possible to realise the intention. See Simester et al, *Criminal Law* (n 15) 152–53. For this reason, the term 'conditional intention' is avoided in the present contribution.

Doctrinally, *dolus eventualis* marks the lower limit of the general concept of intention in criminal law. One speaks of *dolus eventualis* in cases where it can be established that the defendant foresaw (the cognitive aspect) and also accepted (or reconciled himself or herself to – the volitional aspect) the (considerable) possibility that as a result of his or her action a certain harm would occur.[65] Although it must be noted that the notion of *dolus eventualis* is defined and interpreted in slightly differing ways in different criminal law systems,[66] it is abundantly clear that because of this notion the concept of intention has a considerably wider ambit in the continental tradition than is the case in the Anglo-American tradition.

To be sure, we have to be careful not to overestimate the difference between both traditions in this connection. For the majority of offences in English criminal law it is not necessary to prove intention, because proof of the subjective fault element of 'recklessness' normally suffices. Recklessness is a separate fault element in the Anglo-American criminal law tradition. For recklessness to obtain, it generally needs to be established that the defendant has consciously taken a risk that, in the circumstances known to him or her, was unreasonable. It serves a similar function as *dolus eventualis*, with the difference that recklessness does not require proof of a volitional aspect: it is not necessary to establish that the defendant reconciled himself or herself to the effectuation of the relevant harm.[67] However, there are many cases in which proof of intention is indeed necessary in English criminal law;[68] in these cases the difference between the continental and the Anglo-American legal systems with regard to their definitions of intention therefore really matters.[69]

[65] See J Blomsma and D Roef, 'Forms and Aspects of Mens Rea' in J Keiler and D Roef (eds), *Comparative Concepts of Criminal Law* (Cambridge, Intersentia, 2015) 108–09; Blomsma, *Mens Rea and Defences* (n 4) 99–134; Rankinen, 'Positive Fault Requirements' (n 54) 122.

[66] Different legal orders entertain different views and standards regarding the requisite *magnitude* of the perceived chance that a given action will produce a certain criminally relevant result or outcome. And legal orders differ with respect to the meaning and importance ascribed to the volitional and/or the cognitive components of *dolus eventualis*. See eg Blomsma and Roef, 'Forms and Aspects' (n 65) 108–15.

[67] Simester et al, *Criminal Law* (n 15) 154–55; Blomsma and Roef, 'Forms and Aspects' (n 65) 116; RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford, Basil Blackwell, 1990) 142–49.

[68] For instance, recklessness does not suffice for a conviction for murder in English law, since murder requires an intention to kill or at least an intention to cause grievous bodily harm; and neither does recklessness suffice for attempt (whereas *dolus eventualis* generally does in the continental criminal law systems). See Simester et al, *Criminal Law* (n 15) 138, 362–70 and 399–404; Duff, *Intention, Agency and Criminal Liability* (n 67) 173–79 and 192–206.

[69] A matter that complicates things further is that the notion of recklessness functions in some continental law systems as a specific manifestation of the general fault element of *culpa* (negligence). In the Netherlands, eg, recklessness (*roekeloosheid*) constitutes a separate aggravating manifestation of *culpa* in a limited number of offences, such as negligent manslaughter (Art 307 of the Dutch Criminal Code, *Wetboek van Strafrecht*) and negligent causation of a road traffic accident that results in grievous bodily harm or death (Art 6 of the Dutch Road Traffic Act, *Wegenverkeerswet*). In these cases, recklessness (or *luxuria*) marks the upper limit of the concept of negligence, proof of which leads to an increase of the maximum penalty by 100 per cent. Blomsma, *Mens Rea and Defences* (n 4) 200, rightfully notes that recklessness in these contexts may be seen as a middle ground in between *dolus* (*eventualis*) and *culpa* or negligence proper, 'even though it is generally treated as a qualified form of negligence', and that '*luxuria* also helps to prevent the further enlargement of *dolus eventualis*'. For this form of recklessness to obtain it must be established that the defendant has grossly violated an applicable standard of care that exceeds departure from the standard of care that suffices for 'basic' negligence, as a result of which a very grave danger was created. It is furthermore required that the defendant was aware or ought to have been aware of this danger; see Kelk and

Furthermore, also with regard to the general concept of negligence or *culpa*, there are notable differences between the continental and the Anglo-American criminal law systems. For negligence to obtain in English criminal law, for example, it is irrelevant whether the defendant was aware or unaware of the risks that ensued from his or her action or omission;[70] but the concept is itself limited to inadvertent negligence, which means that there is no such thing as 'conscious negligence' in English law (while the concept of recklessness requires conscious risk-taking). The concept of *culpa* in Germany and the Netherlands, by contrast, encompasses both inadvertent and advertent or conscious forms of negligence (*bewusste Fahrlässigkeit*; *bewuste schuld*).[71] This may partly explain why negligence as a minimum mens rea standard is less popular in Anglo-American criminal law systems that, as noted above, typically recognise recklessness as a *tertium quid* between intention and negligence, than in continental criminal law systems that operate with a more rigid dichotomy between *dolus* and *culpa*.[72]

However, apart from this difference, the concepts of negligence in the Anglo-American and the continental criminal law traditions are very similar. As a general rule, negligence or *culpa* comprises both an objective and a subjective component.[73] Objectively, negligence requires that the defendant *ought* to have foreseen the possibility that his or her action or omission would produce the relevant harmful outcome (because a reasonable person in his or her place would have foreseen this outcome) and that the defendant's behaviour falls short of the standard of conduct that applies in the given circumstances. The applicable standard of conduct or standard of care is normally geared, not to the most prudent or cautious person, but to the reasonable person. We blame the negligent defendant precisely because he or she failed to observe this standard of due or reasonable diligence. It must be noted that not just any form of carelessness can qualify as negligence. In many legal systems, a slight discrepancy between the defendant's conduct and the applicable standard of care (*culpa levis*) will not suffice to establish negligence. In these systems, to qualify as negligence, the carelessness must be considerable, that is, sufficiently serious or substantial (*culpa lata*).[74]

De Jong, *Studieboek* (n 28) 298–99. For the equivalent concept in German criminal law (*Leichtfertigkeit*), see Kindhäuser, *Strafgesetzbuch* (n 44) 188. The concept of recklessness in English criminal law is a broader concept that encompasses *dolus eventualis*, but also *luxuria*, and even some forms of conscious negligent behaviour.

[70] Simester et al, *Criminal Law* (n 15) 167.

[71] See Kelk and De Jong, *Studieboek* (n 28) 296–98; Kindhäuser, *Strafgesetzbuch* (n 44) 187–88; Blomsma and Roef, 'Forms and Aspects' (n 65) 122.

[72] See Blomsma and Roef, 'Forms and Aspects' (n 65) 122; Blomsma, *Mens Rea and Defences* (n 4) 172–74. The question whether or not negligence may suffice as a fault element *at all* is subject to doctrinal controversy. See L Alexander and KK Ferzan (with SJ Morse), *Crime and Culpability. A Theory of Criminal Law* (Cambridge, Cambridge University Press, 2009) 69–85; L Alexander and KK Ferzan, *Reflections on Crime and Culpability. Problems and Puzzles* (Cambridge, Cambridge University Press, 2018) 3–4; Simester et al, *Criminal Law* (n 15) 175–76.

[73] Rankinen, 'Positive Fault Requirements' (n 54) 119–23; Blomsma and Roef, 'Forms and Aspects' (n 65) 121–26; Blomsma, *Mens Rea and Defences* (n 4) 174–98.

[74] In Belgian criminal law, by contrast, *culpa levis* (or: *levissima*) may suffice for proof of negligence; see C Van den Wyngaert, S Vandromme and Ph Traest, *Strafrecht en strafprocesrecht in hoofdlijnen*, 11th edn (Oud-Turnhout, Gompel & Svacina, 2019) 318–20 and 338. In English criminal law there exist negligence offences that require 'ordinary' negligence and ones that require nothing less than 'gross' negligence. Ordinary negligence refers to conduct that falls below what would be expected of a reasonable person. Gross negligence

Blaming the defendant for his or her careless behaviour, however, is only legitimate on condition that the subjective requirement of negligence is also fulfilled. Subjectively, it must be established that the defendant also *could* have foreseen the possibility of the harmful outcome and could have attuned his or her behaviour accordingly.[75] With regard to both the objective and the subjective requirements of negligence, certain individual characteristics of the defendant may be taken into account. The *degree* of diligence that was expected of the defendant, for example, may in part depend on the defendant's profession, education, age, et cetera. In German criminal law doctrine this is referred to as '*Garantenstellung*'.[76]

III. First Dimension: Individual Authorship

A. Introduction: Subjectivity, Agency, and Personal Responsibility

The principle of individual culpability demands that the attribution of criminal liability and the imposition of a criminal sanction be subject to the condition that the liable subject can legitimately be considered the 'author' – or, by a German word that was preferred by Immanuel Kant, the *Urheber*[77] – of the offence. The first dimension of the principle of individual culpability traces the offence to a person who is considered the 'free cause' of the offence. Who or what can qualify as the 'author' of a (criminal) offence? Self-evidently, this question is closely linked with the conceptions of subjectivity and agency that are (implicitly or explicitly) adhered to within a given legal system: how one delineates the assembly of (natural or legal) persons who may qualify as 'authors' of offences, depends in part on rules that indicate what types of (behavioural and/or intellectual) involvement of the would-be liable subject in the offence may suffice to establish liability. In other words: the answer to the question who may and who may not assume culpability and liability for a certain offence depends in part on the answer to the question as to how, and on the basis of what criteria, one evaluates the relation between a subject's action or omission, on the one hand, and the registered harm that triggered the quest for a culpable offender in the first place, on the other.

refers to conduct that falls *far* below this standard, which means that in this type of case a more substantial discrepancy exists between the defendant's conduct and the prescribed standard of care. See Simester et al, *Criminal Law* (n 15) 167–68.

[75] This observation necessitates an elucidation. In the previous subsections, it was maintained that mens rea or fault requirements form parts of what Antoine Mooij (*Intentionality, Desire, Responsibility*, n 21) has termed 'guilt of cause' or 'guilt of action' (*αἰτία; causa*), and that the notion of personal blameworthiness belongs to what Mooij has termed 'guilt by default' (*ἁμαρτία*; *culpa*). And the type of culpability denoted as 'guilt by default' exactly amounts to the idea of a failure to comply with a certain standard or to achieve a certain aim. The subjective aspect of negligence – ie, the reproach that is grounded on the finding that the defendant could (and hence should) have foreseen and avoided the harmful outcome of his or her action – can therefore fittingly be regarded as a form of 'guilt by default'. Still, it is not contrived to position negligence (along with intention and recklessness) in the domain of 'guilt of action', considering that the emphasis in negligence lies on its objective aspect, ie, the objectively assessed carelessness of the behaviour of the defendant. See Blomsma, *Mens Rea and Defences* (n 4) 175–92; see also n 25 above.

[76] See Blomsma and Roef, 'Forms and Aspects' (n 65) 124–25.

[77] See subsection II.B. above.

Different legal systems can employ widely differing criteria to assess whether the relation between a certain subject's conduct and a certain harm is sufficiently 'direct' or 'firm' to sustain the finding that the subject in question can legally be regarded as the 'author' (or as one of the 'authors')[78] of the offence concerned. When this relation is direct or firm enough, the subject is legally identified as the person who has (or as one of several persons who have) indeed committed the offence. The criteria may differ in the degree of their detailedness or their vagueness; relatedly, and seen from a more formal or adjectival viewpoint, they may either demand a relatively stringent application, or allow for a more relaxed application by the adjudicating court. And on a more substantive level, the criteria may accord preponderant weight to objective, outward, or physical aspects; they may also, contrarily, attach paramount significance to subjective, inner, or psychological aspects; or, of course, they may – as they often do – provide a more or less balanced mixture of physical and psychological aspects to be taken into account.

The criteria that are used to establish a subject's authorship or perpetration furthermore depend on the liability regime that applies to the *type* of offence at issue. In many legal systems a distinction is made between (real) criminal offences, on the one hand, and administrative and/or regulatory offences, on the other. This distinction – which is directly related to the distinction between criminal law and quasi-criminal law – is not clear-cut and is prone to causing confusion. In some jurisdictions, such as the German legal system, there exists a relatively sharp doctrinal distinction between, on the one hand, offences that – by virtue of, inter alia, their objective seriousness, the legal interests at stake, and/or the main rationale behind the punishment inflicted on those who have been found guilty of committing the offences – belong to the criminal law proper (*Straftaten*) and, on the other hand, offences that fall below the threshold of criminal law and that are merely regulatory in nature (*Ordnungswidrigkeiten*). In such a 'dualistic' system the two types of offences are typically governed by rather different legal regimes with regard to, for example, the types of sanctions that may be imposed (and the maximum degrees of their severity), the requisite mens rea element in the statutory offence definition, and the types of subjects to whom culpability and liability can be attributed (ie, solely to natural persons or to both natural persons and legal entities).[79]

Many or even most jurisdictions, by contrast, have a 'monistic' system of criminal law that encompasses both the 'serious' criminal offences and many offences that would be classified as 'merely regulatory offences' (including petty offences) within the dualistic system in Germany. In practice, however, these so-called 'monistic' systems are generally not quite as unified as this term suggests. In many legal systems, the legislator has chosen to simply decriminalise certain groups of offences; these former criminal offences, often of a 'regulatory' nature, have in many cases been subsumed under areas

[78] There is, of course, often more than just one subject who could be called to answer for one offence. This is the case in forms of participation and almost by definition in cases where a legal entity or a group of legal entities is prosecuted for a criminal or an administrative offence, such as an infringement of competition law.

[79] See Mansdörfer, 'The Treatment of Mere Regulatory Offences' (n 54); and see P Asp, 'Principles of Criminalization: What is "Criminal" in Criminal Law?' in M Ulväng and I Cameron (eds), *Essays on Criminalisation and Sanctions* (Uppsala, Iustus Förlag, 2014) 109–23.

of administrative law. In the Netherlands this was done, for example, with many minor road traffic offences.[80] These legislative rearrangements have led to a system that in effect resembles the dualistic model. But not in all respects: a notable difference that remains is that the criminal law systems of monistic models typically harbour many offences that are often denoted as 'regulatory' criminal offences (such as environmental crimes, financial and economic crimes, or tax fraud) and large numbers of petty offences. As a rule[81] – and contrary to the so-called 'merely regulatory offences' within the German dualistic system – these offences are just as much governed by the general principles and regulations of the general part of substantive criminal law as are the 'classical' crimes of, say, murder, rape, and theft.

In many legal systems, accordingly, one can distinguish between at least two types offences that are (as is the case in the dualistic system of Germany) subject to different legal regimes. On the one hand, there are those offences that belong to the criminal law (and that may or may not include 'regulatory' and petty offences) and that are consequently punishable with 'actual' criminal penalties. On the other hand, there are offences that belong to administrative law and to which administrative (mostly pecuniary) sanctions apply. The distinction between criminal and administrative offences is based on both instrumental and theoretical considerations. Compared to criminal offences, administrative offences are often subject to a relatively lenient liability regime. From an instrumental point of view, this is conducive to a more efficient enforcement of the underlying norms, especially with regard to high frequency offences. Mens rea requirements, for example, tend to be less strict – and sometimes even absent – in the definitions of administrative offences.[82] From a more theoretical point of view, the existence of administrative offences may serve the purpose of enabling the attribution of liability to subjects that cannot qualify as 'authors' of criminal offences within certain jurisdictions.

An important example of this concerns the position of corporate or legal entities. Criminal liability of legal entities is recognised in many, but certainly not in all legal systems. Most jurisdictions that currently *do* recognise the general possibility of attributing criminal culpability and criminal liability to (certain) corporate or legal entities have not done so until relatively recently.[83] And partly on account of the (for the most part) relatively recent reception of corporate criminal liability into the

[80] These offences may often involve a form of vicarious liability, because liability for offences that concern motorised vehicles is often categorically attributed to the person on whose name the vehicle is registered (Dutch: *kentekenaansprakelijkheid*). See Van Luijk, *Het schuldbeginsel* (n 55); JHB Bemelmans, *Tot het tegendeel is bewezen. De onschuldpresumptie in rechtshistorisch, theoretisch, internationaalrechtelijk en Nederlands strafprocesrechtelijk perspectief* (Deventer, Wolters Kluwer, 2018) 213. The English Road Traffic Offences Act 1988 contains a similar construction; see Simester et al, *Criminal Law* (n 15) 284.

[81] Unless, eg, a certain statute expressly deviates from a particular rule from the general part.

[82] The same holds true for many regulatory offences that form parts of the criminal law in eg the Netherlands; moreover, the actus reus of these offences often takes the form of a breach of a duty of care.

[83] The Dutch legislator, eg, implemented the statutory provision that introduced *general* criminal liability of legal entities in 1976 (Art 51 of the Dutch Criminal Code); prior to this, it had been recognised since around the early twentieth century that legal entities could assume criminal liability for a limited number of (economic and regulatory) offences. See Kelk and De Jong, *Studieboek* (n 28) 518–34; M Groenouwe and E Baakman, 'Changing Ideas on Corporate Criminal Liability. A Comparison between the Netherlands and England and Wales' in F de Jong (ed), *Overarching Views of Crime and Deviancy. Rethinking the Legacy of the Utrecht School* (The Hague, Eleven International Publishing, 2015) 271–85.

positive criminal law of national legal systems, there are still many intricate doctrinal questions pertaining to this phenomenon that have not yet been satisfactorily resolved and that, consequently, are sometimes strongly disputed.[84] The continued existence of these doctrinal controversies may find a further partial explanation in the fact that the phenomenon of corporate liability *itself* has for a long time been 'taboo' in criminal law scholarship: the phrase *societas delinquere non potest* has functioned as a rock-solid adage for ages – as it seemingly still does in a number of legal systems, such as those of Germany and Italy.[85] It is rather easy to see why jurisdictions that adhere to the view that legal entities cannot possibly commit an offence because they simply cannot *act*, reject the possibility of corporate criminal liability. In this view, corporate liability would necessarily involve a form of 'vicarious liability'.

According to the doctrine of vicarious (or derivative) liability, legal liability for a particular harm can be attributed to another (legal or natural) person than the one who has in fact committed the offence which brought about this harm. This implies that a person is made liable for the conduct (and for the accompanying state of mind) of another person.[86] In tort law it may be well-justified to impose liability on employers for certain torts that are committed by employees in the course of their employment; in criminal law, however, purely vicarious liability is rather controversial: one can normally only be culpable of and criminally liable for one's own conduct. In administrative law, vicarious liability is generally seen as less problematic, which partly explains why jurisdictions that do not recognise corporate criminal liability often *do* accept that legal entities can be liable for certain administrative or regulatory offences.[87] Jurisdictions that entertain the view that an action is something that not only a natural or physical person, but also a legal entity is capable of performing, by contrast, need not resort to constructions of vicarious liability and may hence more readily accept the possibility of imputing criminal liability to legal entities.[88]

[84] One unresolved and disputed matter concerns the question how mens rea elements should or could be doctrinally reshaped or reframed so as to attain a better 'fit' with the everyday reality of legal entities. See on this question M Hornman and E Sikkema, 'Corporate Intent: In Search of a Theoretical Foundation for Corporate Mens Rea' in F de Jong (ed), *Overarching Views of Crime and Deviancy. Rethinking the Legacy of the Utrecht School* (The Hague, Eleven International Publishing, 2015) 287–309; Simester et al, *Simister and Sullivan's Criminal Law* (n 15) 299–304.

[85] Germany has not yet adopted corporate criminal liability, although this might change in the near future. See M Engelhart, 'Corporate Criminal Liability and Compliance in Germany' in A Fiorella and AM Stile (eds), *Corporate Criminal Liability and Compliance Programs. First Colloquium* (Naples, Jovene Editore, 2012) 167–206. See for Italy: A Di Amato and F Fucito, 'Italy', *International Encyclopaedia of Laws – Criminal Law*, F Verbruggen and V Franssen (eds) (Deventer, Kluwer Law International, 2016); F Cugia di Sant'Orsola and S Giampaolo, 'Liability of Entities in Italy: Was it Not *Societas Delinquere Non Potest*?' (2011) 2(1) *New Journal of European Criminal Law* 59.

[86] See Simester et al, *Criminal Law* (n 15) 283–92; V Franssen, 'The EU's Fight Against Corporate Financial Crime: State of Affairs and Future Potential' (2018) 5 *German Law Journal* 1221, 1237–38.

[87] See for Germany eg Mansdörfer, 'The Treatment of Mere Regulatory Offences' (n 54). In the Italian system corporate entities are subject to a *sui generis* regime of administrative liability with certain features of criminal liability, and actual criminal liability is accepted for some offences; see Cugia di Sant'Orsola and Giampaolo, 'Liability of Entities in Italy' (n 85).

[88] The doctrine of vicarious liability is akin to that of strict or objective liability; and like constructions of strict liability, constructions of vicarious liability are not completely outlawed under the ECHR, provided that the 'person' to whom liability is attributed has a reasonable possibility to exonerate him- or herself. A notorious example of vicarious liability in quasi-criminal law – manifestations of which exist in many jurisdictions – concerns the administrative liability of a car owner for a road traffic offence in cases where the actual driver of the car at the material time of the offence cannot be identified. In a case against the Netherlands, the ECtHR

As illustrated above, the question as to who or what can qualify as the 'author' of a (criminal) offence is closely linked with the conceptions of subjectivity and agency that are (implicitly or explicitly) adhered to within a given legal system. The view that holds that corporate entities can (directly) commit offences presupposes that one subscribes to a conception of subjective agency that is considerably more 'spiritual' and normative, and at any rate considerably less 'physical', than any conception that would be needed to sustain the opposing view that *societas delinquere non potest*. Given the variegated approaches across legal systems, the EU legislature typically does not oblige the Member States to provide for the possibility of attributing criminal liability to legal entities within their national jurisdictions. Member States must ensure that legal persons can be held liable for certain offences that are criminal in nature, but it is left to the Member States themselves to decide whether this liability takes the form of criminal, administrative or even 'only' civil liability.[89]

However, irrespective of the liability regime chosen, the Member States must still ensure that their domestic law provides for sanctions that are 'effective, proportionate, and dissuasive'.[90] As a result, there are several areas of European or Europeanised quasi-criminal law – such as European competition law – that clearly involve punitive measures that can be, and often are, imposed on legal entities and that qualify as 'penalties' for the purposes of Articles 6 and 7 ECHR. In the following two subsections it will be explored how the notion of individual authorship is reflected in European (quasi-)criminal law. Subsection III.B will deal with the ECtHR's view of non-conviction based penalties; subsection III.C will focus on corporate liability in European competition law.

B. Individual Authorship under the ECHR: *GIEM et al v Italy*

Constructions of vicarious liability in penal matters are generally prohibited by the ECtHR when the defendant is not granted a reasonable possibility of exonerating him- or herself. Although the ECHR does not contain a provision that expressly guarantees the principle of individual culpability, the ECtHR has recognised several dimensions of this principle as ensuing from Articles 6 and 7 of the Convention. One important dimension is that of individual authorship. Cases before the ECtHR which deal with

did not find a violation of the right to be presumed innocent (enshrined in Art 6(2) ECHR), in part because of the fact that defences had been available for the car owner on the basis of which he or she could challenge the imposed fine at court. See ECtHR 19 October 2004, *Falk v the Netherlands* (App No 66273/01) *Reports* 2004-XI; Van Luijk, *Het schuldbeginsel* (n 55).

[89] This may at least partly be explained by the principle of subsidiarity and the related respect by the European legislature for the diversity of national criminal law traditions; see n 3 above. Cp European Criminal Policy Initiative, 'A Manifesto on European Criminal Policy' (n 6) 708. The EU is nevertheless slowly pushing Member States to provide for criminal liability of legal entities; see Franssen, 'Corporate Criminal Liability' (n 8) 279. For a critical analysis of the EU approach (basing corporate liability on a mixed concept of vicarious, direct, and functional liability), see Franssen, 'The EU's Fight' (n 86) 1228–32.

[90] And what is more, these sanctions must be equivalent to the sanctions that can be imposed for similar offences existing in national law; see CJEU 21 September 1989, 68/88 (*Greek Maize* case) *Commission of the European Communities v Hellenic Republic* (EU:C:1989:339); CJEU 27 February 1997, C-177/95 *Ebony Maritime SA and Loten Navigation Co Ltd v Prefetto della Provincia di Brindisi et al* (EU:C:1997:89).

this dimension often concern the question whether non-conviction based penalties contravene guarantees enshrined in the ECHR. This question was at issue in a case decided by the Grand Chamber of the ECtHR, in which four legal entities – GIEM Srl, Hotel Promotion Bureau Srl, R.I.T.A. Sarda Srl, and Falgest Srl – and one natural person – Mr Filippo Gironda – complained that the Italian government had confiscated their property in contravention of a number of fundamental rights enshrined in the ECHR.[91]

The applicants were the (co-)owners of plots of land on which they had developed several building complexes. Although the local authorities had approved the different site development plans and the building permits, and had also assured the applicants time and again that the plans were in agreement with all relevant legislation, the criminal court later found the development plans and building permits to be illegal. The plots of land and the buildings were consequently ordered to be confiscated, even though none of the five applicants was found guilty of an offence by the criminal court. The fundamental question at issue during the proceedings before the ECtHR was whether (and, if so, to what extent) the legality principle of Article 7 ECHR and the presumption of innocence codified in Article 6, paragraph 2 ECHR forbid the imposition of a penalty on a person if this person has not previously been found guilty of committing, or has not previously been convicted of, a criminal offence with reference to which the authorities wish to inflict the penalty.

In previous judgments against Italy the ECtHR had already decided that the sanction of confiscation of property – although labelled in Italian law as an administrative compensation measure – qualifies as a 'penalty' within the meaning of the ECHR,[92] and that the imposition of such a penalty must be preceded by a criminal conviction. This also implies that cases in which criminal proceedings are precluded by reason of lapse of time lack a sufficient basis for the imposition of a confiscation sanction.[93] However, in 2015 the Italian Constitutional Court criticised these judgments and found that the interpretations on which they are based could not be regarded as 'sufficiently consolidated' within the ECtHR case law (partly because the judgments

[91] ECtHR *GIEM et al v Italy* (n 11). See on this judgment JHB Bemelmans and MAP Timmerman, 'Noot bij EHRM (GK) 28 juni 2018, *G.I.E.M. S.r.l. e.a. t. Italië*' (2018) 11 *European Human Rights Cases* (no 219) 680. Measures that are aimed at the tracing, freezing, seizure, and/or confiscation of proceeds of crime exist in many jurisdictions, which is not surprising considering that several legislative initiatives of the EU have obliged Member States to adopt the necessary means to enable these sorts of measures within their respective national legal systems with an eye to combating a large number of designated crimes. See Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing, and confiscation of instrumentalities and the proceeds of crime, *Official Journal of the European Union* (OJ) [2001] L 182/1; Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, [2005] OJ L 68/49; Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, [2014] OJ L 127/39. See also K Ligeti and M Simonato, 'Asset Recovery in the EU: Towards a Comprehensive Enforcement Model beyond Confiscation? An Introduction' in K Ligeti and M Simonato (eds), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Oxford, Hart Publishing, 2017) 1–21; and ECtHR *GIEM et al v Italy* (n 11) paras 147–153.

[92] ECtHR 20 January 2009, *Sud Fondi Srl et al v Italy* (App no 75909/01). See also ECtHR 5 July 2001, *Phillips v the United Kingdom* (App No 41087/98), [2001] ECHR 437.

[93] ECtHR 29 October 2013, *Varvara v Italy* (App no 17475/09).

were not rendered by the Grand Chamber), so that Italian courts could not be required to follow and apply these interpretations.[94]

In response to this, the ECtHR concisely notes that 'its judgements all have the same legal value' and that '[t]heir binding nature and interpretative authority cannot therefore depend on the formation by which they were rendered'.[95] Furthermore, the ECtHR confirms its previous judgments and ultimately finds that Article 7 ECHR was violated in respect of the four applicant legal entities, that Article 6, paragraph 2 ECHR was violated in respect of Mr Gironda, and that Article 1 of Protocol No 1 to the ECHR (protecting the right to property) was violated in respect of all five applicants. For the purposes of the present contribution, it is worthwhile to take a closer look at the ECtHR's reasoning with regard to the relation between the principle of individual culpability, the presumption of innocence protected by Article 6, paragraph 2 ECHR, and the principle of legality enshrined in Article 7 ECHR.

With regard to Article 7 ECHR, the Grand Chamber considers that, for this provision to apply in the cases at hand, it is necessary to establish that the Italian confiscation measure qualifies as a 'penalty' within the meaning of the provision. As is well-known, the ECtHR employs an autonomous concept of 'penalty'. Referring to the wording of Article 7, paragraph 1 ECHR, the ECtHR notes 'that the starting-point in any assessment of the existence of a "penalty" is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence'.[96] In other words, for Article 7 ECHR to apply it must be assessed whether or not the person upon whom the penalty is imposed has been convicted (French: *condamné(e)*) beforehand. In agreement with previous case law, the ECtHR subsequently notes that this forms a relevant, but not a decisive factor.[97] Other relevant factors include the nature and purpose of the sanction, its characterisation under national law, the procedures involved in the making and the implementation of the measure, and the measure's severity.[98] Unsurprisingly – and in line with its earlier judgment in the case of *Sud Fondi et al* that was referred to above – the Grand Chamber concludes that the Italian confiscation measure qualifies as a 'penalty' within the meaning of Article 7 ECHR.[99]

Next, the Grand Chamber examines whether the imposition of the impugned confiscation measures without a prior (formal) conviction was reasonably foreseeable for the applicants.[100] At this juncture in the ECtHR's reasoning, a noteworthy

[94] See para 133 of ECtHR *GIEM et al v Italy* (n 11); see also para II.2 in the concurring opinion of Judge Motoc; and paras 16–57 in the partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque.

[95] ECtHR *GIEM et al v Italy* (n 11) para 252.

[96] ECtHR *GIEM et al v Italy* (n 11) para 211.

[97] ECtHR *GIEM et al v Italy* (n 11) paras 215 and 217. See eg ECtHR 17 December 2009, *M v Germany* (App No 19359/04), [2009] ECHR 2071.

[98] These are the so-called *Engel* criteria. See ECtHR 8 June 1976, *Engel et al v the Netherlands* (App no 5100/71) *Series A* no 22, paras 80–82. And see ECtHR 26 February 1996, *Welch v the United Kingdom* (App no 17440/90) *Series A* no 307-A. The *Engel* criteria were embraced by the CJEU in its judgment of 5 June 2012, C-489/10 *Criminal Proceedings against Łukasz Marcin Bonda* (EU:C:2012:319); see Klip, *European Criminal Law* (n 2) 190–94.

[99] ECtHR *GIEM et al v Italy* (n 11) paras 220–34.

[100] In paras 243–246 of ECtHR *GIEM et al v Italy* (n 11) the ECtHR argues that Art 7 ECHR requires the existence of a 'mental link' that traces liability to the defendant's conduct. Referring to its case law on Art 6(2) ECHR, the ECtHR further notes that this requirement does not preclude forms of objective or strict liability that stem from presumptions of liability, provided that the defendant is not deprived of every possibility to

distinction is made between the four applicant companies, on the one hand, and Mr Gironda, on the other. None of the five applicants had been formally convicted of a criminal offence in connection with which the confiscation measure was imposed. But in contrast to Mr Gironda, whose prosecution was discontinued because the offence with which he was charged was statute-barred, the four applicant companies were never prosecuted at all. Under the Italian law, corporate criminal liability is not (generally) accepted.[101] Legal entities may, however, be administratively liable for certain offences. One of these offences is unlawful site development. The confiscation of property is an administrative sanction that is automatically imposed by the Italian criminal court when this offence is proved, irrespective of whether the owner of the property is a natural person or a legal entity. From the fact that the four applicant companies never were parties to the proceedings that led to the imposition of the confiscation measures, the ECtHR concludes that the four legal entities incurred a penalty for actions for which third parties (namely a number of legal representatives and shareholders who were indicted in a personal capacity) have been found culpable.[102] This amounts to a form of vicarious liability which is at variance with the prohibition, stemming from Article 7 ECHR, on punishing a person for an offence that has been committed by another. With regard to the four legal entities, the ECtHR therefore concludes that Article 7 ECHR has been violated.[103]

Interestingly, the Grand Chamber arrives at a different conclusion in respect of the fifth applicant, Mr Gironda. As was mentioned earlier, Mr Gironda was prosecuted, but the proceedings against him were discontinued because the offence of which he stood accused was statute-barred. Accordingly, he was not formally convicted of, or found culpable of committing, the offence of unlawful site development. However, the ECtHR notes that, although a 'declaration of criminal liability is often made in a criminal-court judgment formally convicting the defendant, this should not be seen as a mandatory rule'.[104] The ECtHR goes on to note that the demands of Article 7 ECHR may be satisfied when the imposition of a penalty is preceded not by a *formal* finding of culpability, but by a finding *in substance* that the defendant has committed the offence.

exonerate him- or herself; cp n 56 above. See PH van Kempen and JHB Bemelmans, 'EU Protection of the Substantive Criminal Law Principles of Guilt and *Ne bis in Idem* under the Charter of Fundamental Rights: Underdevelopment and Overdevelopment in an Incomplete Criminal Justice Framework' (2018) 2 *New Journal of European Criminal Law* 247, which rightfully notes on p 255 that one should distinguish between 'protection against the absence of a culpability requirement' and 'protection against presumptions of the presence of culpability'. Bemelmans and Timmerman, 'Noot bij EHRM (GK) 28 juni 2018' (n 91) 684, doubt whether Arts 6(2) and 7 ECHR lend themselves to an interpretation according to which they demand that offence definitions satisfy certain substantive requirements; see in this connection also Bemelmans, *Totdat het tegendeel is bewezen* (n 80) 212–13 and 505–06; and MAP Timmerman, *Legality in Europe. On the Principle Nullum Crimen Sine Lege in EU Law and under the ECHR* (Cambridge, Intersentia, 2018) 3–4.

[101] See n 85. And see Cugia di Sant'Orsola and Giampaolo, 'Liability of Entities in Italy' (n 85); F Mazzacuva, 'The Problematic Nature of Asset Recovery Measures: Recent Developments of the Italian Preventive Confiscation' in K Ligeti and M Simonato (eds), *Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU* (Oxford, Hart Publishing, 2017) 101–15.

[102] ECtHR *GIEM et al v Italy* (n 11) paras 265–272.

[103] ECtHR *GIEM et al v Italy* (n 11) para 274.

[104] ECtHR *GIEM et al v Italy* (n 11) para 251.

In the case of Mr Gironda the criminal proceedings were discontinued 'solely on account of statutory limitation', whereas all the elements of the offence of unlawful site development were 'made out'.[105] This, according to the Grand Chamber, can be regarded, in substance, as a conviction for the purposes of Article 7 ECHR. Consequently, it is concluded that there has been no violation of this provision in respect of Mr Gironda. However, the ECtHR immediately connects its finding that a confiscation measure may be inflicted without a prior formal conviction with an important reservation: the domestic courts in question must have 'acted in strict accordance with the defence rights enshrined in Article 6 of the Convention'.[106] And Mr Gironda also complained that the Italian authorities, by imposing the confiscation measure, violated his fundamental right provided by Article 6, paragraph 2 ECHR, that is, his right to be 'presumed innocent until proved guilty according to law'.[107]

It is noteworthy that the phrase 'proved guilty according to law' is interpreted rather strictly by the ECtHR. The broadened, substantive concept of 'conviction' that the ECtHR construed with a view to the applicability of Article 7 ECHR, is not subsequently applied also to Article 6, paragraph 2 ECHR. In agreement with its previous case law on the matter, the ECtHR notes in paragraph 314 of the judgment that the protection offered by the right to be presumed innocent extends beyond the proceedings aimed at establishing the defendant's culpability for a criminal offence: 'individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued', may not be 'treated by public officials and authorities as though they are in fact guilty of the offence charged'. The presumption of innocence 'could risk becoming theoretical and illusory' if an acquittal or a decision to discontinue criminal proceedings is not respected. In addition, it is stated that 'guilt cannot be legally established where the proceedings have been closed by a court before the gathering of evidence or the conducting of hearings that would have allowed the court to determine the case on its merits'.[108]

In Italy, Mr Gironda had been acquitted by the criminal court on appeal, and the confiscation measure that was imposed by the first instance court had been revoked. This ruling was subsequently quashed by the Italian Court of Cassation (and not thereupon remitted to a lower court). According to the Court of Cassation, the confiscation measure was indeed justified because it had been proved that Mr Gironda was in fact guilty of the offence charged. Thus, the applicant was declared guilty (not formally, as was seen above, but in substance) by the Court of Cassation, despite the fact that the proceedings were discontinued on the ground that the prosecution of the offence was

[105] ECtHR *GIEM et al v Italy* (n 11) para 261. In para 260 the ECtHR remarkably notes that relatively short limitation periods may – especially when complex offences are at issue – lead to situations in which perpetrators 'systematically avoid prosecution and, above all, the consequences of their misconduct'. The ECtHR interprets the Italian legal rules that are at issue in the instant case as seeking to prevent this impunity. This interpretation seems to be inspired by the case-law of the CJEU with regard to retroactive extensions of national limitation periods on the basis of European law. See CJEU 8 September 2015, C-105/14 *Criminal Proceedings against Ivo Taricco et al* (EU:C:2015:555), and CJEU 5 December 2017, C-42/17 (*Taricco II* case) *Criminal Proceedings against MAS and MB* (EU:C:2017:936).

[106] ECtHR *GIEM. et al v Italy* (n 11) para 261.

[107] The four applicant legal entities also complained that the right to be presumed innocent was violated in their cases. These complaints were declared inadmissible.

[108] ECtHR *GIEM et al v Italy* (n 11) para 315.

statute-barred. This course of events, the ECtHR argues in paragraph 317, 'breaches the right to the presumption of innocence'. The underlying idea seems to be that imposing the penalty of confiscation on a person in respect of whom criminal proceedings have been discontinued is tantamount to treating this person as though he or she is in fact guilty. Accordingly, the ECtHR concludes that Article 6, paragraph 2 ECHR was violated in respect of Mr Gironda.

It can be concluded from the foregoing that the 'first dimension' of the principle of individual culpability is clearly manifested in the ECtHR's case law. The Strasbourg court stresses the importance – indeed, the necessity – of establishing the defendant's *own* misconduct as a condition for individual liability of both natural persons and legal entities. Moreover, the ECtHR attaches much weight to an individualised assessment that concentrates on the defendant's *own* culpability for the offence charged. In paragraph 271 of its judgment in the case of *GIEM et al*, the ECtHR cites from its judgment in the case of *Varvara* 'that a consequence of cardinal importance flows from the principle of legality in criminal law, namely a prohibition on punishing a person where the offence has been committed by another'. The prohibition on constructions of vicarious liability of this kind in criminal law had already been emphasised by the ECtHR in earlier judgments[109] and explains why it was concluded that the imposition of a penalty of confiscation of property on the applicant companies in the case of *GIEM et al* was in violation of Article 7 ECHR.

This does not mean that no criticism can be levelled at the approach of the ECtHR. Its reasoning in the case of *GIEM et al* is at certain points somewhat puzzling. As was seen above, the notion of 'conviction' within the meaning of Article 7 ECHR is broader than within the meaning of Article 6, paragraph 2. It is not quite clear what is the rationale for this difference.[110] The ECtHR (still) holds that the imposition of a penalty is not justified without a prior formal conviction of the punished person. In cases where the defendant's culpability for the offence at issue has not at all been assessed and established during the proceedings, the prohibition on imposing a penalty is founded on Article 7 ECHR. In cases, conversely, where this culpability has been assessed and established ('in substance'), but where this finding has not resulted in a (formal) conviction (for instance due to the fact that the prosecution of the offence was statute-barred), the prohibition rests on Article 6, paragraph 2 ECHR.[111]

[109] ECtHR 29 August 1997, *AP, MP and TP v Switzerland* (App No 19958/92), [1997] ECHR 50; ECtHR 29 August 1997, *EL, RL and JO-L v Switzerland* (App No 20919/92), [1997] ECHR 50. See Van Kempen and Bemelmans, 'EU Protection of the Substantive Criminal Law Principles' (n 100) 254–56; Bemelmans, *Totdat het tegendeel is bewezen* (n 80) 214–15.

[110] See Bemelmans and Timmerman, 'Noot bij EHRM (GK) 28 juni 2018' (n 91) 686. In his highly instructive partly concurring, partly dissenting opinion, Judge Pinto De Albuquerque vehemently criticises the concept of a 'substantive' declaration of culpability. According to Pinto De Albuquerque, this concept is in fact 'a blank cheque for the domestic courts to do as they please' (para 29). He argues that, by introducing the notion of a 'substantive' finding of guilt, the majority of the Grand Chamber has enabled domestic courts to deviously circumvent statutory limitation periods, and has acted as 'a subservient surrogate of the [Italian] Government's interests and policy choices' (para 29). According to Pinto De Albuquerque, the concept is, furthermore, at variance with both the principle of legal certainty and the principle of the presumption of innocence (paras 31–35).

[111] See also Directive 2014/42 (n 91), which obliges Member States to enable confiscation 'subject to a final conviction for a criminal offence' and, subject to certain conditions, also in cases where criminal proceedings do not result in a criminal conviction. See M Panzavolta, 'Confiscation and the Concept of Punishment: Can There be a Confiscation Without a Conviction?' in K Ligeti and M Simonato (eds), *Chasing Criminal Money.*

C. Economic Units in EU Competition Law: *Aalborg-Portland* and *Akzo Nobel*

It still remains to be seen how the requirement of individual authorship is dealt with in areas of European quasi-criminal law; that is, in European law domains that are not criminal in nature, but that are endowed with potentially very severe punitive measures that qualify as penalties within the meaning of Articles 6 and 7 ECHR.[112] One important example of a field of quasi-criminal law is European competition law.[113] Almost by definition, competition law is concerned with legal or corporate entities. And quite unlike a natural person,[114] a legal entity may implement changes in its legal structure and/or in the economic activities it applies itself to. Because of this, the question who or what can (still) qualify as the 'author' of a certain infringement of anti-competitive rules can at times assume particularly complex guises. In order to effectively deal with this and other liability issues, the European legislature has opted, from the very start, for a so-called 'economic approach' instead of a purely 'legal approach': EU competition law addresses economic entities denoted as 'undertakings', not legal persons.[115] The concept of an 'undertaking' in the TFEU has a considerably wider ambit than that of a corporate or legal entity. And this focus on economic rather than legal entities primarily serves to prevent potential mismatches between the socio-economic and the juridical reality in allocating liability for infringements of EU competition law.

According to the CJEU, the concept of an undertaking 'covers any entity engaged in economic activity, regardless of its legal status and the way in which it is financed'.[116] The concept must furthermore 'be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal'.[117] This implies that a group of corporations, or a group consisting of natural and legal persons, can constitute a single undertaking – or a single economic unit – for the purposes of EU

Challenges and Perspectives on Asset Recovery in the EU (Oxford, Hart Publishing, 2017) 25–52; Franssen, 'The EU's Fight' (n 86) 1244–46. The ECtHR has considerably fewer problems with cases in which the criminal court's decision on the penalty is based *in part* on offences of which the defendant was not convicted; see ECtHR 1 March 2007, *Geerings v the Netherlands* (App no 30810/03) para 44.

[112] See sub-section III.B. above.

[113] See C Harding, 'The Relationship Between EU Criminal Law and Competition Law' in V Mitsilegas, M Bergström and Th Konstadinides (eds), *Research Handbook on EU Criminal Law* (Cheltenham, Edward Elgar Publishing, 2016) 249–371.

[114] However, in most jurisdictions many or even most offences are subject to certain limitation periods and become statute-barred once these expire. This phenomenon could be interpreted as a legal provision that gives expression not only to the idea that the impact of a crime and the demand for retribution lapse over time, but also to the idea that a human individual is not a static entity but changes over time.

[115] See Arts 101–102 TFEU. See further Franssen, 'Corporate Criminal Liability' (n 8); M Veenbrink, *Criminal Law Principles and the Enforcement of EU and National Competition Law: A Silent Takeover?* (Deventer, Wolters Kluwer, 2020) 169. However, considering that economic entities typically lack the capacity to hold rights and obligations, liability for infringements of competition law must be allocated to the legal or natural person actually in charge. See C Harding, 'Sanction Accumulation in the Context of Business Offending. The Full Force of the Law?' (2017) 25(2) *European Journal of Crime, Criminal Law and Criminal Justice* 163–87, 167–68; MJ Frese, *Sanctions in EU Competition Law: Principles and Practice* (Amsterdam, University of Amsterdam, 2012) 64. Cp also subsection VI.C. below, dealing with problems of double jeopardy.

[116] CJEU 10 September 2009, C-97/08 *Akzo Nobel et al v Commission* (EU:C:2009:536), para 54.

[117] CJEU *Akzo Nobel et al* (n 116) para 55. See W Frenz, *Handbook of EU Competition Law* (Berlin, Springer, 2016) 224–25.

competition law. This is assessed on an ad hoc basis, in light of varying economic and organisational factors.[118] Although the focus on economic entities provides for a rather flexible approach in allocating liability for infringements of competition law, difficult questions of responsibility and liability may still arise, especially in cases where, during or after the infringement, changes have occurred within the legal or business structure of the company or group of companies involved.

In order to establish what economic unit should be held liable for an infringement of competition law in these sorts of difficult cases, the European Commission – which is the prime authority to deal with issues of liability under European competition law and to impose fines in cases where it establishes this liability – employs the so-called doctrine of 'economic continuity'. This doctrine entails the following test: if and to the extent that, following a reorganisation, the 'new' undertaking is economically and functionally equal to the 'old' undertaking liability for infringements of competition law that took place prior to or during the reorganisation is not lost but is assumed by the post-reorganisation undertaking.[119] Economic continuity or discontinuity can often be a rather difficult matter to assess. Difficulties may arise when an undertaking has sold or hived-off certain specific business units. In cases where the relevant infringement of competition law has taken place in one or more of these business units, liability as a rule remains with the transferring entity. This result is mainly grounded on two considerations: first, the buyer should not be liable for infringements over which it had no influence and for which it consequently bears no culpability; and second, the entity in whose sphere of responsibility the infringement of law has occurred should not be able to escape liability by means of selling certain of its business units or by otherwise divesting itself of some of its economic activities.[120]

A different result is reached, however, in cases where, after an infringement of competition law, the entire undertaking either is sold to another undertaking or has merged into a new legal entity. In such cases, application of the doctrine of economic continuity generally results in the transferral of liability to the acquiring undertaking or the new corporate entity.[121] This transferral of liability, it must be noted, is subject to the important condition that the entity that was responsible for the management of the undertaking at the material time of the infringement of competition law has been liquidated or has otherwise ceased to exist for legal purposes after the sale or the merge. This implies that an undertaking which remains in existence after a reorganisation or after having divested itself of (some of) its economic activities, normally retains its liability for prior infringements to the exclusion of the successor.[122] This rule was

[118] See Franssen, 'Corporate Criminal Liability' (n 8) 299; Frese, *Sanctions in EU Competition Law* (n 115) 64–65.

[119] Frenz, *Handbook* (n 117) 233; Commission Decision 94/601/EC of 13 July 1994, *Cantonboard*, *OJ* [1994] OJ L 243/1 (para 145).

[120] Frenz, *Handbook* (n 117) 234; Commission Decision 89/190/EEC of 21 December 1988, *PVC Cartel*, [1989] OJ L 74/1 (para 49).

[121] Frenz, *Handbook* (n 117) 234; see also CJEU 16 December 1975, Case 40/73 *Suiker Unie et al v Commission* (EU:C:1975:174).

[122] Commission Decision 94/599/EC of 27 July 1994, *PVC Cartel II*, [1994] OJ L 239/14 (para 41); this Decision replaced the previous Commission Decision 89/190/EEC (n 120).

confirmed by the CJEU in the case of *Anic*.[123] Anic had been found to have infringed anticompetitive rules by participating in a polypropylene cartel. The company claimed that, although it still legally existed as a legal entity, it could not be held liable for the infringements because it had meanwhile sold off its entire polypropylene business to another undertaking. To no avail: explicitly referring – interestingly – to the notion of 'personal responsibility', the CJEU dismissed Anic's appeal against the judgment of the General Court that held Anic liable:

> In complaining that [the General Court] attributed responsibility for the infringements to it although it had transferred its polypropylene business to Monte, Anic is disregarding the principle of personal responsibility and neglecting the decisive factor, identifiable from the case-law of the Court of Justice … that the 'economic continuity' test can only apply where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed. It also follows that the application of these tests is not contrary in any way to the principle of legal certainty.[124]

Thus, the continued existence of the infringer normally precludes liability of the transferee or the acquiring company. However, in the case of *Aalborg-Portland et al*, the *Anic* rule did not apply.[125] Although this case is relatively old, it may still be seen as a case in point with regard to the way in which the question of 'individual authorship' is dealt with within the quasi-criminal law context of European competition law. Aktieselskabet Aalborg-Portland Cement Fabrik, a Danish legal entity, was found guilty of infringing Article 101, paragraph 1 TFEU by participating in a cartel in the cement sector. The economic activities of this undertaking were later transferred to a newly-established legal entity going by the name Aalborg in 1990, subsequent to which Aktieselskabet Aalborg-Portland Cement Fabrik became a holding company that held 50 per cent of the shares in Aalborg. The other 50 per cent of the shares were held by another company, called Blue Circle. Aalborg was held liable for the infringements of competition law by the Commission; this decision was upheld by the General Court.

On appeal, Aalborg claimed that it was unjustifiably held liable for the infringements committed by Aktieselskabet Aalborg-Portland Cement Fabrik in light of existing case law arguing that 'the "economic continuity" test can only apply where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed'. In his Opinion, Advocate General Dámaso Ruiz-Jarabo Colomer indeed concluded that Aalborg could not be held responsible for the infringements because these were committed by a corporate entity that continued to exist as a holding company, owning 50 per cent of Aalborg's share capital. According to the Advocate General, attributing liability to Aalborg would contravene the principle of individual culpability for two reasons:

> First, it contradicts the case-law of the Court of Justice, which has held that 'it falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, at the time of the decision finding

[123] CJEU 8 July 1999, C-49/92 P *Commission v Anic Partecipazioni* (EU:C:1999:356). See A Jones and B Sufrin, *EU Competition Law. Texts, Cases, and Materials*, 4th edn (Oxford, Oxford University Press, 2011) 1118. Cp General Court (GCEU) 28 April 1994, T-38/92 *All Weather Sports Benelux BV v Commission* (EU:T:1994:43).

[124] CJEU *Anic* (n 123) para 145.

[125] CJEU *Aalborg-Portland et al* (n 116).

> the infringement, another person had assumed responsibility for operating the undertaking'. Second, because the 'one and the same economic entity' test, as the key to the transfer of responsibility from the former cement manufacturer to Aalborg, is based on an objective concept which is open to challenge. Irrespective of the mistake in the assertion, since a third party (Blue Circle) holds 50% of the appellant's share capital, fixing the objective in the activity and not in the person carrying it out, irrespective of the fact that the latter person exists and can answer for its acts, is tantamount to ignoring the principle of culpability and the principle that punishment should only be applied to the offender.[126]

The CJEU, however, rejected Aalborg's claim. It ruled that the fact that Aktieselskabet Aalborg Portland-Cement Fabrik still existed did not preclude 'the Commission from proceeding against Aalborg as being, from an economic and organisational point of view, the *author* of the infringement' (emphasis added).[127] It stated that the Court of First Instance had rightfully concluded that, for the purposes of applying Article 85, paragraph 1 of the Treaty establishing the European Economic Community,[128] the undertaking run by Aalborg from 1990 constituted the same economic entity as the one that was previously run by Aktieselskabet Aalborg Portland-Cement Fabrik. Furthermore, the CJEU ruled that the continued existence of the infringing company normally precludes the attribution of liability to the acquiring company, unless both companies are 'structurally related'.[129] In the present case, both companies were indeed found to be structurally related. This means that:

> [t]he fact that Aktieselskabet Aalborg Portland-Cement Fabrik still exists as a legal entity does not invalidate that finding and did not therefore in itself constitute a ground for annulling the Cement Decision in respect of Aalborg. In that regard, it is true that in *Commission* v *Anic* (paragraph 145) the Court held that there can be economic continuity only where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed. However, that case concerned two existing and functioning undertakings one of which had simply transferred part of its activities to the other and where there was no structural link between them. As is apparent from paragraph 344 of this judgment, that is not the position in this case.[130]

The principle that punishment should only be applied to the offender – also referred to as the principle of 'personal responsibility' – forms an established part of European

[126] Opinion of 11 February 2003, C-204/00 P *Aalborg-Portland A/S et al v Commission* (EU:C:2003:85) paras 70–71. In paras 63–64 of his Opinion, AG Ruiz-Jarabo Colomer interestingly states: 'the Court of Justice must begin by setting out a general principle of law, developed in order to limit the exercise of *ius puniendi* by the public authorities: the principle that punishment should only be applied to the offender, which complements the principle of culpability, whose first and most important manifestation is that only the perpetrator can be charged in respect of unlawful conduct. That principle, like all the safeguards derived from criminal law, requires great caution when it is applied to administrative proceedings, since, when it comes to imposing penalties or making compensation for unlawful conduct, a system of objective responsibility, or strict responsibility, is unacceptable.' See also Blomsma, *Mens Rea and Defences* (n 4) 224–25; JM ten Voorde, 'Een autonome en uniforme uitleg van opzet binnen de Europese Unie. Een commentaar bij HvJ EU 27 februari 2014, zaak C-396/12' (2014) 6 *Nederlands Tijdschrift voor Europees Recht* 203, 208.

[127] CJEU *Aalborg-Portland et al* (n 116), para 355.

[128] Now: Art 101 TFEU.

[129] See on the concept of a 'structural link' as part of the 'economic continuity test' Frese, *Sanctions in EU Competition Law* (n 115) 67–68; Frenz, *Handbook* (n 117) 235; Jones and Sufrin, *EU Competition Law* (n 123) 1118–20; Veenbrink, *Criminal Law Principles* (n 115) 364–65.

[130] CJEU *Aalborg-Portland et al* (n 116), paras 357–359.

competition law. The CJEU has repeatedly stated that, pursuant to this principle, the legal or natural person answerable for an infringement of competition law is the legal or natural person *actually managing* the undertaking at the material time of that infringement.[131] This principle is somewhat relaxed, however, by the doctrine of economic continuity, which – as may be concluded from the foregoing – is sometimes applied with the effect of attributing liability for infringements of competition law to *another* entity than the one that actually managed the undertaking at the material time of the infringement. The rationale for this relaxation is twofold:

- First, a penalty imposed on an undertaking that continues to exist in law but has ceased economic activity is likely to have no deterrent effect.
- Second, if no possibility were foreseen to impose a penalty on an entity other than the one which committed the infringement, undertakings could escape penalties simply by changing their identity through restructurings, sales or other legal or organisational changes.[132]

This is not to deny that the concept of economic continuity has met with criticism. Its precise meaning (including that of the criterion of a 'structural link') is not very clear, and its application is not always straightforward. The CJEU's judgment in the case of *Aalborg-Portland et al*, for instance, has been criticised in light of the first-mentioned limb of the rationale of the doctrine of economic continuity. According to the criticism, the CJEU has not taken sufficient account of the fact that the entity that was in charge at the time of the infringements (Aalborg-Portland Cement Fabrik A/S) remained in existence after the transferral of its economic activities to the newly established legal entity (Aalborg), and also served as a holding company with no less than 50 per cent of shares in the new company: 'the holding company is likely to be stronger financially than the corporate transferee which would mean that avoidance of liability resulting from the thin capitalisation of the new operating entity could not be ruled out.'[133] Notwithstanding this criticism, it is clear that liability for infringements of competition law that occur during or prior to structural changes within a company may not, as a rule, be established on the basis of constructions of *purely* vicarious liability: an entity cannot be liable for an infringement of another entity if no structural links between the two can be established.[134]

However, the principle referred to as 'personal responsibility' is relaxed further by the doctrine of so-called 'parent liability'. A company may be liable for an infringement of competition law committed by an undertaking that it, directly or indirectly (through a shareholding), owns. This liability of a parent for anticompetitive behaviour of its subsidiary is based on the idea that a parent company normally exercises (decisive)

[131] See Frese, *Sanctions in EU Competition Law* (n 115) 64–67.

[132] Frese, *Sanctions in EU Competition Law* (n 115) 67–68.

[133] Frenz, *Handbook* (n 117) 235. See also W Berg, 'Die Rechtsprechung des EuGH und EuG auf dem Gebiet des Kartellrechts im Jahr 2004' (2005) 2 *Europaïsches Wirtschafts- und Steuerrecht* 49.

[134] Cp paras 63–64 in the AG's opinion (n 126). For a critical analysis of the EU's approach to corporate (criminal) liability, see Franssen, 'The EU's Fight' (n 86) and Franssen, 'Corporate Criminal Liability' (n 8).

influence over the (anticompetitive) behaviour of its subsidiaries. In the important case of *Akzo Nobel et al*, the CJEU concluded:

> that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities … That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking … [This] enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.[135]

As a rule, liability for an infringement of competition law committed by a subsidiary undertaking may be imputed to the parent company only when the parent company has actually exercised *decisive influence* over the conduct of the subsidiary undertaking. To this extent, the principle of personal responsibility – or the principle that liability should only be incurred on the actual offender – clearly appears to be respected by the doctrine of parent liability. However, in cases where a parent company owns all or virtually all of the shares in a subsidiary company which is found to have infringed EU competition rules, 'there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary'.[136] Although this presumption may be rebutted, it appears that this possibility is in fact almost illusory. In order to rebut the presumption, the parent company is required to demonstrate that the subsidiary company acts on its own initiative on the market, independently from the parent company.[137]

It may be concluded from the foregoing that, while it is true that the CJEU clearly defers to the 'first dimension' of the principle of individual culpability in its case law in the field of competition law, the purport of this dimension in competition law deviates from the traditional criminal law approach. This is to say that competition law and criminal law differ in the answers given to the question as to who can legally be designated as the 'author' of a certain infringement. The range of persons who may potentially be designated as infringers of EU competition rules is wider than the range of persons to whom – in accordance with the classical view in criminal law – perpetration may potentially be attributed. In other words, whereas the first dimension of the principle of individual culpability implements evidentiary thresholds in both domains, this threshold is generally higher in criminal law than in the quasi-criminal law domain of EU competition law: compared with the latter, criminal law generally demands a more direct and firm relation between a particular person's conduct and a certain harm in order to sustain the finding that this person can legally be regarded as the 'author' of the offence concerned.

[135] CJEU *Akzo Nobel et al* (n 116) paras 58–59.

[136] CJEU *Akzo Nobel et al* (n 116) para 60. See also GCEU 17 May 2011, T-299/08 *Elf Aquitaine SA v Commission* (EU:T:2011:217), upheld by CJEU 2 February 2012, C-404/11 *Elf Aquitaine SA v Commission* (EU:C:2012:56).

[137] See Frenz, *Handbook* (n 117) 232–33; Frese, *Sanctions in EU Competition Law* (n 115) 66–67; Franssen, 'Corporate Criminal Liability' (n 8) 301; GCEU *Elf Aquitaine* (n 136) para 122.

Allowing of a more flexible and adaptable allocation of liability, the economic approach under EU competition law secures a better 'fit' with socio-economic reality than the more rigid, legal approach to corporate liability that prevails in criminal law. In cases, for example, concerning the anticompetitive behaviour of an entity that has meanwhile been dismantled and liquidated, but whose business activities are continued by another (existing or newly created) corporate entity, it is possible, in principle, to impute liability for the infringement to the successor. This is even possible, as was seen above, in some cases where the infringing company has *not* ceased to exist, provided that there is a 'structural link' between the old and the new company. In a strictly legal approach, by contrast, it is not permitted to hold an entity liable for past offences of its predecessor.[138] And in cases concerning parent-subsidiary relations, the parent company may be vicariously liable under EU competition law for an infringement committed by its subsidiary, even when there has been no personal involvement and no guilt whatsoever on the part of the parent company with respect to the infringement. In criminal law, by contrast, liability of a parent company typically clearly requires more, such as proof of a fault element.[139]

So although the economic approach in EU competition law is opportune from an instrumental point of view, the more exclusive focus in criminal law on legal entities (as opposed to 'economic entities'), conversely, has the advantage of rendering the personal scope of attribution of liability more foreseeable, thereby securing a high(er) degree of legal certainty. Moreover, the criminal law approach is conducive to a more distinct determination of the person whose individual culpability should be established and to whom the sanction should be tailored; the criminal law approach is consequently also more apt to satisfy the requirements of the principle of individual culpability.[140] Holding a person liable for another person's behaviour is at variance with the criminal law's basic principles. In EU competition law, however, this is exactly what happens when a group of persons – constituting an 'economic entity' – is collectively held liable for infringements committed by a subsidiary company.[141] Finally and relatedly, it should be noted that although liability for infringements of Articles 101 and 102 TFEU is established at the level of undertakings or economic entities, the legal consequences of the allocated liability are necessarily borne by legal (and possibly natural) persons against whom the Commission's fining decisions and the Courts' judgments are enforced.[142]

[138] See Franssen, 'Corporate Criminal Liability' (n 8) 291.

[139] See Harding, 'Sanction Accumulation' (n 115) 170; Franssen, 'Corporate Criminal Liability' (n 8) 301.

[140] Franssen, 'Corporate Criminal Liability' (n 8) 290. Franssen argues, however, that a more economic approach to corporate criminal liability would be advisable in EU criminal law, in order, inter alia, to more effectively deal with avoidance strategies of undertakings that are deployed with the aim of indemnifying them against incurring criminal liability.

[141] See Frese, Sanctions *in EU Competition Law* (n 115) 62–68; Franssen, 'Corporate Criminal Liability' (n 8) 302.

[142] See the Opinion of AG Juliane Kokott of 10 September 2009, C-978/08 *Akzo Nobel NV et al v Commission* (EU:C:2009:262) para 36: '[T]he addressees of the competition rules and the addressees of decisions of the competition authorities are not necessarily the same.' And see Franssen, 'Corporate Criminal Liability' (n 8) 303; GCEU *Elf Aquitaine* (n 136) para 122.

IV. Second Dimension: Mens Rea Elements

A. Introduction: Fault Elements in EU (Quasi-)Criminal Law

The different fault or mens rea elements of offence definitions represent the second dimension of the principle of *nulla poena sine culpa*. These requirements belong to the domain that Antoine Mooij has aptly termed 'guilt of cause' or 'guilt of action' (*αἰτία*; *causa*).[143] This dimension also warrants a relatively elaborate discussion. This is due, first of all, to the fact that proof of the requisite fault element underpins the presupposition of personal blameworthiness and lays the foundation for the ultimate imputation of criminal liability.[144] In other words, mens rea helps establish the defendant's guilt. There are, however, still more purposes that are discharged by mens rea elements. Winnie Chan and Andrew Simester identify three additional functions.[145] Mens rea sometimes constitutes the morally wrongful character of a defendant's behaviour in that the fault element is sometimes *integral* to the wrong or harm for which the defendant is called to answer: some offences derive their criminal or wrongful character to a considerable extent from the mental state with which they are committed. Moreover, mens rea elements serve the purpose of securing fair warning to defendants. And lastly, mens rea requirements play a mediating role in the process of criminalisation, in the sense that the level of stringency of a fault requirement that is incorporated into in an offence definition affects the ambit of the offence and, consequently, the level of protection offered to the legal interests for the sake of which the offence is created.

The two last-mentioned additional functions of mens rea are especially relevant within the context of European (quasi-)criminal law, considering the multi-layered patchwork of regulations in certain of its areas, the diverging legal traditions of the many EU Member States into which the European rules have to be integrated, and the interpretative questions, uncertainties or even perplexities to which all of this may give rise. A full and fine-grained picture of the different mens rea elements that can be found in the various domains of European (quasi-) criminal law cannot, as a matter of course, be offered here. The aim of the present section is to provide a broad sketch of the meanings attached to the most common fault elements in European criminal and quasi-criminal law.[146] In that regard some attention will be paid to certain interpretative difficulties that can be encountered in the case law of the CJEU. Such difficulties may easily occur in light of the fact that the terms that denote subjective fault elements in

[143] See subsection II.B. above.

[144] See De Jong, 'Theorizing Criminal Intent' (n 24); and see subsection II.B. above.

[145] W Chan and AP Simester, 'Four Functions of Mens Rea' in M Ulväng and I Cameron (eds), *Essays on Criminalisation and Sanctions* (Uppsala, Iustus Förlag, 2014) 143–62.

[146] The issue whether the European legislator and/or the CJEU would do better to adopt the tripartite classification of fault elements that prevails in the Anglo-American criminal law tradition, or rather the bipartite division of fault elements that one encounters in most continental criminal law systems (see subsection II.C.) will not be dealt with here. See Blomsma, *Mens Rea and Defences* (n 4) 59–204; J Blomsma, 'Fault Elements in EU Criminal Law: The Case for Recklessness' in A Klip (ed), *Substantive Criminal Law of the European Union* (Antwerp, Maklu, 2011) 135–59; in the same volume: T Weigend, 'Comments on Jeroen Blomsma's Case for Recklessness', 161–71; G Taylor, 'Concepts of Intention in German Criminal Law' (2004) 24(1) *Oxford Journal of Legal Studies* 99; G Taylor, 'The Intention Debate in German Criminal Law' (2004) 17(3) *Ratio Juris* 346.

European legislative acts are generally not defined by the European legislature, whereas these terms can have meanings that differ significantly across the legal systems of the different Member States. Furthermore, the different language versions of a legislative act occasionally exhibit notable terminological differences concerning fault elements.

In its judgment in the case of *Rinkau*, the CJEU stated that mens rea elements that form parts of European legislation must be regarded as independent or autonomous concepts 'which must be explained by reference, first, to the objectives and scheme' of the legislative instrument in question and, second, 'to the general principles which the national legal systems have in common'.[147] Although the CJEU seeks to ensure as far as possible that the rights and obligations of the contracting states and of concerned individuals arising from European legislation are 'equal and uniform', the conceptual framework of mens rea elements in European criminal and quasi-criminal law is still rather fragmentary and partly inconsistent. This is partially a result of the fact that the CJEU aims not at providing interpretations of mens rea elements that are uniform for the *whole* of EU law, but rather at providing uniform interpretations of mens rea elements for the purposes of the *particular* legislative acts in which they figure.[148] As a consequence, the exact meaning attributed to a fault element may vary somewhat from one legislative instrument to another.

Unsurprisingly, by far the most frequently used concept of subjective fault in European legislation in fields of (quasi-)criminal law is that of intention. Lesser degrees of fault, such as recklessness or negligence, are much more seldom adopted, at least in specifically criminal law provisions.[149] In the remainder of this section a number of interpretative issues will be discussed with regard to three mens rea elements. The following subsection discusses the concept of intention in European criminal and quasi-criminal law; subsection IV.C deals with the concepts of recklessness and (serious) negligence as offence elements in European legislation.

B. Intention: *Touring Tours und Travel* and *Spector Photo Group*

A judgment of the CJEU of 13 December 2018,[150] concerning a preliminary ruling at the request of the German Federal Administrative Court (Bundesverwaltungsgericht), provides an interesting example of a case regarding a form of quasi-criminal law

[147] CJEU 26 May 1981, Case 157/80 *Criminal Proceedings against Siegfried Ewald Rinkau* (EU:C:1981:120) para 11. The CJEU adds that this is 'all the more necessary where … terminological differences exist between the various language versions' of the legislative instrument at issue. With regard to the concept of 'intentional non-compliance' as referred to in eg Art 51(4) of Council Regulation 1698/2005/EC of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), [2005] OJ L 277/1, the CJEU noted in its judgment of 27 February 2014, C-396/12 *Van der Ham and Van der Ham-Reijersen van Buuren v College van Gedeputeerde Staten van Zuid-Holland* (EU:C:2014:98) para 32, that, 'in accordance with settled case-law, that concept must be given an independent and uniform interpretation, having regard to the usual meaning of those words, the context of those Articles and the objective pursued by the legislation of which they are part'.

[148] See Ten Voorde, 'Een autonome en uniforme uitleg' (n 126) 204; Blomsma, *Mens Rea and Defences* (n 4) 5–15; Rankinen, 'Positive Fault Requirements' (n 54) 139; Klip, *European Criminal Law* (n 2) 222–23.

[149] Rankinen, 'Positive Fault Requirements' (n 54) 124.

[150] CJEU *Touring Tours und Travel* (n 12).

enforcement that evokes questions pertaining to the role of the culpability principle in matters within the grey zone between administrative and criminal law. The Bundesverwaltungsgericht asked the CJEU to decide whether a certain national administrative regulation – the enforcement of which may involve the imposition of administrative monetary penalties – is compatible with existing EU law. The matters raised are interesting because they mark a topical tension within the AFSJ. How, if at all, can a Member State fulfil its duties under European law instruments – including obligations to criminalise certain behaviour – to combat illegal immigration and especially (in the current case) to prevent the intentional facilitation of unauthorised entry, transit and residence of third-country nationals, without jeopardizing the free movement of EU citizens and legally staying third-country nationals across the mutual borders of states that are part of the Schengen area?

Paragraph 63 of the German Law on the Residence of Foreign Nationals (*Aufenthaltsgesetz*)[151] formulates a number of obligations addressed to (international) transport undertakings (*Beförderungsunternehmer*). Section 1 prescribes that a carrier of passengers is not allowed to bring foreign nationals into the territory of the Federal Republic of Germany if these foreign nationals are not in possession of the requisite passport or residence permit. This legal prohibition simultaneously entails an obligation on the part of the transporter to carry out adequate checks of passports and visas.[152] Section 2 states that an infringement of this obligation may lead to a formal prohibition from continuing to bring foreign nationals into the territory of the Federal Republic of Germany in breach of section 1, accompanied by a formal warning that for every recurring infringement a fine (*Zwangsgeld*) will be imposed that can range between one thousand and five thousand euros. Two bus service undertakings – one from Germany and the other from Spain – were faced with the aforementioned prohibition under section 2 of paragraph 63 and were threatened with a penalty payment of 1000 euros for every individual foreign national without a passport or resident permit that they would bring into the federal territory of Germany. Both undertakings brought proceedings against the Federal Republic of Germany.

The undertakings claimed that their obligations under paragraph 63 of the *Aufenthaltsgesetz* are at variance with Article 67, paragraph 2 TFEU and Articles 20 and 21 of the Schengen Borders Code[153] insofar as these obligations involve the requirement to check passengers' documents prior to boarding the coach on routes that only cross an *internal* border within the Schengen area. Article 20 of the Schengen Borders Code, after all, prohibits border controls on persons, irrespective of their nationality, when they cross internal borders within the Schengen area. This general prohibition is subject to a limited number of exceptions, which are stipulated in Article 21. These exceptions predominantly concern security checks on persons and the exercise of police powers by

[151] Law on the Residence, Employment and Integration of Foreign Nationals in Federal Territory (*Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet*).

[152] Paragraphs 63(1) and (2) of the General Administrative Provision relating to the Law on the Residence of Foreign Nationals (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz*).

[153] As amended by Regulation 562/2006 that was applicable at the material time of the facts that triggered the proceedings, but was repealed and replaced by Regulation 2016/399/EU of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L 77/1.

the appropriate state authorities as long as the exercise of these police measures does not amount to an equivalent of border controls. The claimants argued that their obligations under paragraph 63 of the *Aufenthaltsgesetz* cannot qualify as one of the exceptions enumerated in Article 21 of the Schengen Border Code and hence amount to an unlawful contravention of the freedom of movement within the Schengen area.

Against this, the Federal Republic of Germany submitted that it was authorised to obligate internationally operating coach transport undertakings to perform checks on the required documents of passengers and to threaten any non-compliance with this obligation with an administrative penalty on the grounds that a number of instruments of EU law, most notably Directive 2002/90 and Framework Decision 2002/946, require the imposition of penalties for infringements of transport prohibitions such as those provided for in paragraph 63 of the *Aufenthaltsgesetz*. The Directive and Framework Decision[154] aim at preventing the facilitation of unauthorised entry, transit and residence of third-country nationals in the EU. Paragraph 1(a) of Article 1 of Directive 2002/90 requires each Member State to adopt appropriate sanctions against, inter alia, anyone 'who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens'.

In its preliminary ruling the CJEU circumvented this whole issue of whether or not Germany could legitimately claim to uphold and enforce paragraph 63 of the *Aufenthaltsgesetz* for the purpose of fulfilling its duties to combat (the facilitation of) illegal immigration under Directive 2002/90 and Framework Decision 2002/946 (and Directive 2001/51). The reason for this is that the referring court had expressly stated in its request for a preliminary ruling that it did not seek any clarification from the CJEU regarding the possible implications of these three European law instruments for the replies which had to be given to the questions asked.[155] The CJEU therefore stuck to the questions posed by the referring court, the scope of which was limited to an examination of paragraph 63 of the German *Aufenthaltsgesetz* in light of Article 67, paragraph 2 TFEU and Articles 20 and 21 of the Schengen Borders Code. The CJEU noted, first, that the checks as prescribed by paragraph 63 of the *Aufenthaltsgesetz* do *not* amount to 'border checks' within the meaning of, and (directly) prohibited by, Article 20 of the Schengen Borders Code, but must be seen as 'checks within the territory of a Member State', referred to in Article 21 of that regulation. This is so, according to the CJEU,

[154] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, [2002] OJ L 328/17; Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, *OJ* [2002] L 328, 1. The Federal Republic of Germany also referred to Council Directive 2001/51/EC of 28 June 2001, [2001] OJ L 187/45 supplementing the provisions of Art 26 of the Convention implementing the Schengen Agreement (the CISA Convention; Convention of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed in Schengen (Luxembourg) on 19 June 1990, [2000] OJ L 239/19).

[155] The CJEU recalls in this connection that 'it is for the referring court alone to determine and formulate the questions to be referred for a preliminary ruling concerning the interpretation of EU law which are necessary in order to resolve the dispute in the main proceedings'; CJEU *Touring Tours und Travel* (n 12) paras 39–42. See also CJEU 18 July 2013, C-136/12 *Consiglio Nazionale dei Geologi v Autorità garante della concorrenza e del mercato* (EU:C:2013:489).

because the checks at issue are carried out, 'not "at borders" or "when the border is crossed", but, in principle, inside the territory of a Member State, in the present case the one in which the travellers board the coach at the start of the cross-border journey'.[156]

The checks referred to in Article 21 of the aforementioned Schengen Borders Code are not automatically prohibited by this provision. As was mentioned above, certain checks within the territory of a Member State are permitted, provided that the exercise of these checks does not amount to an 'equivalent of border controls'. And the CJEU concluded, second, that this condition was not satisfied in the present case: the checks imposed under section 1 of paragraph 63 of the *Aufenthaltsgesetz* must be classified as measures that have an 'effect equivalent to border checks', which are prohibited by Article 21.[157] The CJEU therefore ruled that paragraph 2 of Article 67 TFEU and the Schengen Borders Code preclude legislation of a Member State,

> which requires every coach transport undertaking providing a regular cross-border service within the Schengen area to the territory of that Member State to check the passports and residence permits of passengers before they cross an internal border … and which allows … the police authorities to issue orders prohibiting such transport, accompanied by a threat of a recurring fine, against transport undertakings which have been found to have conveyed to that territory third-country nationals who were not in possession of those travel documents.[158]

Advocate General Yves Bot reached the same conclusion in his Opinion. (He differed, however, in his conclusion regarding the classification of the checks prescribed by paragraph 63 of the *Aufenthaltsgesetz*; according to the Advocate General these checks must be treated as 'border checks' within the meaning of, and prohibited by, Article 20 of the Schengen Borders Code.)[159] Having concluded that the border checks prescribed by the *Aufenthaltsgesetz* are prohibited by the Schengen Borders Code, the Advocate General went on to examine whether, as the Federal Republic of Germany maintained in its observations, those checks may be regarded as being imposed under the provisions of international and European law which have been adopted in order to combat illegal immigration. Although, as was seen before, this question was later left unaddressed by the CJEU in its preliminary ruling, it is worthwhile for the purposes of this chapter to pay some attention to the Advocate General's rather extensive treatment of this issue, not least because Bot makes a number of interesting observations on the meaning of *dolus eventualis*.

[156] CJEU *Touring Tours und Travel* (n 12) para 45.

[157] For the reasoning, see CJEU *Touring Tours und Travel* (n 12) paras 46–73.

[158] CJEU *Touring Tours und Travel* (n 12) para 73.

[159] See his Opinion of 6 September 2018, Joined cases C-412/17 and C-474/17 *Touring Tours und Travel GmbH and Sociedad de Transportes SA v Bundesrepublik Deutschland* (EU:C:2018:671) paras 73–104. AG Bot notes that the sole purpose of the checks is 'to ensure that the persons on board the coach who intend to cross the border of the Member State of destination are indeed permitted to enter the territory of that Member State', and that 'those checks have the effect of preventing passengers from entering the territory of that State if they do not have the required travel documents, in the same way as checks carried out by border guards in connection with the crossing of internal borders' (para 85). In this way, the checks have 'the effect of breaking the direct temporal and spatial link with the crossing of the border, thereby extending territorial borders outwards and introducing what commentators have described as "remote checks" or "outsourced" checks' (para 86). Moreover, the AG concludes that para 63 of the *Aufenthaltsgesetz* introduces 'a systematic obligation to carry out checks, compliance with which is unconditional and infringement of which is unlawful' (para 87).

The Federal Republic of Germany had submitted that as soon as a transport undertaking has been informed by the competent authorities of the finding that it has brought third-country nationals without the requisite papers into the territory of Germany, this undertaking is fully aware of its unlawful (past) conduct. If the undertaking nevertheless refrains from carrying out the required checks, although such checks are practicable and reasonable, any continued failure to comply with the obligations under section 1 of paragraph 63 of the *Aufenthaltsgesetz* would suffice to establish that the undertaking has reconciled itself, at least in part, to the possibility of facilitating illegal immigration, and hence that it has acted with *dolus eventualis*.[160] And this, it was argued, would constitute a form of intentional assistance by the transport undertaking of unauthorised entry of a person within the meaning of paragraph 1(a) of Article 1 of Directive 2002/90. Article 3 of Directive 2002/90 and Article 1 of Framework Decision 2002/946 require that this offence is subject to an 'effective, proportionate and dissuasive' penalty. And the Federal Republic of Germany submitted that such a penalty is provided for in the aforementioned section 2 of paragraph 63 of the *Aufenthaltsgesetz*.

Advocate General Bot disagrees. He acutely observes in his Opinion[161] that the Federal Republic of Germany failed to indicate that the offence of facilitation of unauthorised entry defined in Article 1 of Directive 2002/90 had already been transposed into German law in separate provisions, namely in paragraphs 95 to 97 of the *Aufenthaltsgesetz*.[162] But more importantly, he states furthermore that provisions of criminal law require 'a strict interpretation of the material and mental elements constituting that offence'.[163] He goes on to argue that paragraph 1(a) of Article 1 of Directive 2002/90 seeks to criminalise not a person who takes the risk of helping an illegally staying person to enter the territory, 'but rather a person who has the criminal intention of committing the specific act prohibited by law (specific intent)'[164] – which is to say that Article 1 of the Directive only targets those 'persons who, in a considered and intentional manner, engage in conduct with the aim of performing the prohibited act'.[165] According to Bot, this does not warrant an interpretation that includes *dolus eventualis*:

> In its observations, the Federal Republic of Germany actually refers to a form of intention which it calls '*dolus eventualis*', which it defines as 'indirect intention'. That form of intention covers a person who did not intend to commit an offence in its entirety. In the present case, the person concerned does not have a proven wrongful intent to commit a serious offence of collaborating with a smuggling network, but is acting recklessly, carelessly or negligently. … It must be accepted that a person who 'knowingly' or 'intentionally' facilitates the unauthorised

[160] Mistakenly referred to as 'indirect intent' by the Federal Republic of Germany and the AG; see the opinion of AG Bot (n 159) paras 137–138 and 145; and cp subsection II.C. above.
[161] Opinion of AG Bot (n 159) para 123.
[162] These provisions were examined by the CJEU in its judgment of 10 April 2012, C-83/12 PPU *Criminal Proceedings against Minh Khoa Vo* (EU:C:2012:202).
[163] Opinion of AG Bot (n 159) para 126.
[164] Opinion of AG Bot (n 159) para 137.
[165] Opinion of AG Bot (n 159) para 143.

> entry of a third-country national into the territory does not have the same criminal intent as a person who only negligently takes that risk.[166]

As was mentioned before, the CJEU was able to circumvent this whole issue of whether or not Germany could legitimately claim to uphold and enforce paragraph 63 of the *Aufenthaltsgesetz* for the purpose of fulfilling its duties to combat the facilitation of illegal immigration under Directive 2002/90 and Framework Decision 2002/946. Consequently, it did not express itself on the question whether or not *dolus eventualis* is included in the mens rea element of intention within the meaning of paragraph 1(a) of Article 1 of Directive 2002/90. But if it would have addressed this issue, the CJEU would quite probably have indicated that the Advocate General's reasoning on this issue is unsound. As is self-evident, a person who recklessly or negligently takes the risk of facilitating the unauthorised entry of a third-country national does not display the same state of mind as someone who specifically intends to facilitate this unauthorised entry. However, it would be clearly wrong to conclude from this that the concept of intention within the meaning of Article 1 of Directive 2002/90 (and possibly, for that matter, within the meaning of any other legal provision that contains the concept) could not encompass *dolus eventualis*.

In fact, it is rather likely that it does.[167] It is at least clear that the notion of *dolus eventualis* is not alien to the CJEU's interpretation of intention, as may be illustrated, for example, with the case of *Afrasiaba et al.*[168] The case concerned criminal proceedings in Germany against three men who stood accused of having supplied materials intended for the manufacture of nuclear missiles to the Islamic Republic of Iran. This constituted a criminal offence pursuant to paragraph 34 of the (since replaced) German Law on Foreign Trade (*Außenwirtschaftsgesetz*), which implemented Regulation 423/2007.[169] Article 7, paragraph 4 of this Regulation compelled the Member States to prohibit '[t]he participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent' the prohibition of supplying economic resources to Iran. In its reference for a preliminary ruling, the Oberlandesgericht in Düsseldorf asked the CJEU, among other things, to clarify whether or not the mens rea requirement referred to as 'knowingly and intentionally' encompasses *dolus eventualis*. In response, the CJEU stated the following:

> The terms 'knowingly' and 'intentionally' imply, for the purposes of Article 7(4) of Regulation No 423/2007, firstly an element of knowledge and secondly an element of intent. Those two

[166] Opinion of AG Bot (n 159) paras 138 and 142. An additional argument for his contention that the offence of facilitation of unauthorised entry excludes the concept of *dolus eventualis* is derived from the fact that the applicable penalties, as defined in Art 1 of Framework Decision 2002/946 (n 154), must be sufficiently dissuasive. And, according to Bot (para 143), 'it is possible to dissuade only persons who intend to commit the act punishable by law or to re-offend. Moreover, the severity of the penalties, which may take the form of an "extradition" measure or custodial sentences, precludes, in my view, such penalties being imposed on persons who take only the risk of committing the offence.'

[167] Except of course in legal systems (such as English criminal law) that do not recognise the concept of dolus eventualis altogether (see subsection II.C. above).

[168] CJEU 21 December 2011, C-72/11 *Generalbundesanwalt beim Bundesgerichtshof v Mohsen Afrasiaba et al* (EU:C:2011:874).

[169] Council Regulation 423/2007/EC of 19 April 2007 concerning restrictive measures against Iran, [2007] OJ L 103/1. The Regulation was repealed in 2010 by Council Regulation 961/2010/EU of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007, [2010] OJ L 281/1.

> cumulative requirements of knowledge and intent are met where the person participating in an activity covered by Article 7(4) of Regulation No 423/2007 deliberately seeks the object or the effect, direct or indirect, of circumvention connected therewith. They are also met where the person in question *is aware that his participation in such an activity can have that object or effect and accepts that possibility* (emphasis added).[170]

The last cited sentence attests to a rather straightforward and univocal recognition of the concept of *dolus eventualis* by the CJEU.[171] It is noteworthy that the CJEU binds this concept to a relatively low evidentiary threshold, even for *dolus eventualis* standards: according to the quoted paragraph, it must be established that the defendant consciously accepted the (mere) *possibility* of a circumvention of the relevant prohibition. With this fairly extensive interpretation, the Court seems to have silently passed over the fact that in many national legal systems *dolus eventualis* presupposes a *considerable chance* – that is, a chance of a certain magnitude or gravity – that the defendant's action would indeed result in the relevant harm.[172] It seems reasonable to assume that the CJEU does not refer to the legal traditions of the Member States with regard to the concept of intention because of the Court's objective to ensure the practicability of its interpretation of the terms 'knowingly' and 'intentionally' in the legal systems of all Member States.[173] It should be remembered, however, that the CJEU first and foremost seeks to provide uniform interpretations of mens rea elements for the purposes of the *particular* legislative acts of which they form parts. This implies that the meaning attributed to a certain fault element may vary somewhat from one legislative instrument to another. Moreover, it is not inconceivable that in some other case, concerning the scope and meaning of intention in some other legislative act, the CJEU may be prompted to *deny* that *dolus eventualis* could suffice to establish intention for the purposes of the particular provision at issue.

In addition to this, one can point to some notable differences between EU criminal law and EU quasi-criminal law. One difference – that will be returned to in the next sub-section – concerns the role of intention. Intention enjoys predominance over other fault elements in both criminal law and most quasi-criminal law areas. Its predominance is clearly strongest, however, in the field of EU criminal law, where

[170] CJEU *Afrasiaba et al* (n 168) paras 66–67. In his Opinion of 16 November 2011, C-72/11 *Generalbundesanwalt beim Bundesgerichtshof v Mohsen Afrasiaba et al* (EU:C:2011:737), AG Bot, contrarily, argues for a narrow interpretation of the concept of intention, which leaves no room for the notion of *dolus eventualis*.

[171] In the case of *Van der Ham* (n 177), the CJEU concluded that *dolus eventualis* is also encompassed by 'the concept of "intentional non-compliance" within the meaning of Article 67(1) of Regulation No 796/2004 and Article 23 of Regulation No 1975/2006' (para 37).

[172] The requisite magnitude or degree of seriousness of the chance of the relevant harm may vary from one Member State to another (see n 66 above). This topic is furthermore subject to doctrinal discussions and disputes in many legal systems; see Blomsma, *Mens Rea and Defences* (n 4) 104–12.

[173] This point will be briefly returned to towards the end of the next subsection. See Ten Voorde, 'Een autonome en uniforme uitleg' (n 126) 206 where it is argued that a possible additional reason for the rather broad interpretation of *dolus eventualis* in the *Afrasiaba* judgment may be the CJEU's wish to ensure that no 'gap' exists between the concepts of intention and negligence; furthermore, it could be speculated that the CJEU may have objections against generally binding the concept of negligence to unduly stringent evidentiary requirements, unless, of course, an aggravated form of negligence is at issue; this is the case where legislation makes explicit reference to such an aggravated form (eg the element referred to as 'serious negligence' in a number of Directives, some of which will be discussed in the next subsection).

intention is, so to speak, the 'default' mens rea requirement. A related difference may be seen in the fact that some provisions in EU quasi-criminal law instruments bearing on liability issues do not expressly refer to a fault requirement (whereas criminal law provisions typically do), so that the question may arise whether or not, for liability to be established, proof of a certain fault element is (nevertheless) necessary. The absence of fault elements is often grounded on considerations of effectivity and enforcement. An example of this is Article 2 of Directive 2003/6 which compelled the Member States to prohibit certain persons in possession of inside information from using that information, and to subject violations of this prohibition to administrative sanctions.[174] One of the questions raised in the well-known *Spector Photo Group* case was whether or not it must be proved, for liability to be incurred, that the inside information was used intentionally or deliberately.[175] The CJEU ruled that this was not the case:

> The fact that Article 2(1) of Directive 2003/6 does not expressly provide for a mental element can be explained, first, by the specific nature of insider dealing, which enables a *presumption* of that mental element once the constituent elements referred to in that provision are present … [and] second, by the purpose of the Directive, which … is to ensure the integrity of Community financial markets and to enhance investor confidence in those markets. The Community legislature opted for a preventive mechanism and for administrative sanctions for insider dealing, *the effectiveness of which would be weakened* if made subject to a *systematic analysis of the existence of a mental element*. … [O]nly if the prohibition on insider dealing allows infringements to be effectively sanctioned does it prove to be powerful and encourage compliance with the rules by all market actors on a lasting basis. The effective implementation of the prohibition on market transactions is thus based on a simple structure in which subjective grounds of defence are limited, not only to enable sanctions to be imposed but also to prevent effectively infringements of that prohibition (emphasis added).[176]

A similar issue was brought up in the case of *Van der Ham* that concerned an entirely different branch of quasi-criminal law: the EU's common agricultural policy.[177] Numerous measures aimed at supporting farmers have been adopted since the launch of this policy area in 1962. Mr and Mrs Van der Ham, owners of an agricultural undertaking in the Netherlands, were beneficiaries of two such support measures (that are financed by the European Agricultural Fund for Rural Development). They received income support as well as aid aimed at furthering environmentally-friendly farm

[174] Directive 2003/6/EC of 28 January 2003 of the European Parliament and the Council on insider dealing and market manipulation, [2003] OJ L 96/16; this Directive was later repealed by Regulation 596/2014/EU of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation), [2014] L 173/1. See also subsection IV.C. below.

[175] CJEU *Spector Photo Group* (n 12).

[176] CJEU *Spector Photo Group* (n 12) paras 36–37. According to the CJEU, the presumption of intention does not violate the right to be presumed innocent enshrined in Art 6(2) ECHR, considering that the presumption of intention must always be open to rebuttal and that the rights of the defence must be guaranteed (paras 43–44). See Rankinen, 'Positive Fault Requirements' (n 54) 138–39; JAE Vervaele, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice* (Naples, Editoriale Scientifica, 2014) 81–85; Van Kempen and Bemelmans, 'EU Protection of the Substantive Criminal Law Principles' (n 100) 257; Blomsma, *Mens Rea and Defences* (n 4) 208, 224 and 233.

[177] CJEU judgment of 27 February 2014, C-396/12 *Van der Ham and Van der Ham-Reijersen van Buuren v College van Gedeputeerde Staten van Zuid-Holland* (EU:C:2014:98).

management.[178] Beneficiaries of these types of support schemes are required to comply with a number of obligations related to various aspects of the agricultural practice. Pursuant to a Ministerial Decree (which transposed the relevant EU legislation), a failure to comply with these rules is 'punished' with a reduction of the received support by a certain percentage. In cases of intentional non-compliance, the support is reduced by twenty per cent. During an inspection on the Van der Ham premises, the Dutch authorities observed that a particular rule had not been observed. The rule in question was infringed as an immediate result of the conduct of a third party, an agricultural contractor. His failure to comply with the relevant obligation was attributed to Mr and Mrs Van der Ham, on whose behalf and under whose instructions the contractor had carried out his work.[179]

On top of this, the beneficiaries of agricultural aid were found to be liable for the *intentional* non-compliance with the relevant obligation; in consequence of this finding, their subsidy for environment-friendly farm management was reduced by twenty per cent. Pursuant to a provision in the aforementioned Ministerial Decree, intention should always be assessed in light of six listed criteria, some of which refer to fully objective matters of fact. In practice, this meant that intention could be established on the mere ground that one or more of the listed circumstances obtained in the case at hand. One of these circumstances is the existence of 'a long-established, settled policy', which played a pivotal role in the case of Mr and Mrs Van der Ham. The fact that the infringed rule was part of a long-established, settled policy sufficed to ground the finding of intention.

Inferring intention directly from an objective circumstance is in fact not much different from starting from a *presumption* of intention (as was at issue in the *Spector Photo Group* case). Yet, the CJEU concluded that Member States are at liberty to enact provisions that set criteria for establishing intention in relation to non-compliance with the relevant rules. The Court further stated that the adoption of a national provision that lends a high probative value to the criterion of 'the existence of a long-established, settled policy' is not precluded by EU law, on condition that the accused person has the possibility of adducing evidence to negate the inferred intention.[180] In conclusion: within areas of quasi-criminal law, mens rea elements are generally bound to less stringent requirements, and they are generally assessed in a more 'objectified' way, than is typically the case within criminal law.[181] And in view of instrumental considerations,[182] quasi-criminal law offences are occasionally even made subject to a 'strict' liability

[178] As introduced by Council Regulation 1698/2005 (n 147). The Regulation was repealed by Regulation 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, [2013] OJ L 347/487.

[179] The CJEU allows this form of vicarious liability on the condition that it can be established that the beneficiary of aid 'acted intentionally or negligently as a result of the choice or the monitoring of the third party or the instructions given to him, irrespective of the intentional or negligent nature of the conduct of the third party'; CJEU *Van der Ham* (n 177) para 53.

[180] CJEU *Van der Ham* (n 177) paras 40–41.

[181] Which is not to deny that many national criminal law systems contain offences which lack a mens rea requirement altogether; see subsection II.C. above.

[182] See Franssen, 'EU Criminal Law and *Effet Utile*' (n 2).

regime in the sense that intention (or a different form of mens rea) may sometimes be presumed – provided, of course, that the presumption is rebuttable.[183]

C. Recklessness and 'Serious' Negligence: *Intertanko*

On 3 June 2008 the Grand Chamber of the CJEU delivered a preliminary ruling at the request of the (administrative) Queen's Bench Division of the High Court of Justice of England and Wales.[184] The judgment provides an interesting example of a case that evokes questions pertaining to the role of the culpability principle in matters that are dealt with in both international law and European (criminal) law. The claimants in the proceedings that gave rise to the reference for a preliminary ruling comprised a group of five organisations within the maritime shipping industry. They asked the High Court to review the legality of Directive 2005/35 on ship-source pollution in light of international law provisions.[185] The international norms in issue are primarily laid down in the International Convention for the Prevention of Pollution from Ships ('Marpol 73/78'), to which all the Member States are parties, but not the EU itself.[186] In addition, since the relevant standards in Marpol 73/78 are, at least to some extent, incorporated in the United Nations Convention on the Law of the Sea ('UNCLOS'),[187] this Convention also played a notable role in the proceedings.

Directive 2005/35 was negotiated in response to major oil pollution disasters, such as the sinking of the *Prestige* tanker off the coast of Galicia in 2002. It was generally recognised that it was urgent to ensure an appropriate implementation and enforcement of the applicable international rules for the prevention and control of vessel-source pollution. The European Commission noted that

> the implementation of Marpol 73/78 shows discrepancies among Member States and there is thus a need to harmonise its implementation at Community level; in particular, the practices of Member States relating to the imposition of penalties for discharges of polluting substances from ships differ significantly.[188]

In order to remedy this, Article 4 of the Directive obligates Member States to ensure that ship-source discharges of polluting substances into certain maritime areas are 'regarded as infringements if committed with intent, recklessly or by serious negligence'.

[183] See n 56 and accompanying text above. The possibility of rebutting the presumption of culpability is the subject of section V below.

[184] CJEU 3 June 2008, C-308/06 *Intertanko et al v Secretary of State for Transport* (EU:C:2008:312).

[185] Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, [2005] OJ L 255, 11.

[186] The International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978.

[187] United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, entered into force on 17 November 1994. The Convention was approved on behalf of the EC by Council Decision 98/392/EC of 23 March 1998, [1998] OJ L 179/1.

[188] Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences, COM(2003) 92 final, [2004] OJ C 92E/77 (recital 3).

Article 5 adds that an infringement does not exist when a discharge of polluting substances satisfies certain conditions mentioned in Annex I and Annex II to Marpol 73/78. And where infringements do exist, Article 8 compels Member States to ensure that these are subject to 'effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties'. However, the Directive was amended in 2009 (that is, after the preliminary ruling in the *Intertanko* case) in order, inter alia, to introduce the requirement that the 'infringement' under the Directive is considered a *criminal* offence.[189]

The contents of Articles 4 and 5 of Directive 2005/35 gave rise to the main questions that were at issue in the *Intertanko* case. With respect to the indication of what actions and whose actions constitute an 'infringement' according to these Articles, it appeared that the Directive does not neatly conform to the relevant international norms but expands their scope in two significant respects. First, whereas Marpol 73/78 limits liability in case of accidental discharges of polluting substances to the shipowner and the master, the Directive stipulates that penalties are to be applicable also to the owner of the cargo, the classification society or any other person involved. Second, the Directive attaches the possibility of imposing a penalty at a (seemingly) lower mens rea threshold. Whereas Marpol 73/78 requires that one 'acted either with intent to cause damage, or recklessly and with knowledge that damage would probably occur', the Directive sets the lower limit of the standard for liability to 'serious negligence'. According to the claimants in the *Intertanko* case, unsurprisingly, Articles 4 and 5 of Directive 2005/35 do not comply with the relevant rules under international law and should therefore be considered invalid.

A complicating factor was the fact that the liability scheme under the Directive and the international rules vary somewhat depending on whether discharges of polluting substances take place in the territorial seas of the Member States or in waters beyond the territorial seas. What complicated matters even further was the interplay between international and European law. Norms that are part of international treaties have primacy over European legal instruments, provided that the EU is bound by these norms. Further, a European legal instrument may be examined in light of an international treaty only if the nature and broad logic of the treaty in question do not preclude this and the treaty's provisions are sufficiently operational (that is, unconditional and sufficiently precise as regards their content). It therefore had to be decided whether the relevant provisions from Marpol 73/78 and UNCLOS fulfil these conditions.

Advocate General Juliane Kokott concludes in her Opinion that although all Member States are party to Marpol 73/78, the European Community (EC; now the EU)

[189] Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, [2009] OJ L 280/52. The Directive initially made reference to Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, [2005] OJ L 255/164. In CJEU 23 October 2007, C-440/05 *Commission v Council* (EU:C:2007:625), the Framework Decision was annulled because it was found to violate Art 47 of the Treaty on European Union (TEU). See V Mitsilegas, M Fitzmaurice and E Fasoli, 'The Relationship between EU Criminal Law and Environmental Law' in V Mitsilegas, M Bergström and Th Konstadinides (eds), *Research Handbook on EU Criminal Law* (Cheltenham, Edward Elgar Publishing, 2016) 272–93, 279–83.

is not itself bound by it.[190] The same conclusion is later reached by the CJEU. With regard to UNCLOS, however, the Advocate General and the CJEU arrive at opposing conclusions. According to Advocate General Kokott, the EC/EU is bound by UNCLOS; moreover, she concludes that the nature and broad logic of this Convention do not preclude an examination of Directive 2005/35 in light of the Convention, and that the provisions in this Convention – read in conjunction with the relevant provisions in Marpol 73/78 – are sufficiently clear and unconditional.[191] The CJEU disagrees with this finding, as will be seen later on. The Advocate General then goes on to examine whether the Directive complies with the provisions of UNCLOS and Marpol 73/78. She first considers the alleged extension under the Directive of liability for polluting discharges beyond the territorial seas to persons other than the master and owner. Kokott submits – somewhat sweepingly[192] – that the relevant provisions in Marpol 73/78 refer to the master and owner merely 'by way of example', and that they therefore do not preclude liability of other persons, under the same conditions.[193]

More relevant for the purposes of this chapter is how the Advocate General subsequently examines whether and to what extent the personal liability standard employed in Article 4 of the Directive (requiring infringements to be committed 'with intent, recklessly or by serious negligence') is in conformity with the standard under Marpol 73/78 (requiring that one 'acted either with intent to cause damage, or recklessly and with knowledge that damage would probably occur'). For this examination a distinction is made between discharges that take place in the territorial seas of the Member States and discharges that take place beyond these areas (that is, in international straits, in the exclusive economic zone, or on the high seas). This is done because, according to the Advocate General, different international rules apply to infringements depending on whether they take place in or beyond territorial seas. As regards the territorial seas, the Advocate General argues that UNCLOS does not incorporate liability standards from Marpol 73/78. The international rules that cover the territorial seas are more lenient and permit, according to the Advocate General, more room for European legislation to provide for stricter liability conditions than the international standards which are applicable in straits, in the exclusive economic zone and on the high seas.[194]

Insofar as Article 4 of Directive 2005/35 applies to discharges of polluting substances *beyond* territorial waters, the Advocate General contends that its standard of liability may not be stricter than the standard provided for in Marpol 73/78. This implies, first, that the term 'recklessly' in Article 4 must be interpreted in conformity with the equivalent standard in Marpol 73/78, which means that, for recklessness to exist, it is

[190] Opinion of 20 November 2007, C-308/06 *Intertanko et al v Secretary of State for Transport* (EU:C:2007:689) paras 34–79.

[191] See P Eeckhout, 'Case C-308/06, *The Queen on the application of Intertanko and Others v Secretary of State for Transport*, judgment of the Court of Justice (Grand Chamber) of 3 June 2008, nyr' (2009) 46(6) *Common Market Law Review* 2041; R Pereira, 'On the Legality of the Ship-Source Pollution 2005/35/EC Directive – The Intertanko Case and Selected Others' (2008) 17(6) *European Energy and Environmental Law Review* 372.

[192] See Eeckhout, 'Case C-308/06' (n 191) 2047: 'Tongue in cheek, one could say that international law is interpreted in conformity with EC law. A most convenient way of course to avoid breach of international obligations.'

[193] Opinion of AG Kokott (n 190) para 93.

[194] See the Opinion of AG Kokott (n 190) paras 113–138.

not enough that the perpetrator *ought* to have been aware of the risk that, as a result of his actions, damage would probably occur. What needs to be established is that he in fact *acted with knowledge* of this risk.[195] Secondly, the term 'serious negligence' in Article 4 of the Directive equally needs to be interpreted restrictively so as to conform to the lower standard provided for in Marpol 73/78. According to Advocate General Kokott, this implies that the concept of serious negligence present in the Directive could be interpreted in line with the German concept of *bewusste große Fahrlässigkeit* and could hence be taken to mean exactly 'recklessness in the knowledge that damage will probably occur'.[196] This narrow interpretation would conveniently avoid conflict between the Directive and international law as embodied in Marpol 73/78.[197]

However, insofar as Article 4 of the Directive applies to discharges of polluting substances *within* the territorial waters of the Member States, the Advocate General contends that its standard of liability may be stricter than the standard provided for in Marpol 73/78. This means that the phrase 'serious negligence' may be construed more broadly and be taken to refer to 'a serious breach of duties of care without, however, any need for knowledge that damage is probable'.[198] Finally, it is pointed out by Advocate General Kokott that this interpretation of the concept of serious negligence does not infringe the principle of legal certainty, inter alia, because the actual criminal law provisions are adopted by the Member States in implementation of the Directive, and further case law may gradually clarify the concept of serious negligence, which is permissible under ECtHR case law.[199]

As was mentioned before, the CJEU takes another route. It does not share Advocate General Kokott's conclusion that the legality of Directive 2005/35 is susceptible to an examination in light of the relevant provisions in Marpol 73/78 that have been incorporated in UNCLOS. The CJEU, by contrast, concludes that the EC/EU is bound by UNCLOS but that its nature and broad logic preclude the examination of the validity of Directive 2005/35 in light of its provisions, because 'UNCLOS does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States'.[200] This conclusion enables the Court to circumvent the whole issue of whether or not Directive 2005/35

[195] Opinion of AG Kokott (n 190) paras 97–101. In this connection, the AG makes reference (in para 109) to a survey conducted by the Research and Documentation Service at the CJEU, which shows that the concept of recklessness, thus defined, is treated in the legal systems of many Member States as a form of the 'serious negligence' which Directive 2005/35 (n 185) lays down as a standard for liability.

[196] Opinion of AG Kokott (n 190) para 109.

[197] Opinion of AG Kokott (n 190) paras 110–112.

[198] Opinion of AG Kokott (n 190) para 116. See Eeckhout, 'Case C-308/06' (n 191) 2047: 'Effectively, therefore, Kokott proposes that one and the same concept in Article 4 of the Directive be interpreted differently, depending on whether it is applied to acts of pollution in the territorial sea, or beyond that sea.'

[199] Opinion of AG Kokott (n 190) paras 144–149. According to established case law of the ECtHR, Art 7 ECHR does not rule out gradual clarification by means of judicial interpretation. See eg ECtHR 22 November 1995, *CR v the United Kingdom* (App No 20190/92) [1995] ECHR 51: 'However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. … Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.'

[200] CJEU *Intertanko et al* (n 184) para 64.

conforms to the rules of international law that were invoked by the claimants in the proceedings giving rise to the request for a preliminary ruling in the case at hand. As a consequence of this, the CJEU makes no comments on the alleged extension under the Directive of liability for polluting discharges beyond the territorial seas to persons other than the master and owner; nor does it assess how the concepts of recklessness and serious negligence as employed in Article 4 of the Directive relate to the relevant rules under international law. The only question then left for the CJEU to answer is the fourth and last question that the High Court of Justice of England and Wales referred for a preliminary ruling: 'Does the use of the phrase "serious negligence" in Article 4 of the Directive infringe the principle of legal certainty, and if so, is Article 4 invalid to that extent?'.

The CJEU acknowledges that Articles 4 and 8 of the Directive oblige Member States 'to punish ship-source discharges of polluting substances if committed "with intent, recklessly or by serious negligence", without defining those concepts'.[201] However, the CJEU goes on to note that these concepts 'correspond to tests for the incurring of liability which are to apply to an indeterminate number of situations' and not to 'specific conduct capable of being set out in detail in a legislative measure', and that these concepts 'are fully integrated into, and used in, the Member States' respective legal systems'.[202] Subsequently, and interestingly,[203] the CJEU provides a rather detailed substantive description of the fault element of 'serious negligence' within the meaning of Article 4 of the Directive. According to the CJEU, the concept of negligence is used in all Member States to refer to 'an unintentional act or omission by which the person responsible breaches his duty of care', and the concept of 'serious' negligence in many national legal systems can only refer to a 'patent' breach of such a duty of care.[204] 'Serious negligence' within the meaning of Article 4 of the Directive must therefore

> be understood as entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation.[205]

The CJEU concludes that no breach of the principle of legal certainty exists, since the Directive in any event needs to be transposed into national law, meaning that the actual definition of the infringements and the applicable penalties 'are those which result from the rules laid down by the Member States'.[206] These rules differ across the Member States. One main difference was extensively discussed in subsection II.C.

[201] CJEU *Intertanko et al* (n 184) para 72.
[202] CJEU *Intertanko et al* (n 184) paras 73–74.
[203] See Rankinen, 'Positive Fault Requirements' (n 54) 132.
[204] CJEU *Intertanko et al* (n 184) paras 75–76.
[205] CJEU *Intertanko et al* (n 184) para 77. In this passage one clearly recognises the notion that was referred to as *Garantenstellung* in subsection II.C. above. Cp ECtHR [GC] 15 November 1996, *Cantoni v France* (App No 17862/91), [1996] ECHR 52, para 35: 'The Court recalls that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed … A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail … This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails.' Also AG Kokott refers to these notions in paras 147–149 of her Opinion (n 190).
[206] CJEU *Intertanko et al* (n 184) para 78.

above: whereas English criminal law distinguishes between different mens rea states according to a tripartite framework, continental criminal law systems use a bipartite framework in which the notion of *dolus eventualis* marks the lower limit of the concept of intention. As a consequence, the concept of intention is typically considerably broader in continental criminal law systems than in the Anglo-American systems. In English criminal law, recklessness fulfils a function similar to that of *dolus eventualis*, but it occupies a position between intention and negligence as a separate and independent mens rea element.

The fact that the offence description in Article 4 of Directive 2005/35 explicitly mentions recklessness in addition to intention and 'serious' negligence, then, might strike one as inconsequential, considering that it was concluded in the previous subsection that *dolus eventualis* is a recognised form of intention in EU criminal law.[207] However, the fact that the EU legislature frequently includes the complete triplet of intention, recklessness and (serious) negligence in definitions of infringements, is quite understandable – and opportune – in light of the CJEU's statement, cited above, that EU Directives need to be transposed into national law. Including all three fault elements may serve to facilitate a uniform transposition of the relevant provisions into differing domestic law systems, irrespective of whether these distinguish between two or three main mens rea elements: legal systems adhering to the bipartite classification can simply refrain from incorporating recklessness as a separate element, since it may be assumed that the concept of *dolus eventualis* sufficiently[208] 'covers' the mental state typically referred to as recklessness in legal systems that adhere to the tripartite framework.[209]

Member States appear thus to enjoy some freedom in transposing EU legislation into national law.[210] Under Directive 2005/35, the Member States were furthermore free to subject the offence of ship-source discharges of polluting substances to either a criminal or an administrative liability regime. One year after the CJEU's judgment in

[207] See paras 66–67 in CJEU *Afrasiaba et al* (n 168) cited in subsection IV.B. above.

[208] As was seen in subsection II.C. above, the concepts of recklessness and *dolus eventualis* are certainly not completely identical in substance. Moreover, legal orders that employ the same basic (bipartite or tripartite) framework may still interpret certain manifestations of mens rea elements somewhat varyingly; see n 58 above.

[209] It should be noted that it can be very difficult, if not impossible, to secure a more or less equal and uniform implementation of EU legislation in the different Member States in cases where a so-called 'dual-track' approach is adopted, ie, an approach in which criminal sanctions apply to an infringement when committed intentionally, and administrative penalties apply when this infringement is committed recklessly or negligently. One and the same act, performed with an identical state of mind, may then be found to constitute an infringement committed intentionally (and hence punishable with a criminal sanction) in one country, and be found to constitute an infringement committed with recklessness (and hence subject to the imposition of an administrative penalty) in another country. However, the fact that Member States apply different liability regimes with regard to offences stemming from EU law is a rather 'natural' phenomenon: as will be seen later on, the EU legislature often only provides for minimum rules for criminalisation, and Member States are free to adopt more stringent criminal law rules.

[210] But not necessarily very much, of course. Art 4 of Directive 2005/35 (n 185), for instance, requires at least 'serious negligence'. And as was seen, the CJEU defined this concept in the *Intertanko* case in terms of 'patent' breaches of the relevant duty to care. This seems to imply that gross negligence (*culpa lata*) is required and, consequently, that minor negligence (*culpa levissima*) will not suffice (cp n 74 on applicable standards for negligence in Belgian and English criminal law).

the *Intertanko* case, this discretionary space was removed. As was mentioned above, Directive 2005/35 was amended by Directive 2009/123 which left the Member States with no other option than to make the offence, under the conditions specified in the Directive, subject to criminal sanctions.[211] The CJEU's ruling in the *Intertanko* case nevertheless remains relevant and important. For one thing, the 2009 Directive – like its predecessor – defines polluting ship-source discharges as infringements 'if committed with intent, recklessly or with serious negligence', so that the CJEU's interpretation of the concept of serious negligence in the *Intertanko* case seems valid still.

And on a far more general note, it seems reasonable to submit that the succession of Directive 2005/35 by Directive 2009/123 testifies to the EU legislature's increased, and still increasing, 'appetite for criminal law'.[212] More than that, Directive 2009/123 may even be seen as a rather *rapacious* manifestation of this appetite, considering that it sets the mens rea threshold relatively low: 'serious negligence' suffices to incur criminal liability. Normally, however, the EU legislature 'only' requires Member States to subject *intentional* misconduct to criminal sanctions. A notable example can be found in the Market Abuse Directive and the Market Abuse Regulation, both of 2014, introducing criminal sanctions against insider dealing and market manipulation.[213] Prior to the adoption of these legislative acts, the EU's framework for market abuse still relied on an administrative enforcement regime. The mentioned Directive and Regulation replaced this framework with a 'dual-track' approach consisting of a combination of an administrative and a criminal liability regime.

Article 30, paragraph 2 of Regulation 596/2014 requires Member States to invest the competent national authorities with the power to impose a large number of differing administrative measures, including several quasi-criminal sanctions.[214] The provisions in Regulation 596/2014 set minimum requirements, which is to say that Member States may also adopt criminal sanctions instead of the mentioned administrative sanctions, if they so desire.[215] With respect to some offences, however, the Member States *must* resort to a criminal liability regime as a means to enforce the EU's market abuse rules. Pursuant to Directive 2014/57, Member States are obliged to apply criminal sanctions to the offences of insider dealing, unlawful disclosure of information, and market manipulation, 'at least in serious cases and when committed intentionally'.[216] The Directive provides for, again, minimum rules, so that Member States are free to subject market abuse to more stringent criminal law rules; for example, they may

[211] See n 189.

[212] Franssen, 'EU Criminal Law and *Effet Utile*' (n 2) 92; Mitsilegas, Fitzmaurice and Fasoli, 'The Relationship between EU Criminal Law and Environmental Law' (n 189) 288–91.

[213] Directive 2014/57/EU of the European Parliament and of the Council on criminal sanctions for market abuse of 16 April 2014, [2014] OJ L 173/179 12 June 2014; Regulation 596/2014 (n 174). See MJJP Luchtman and JAE Vervaele, 'Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union' (2014) 5(2) *New Journal of European Criminal Law* 202.

[214] Such as the disgorgement of profits gained or losses avoided and pecuniary sanctions. See Luchtman and Vervaele, 'Enforcing the Market Abuse Regime' (n 213); Franssen, 'EU Criminal Law and *Effet Utile*' (n 2) 94.

[215] See Art 30(1) Regulation 596/2014 (n 213). This freedom for Member States to choose between administrative and criminal sanctions already existed under the former EU framework for market abuse.

[216] See Arts 3(1), 4(1) and 5(1) of Directive 2014/57 (n 213). Art 7 formulates minimum rules for the maximum term of prison sentences for natural persons. The obligation to impose criminal sanctions does not exist with regard to legal entities; see Arts 8 and 9 and see subsections III.A. and III.C. above.

'provide that market manipulation committed recklessly or by serious negligence constitutes a criminal offence'.[217]

The foregoing illustrates a notable difference between EU criminal law and EU quasi-criminal law.[218] When the EU obliges Member States to subject certain behaviour to criminal sanctions, the obligation nearly always concerns intentional manifestations of that behaviour only. Criminalisation of reckless and/or seriously negligent behaviour, by implication, is only seldom required. Liability for unintentional behaviour is much more common in areas of punitive administrative law; and in some of these areas of quasi-criminal law, liability may even extend to 'mere' or 'ordinary' negligence, whereas at least *serious* negligence is required in EU criminal law.[219] And lastly, it was seen in the previous subsection that for some quasi-criminal offences the requisite mens rea element may rather easily be inferred from certain objective criteria, or may even be *presumed* to be fulfilled (provided, that is, that the presumption is open to rebuttal).

V. Third Dimension: Exculpatory Defences

A. Introduction: Blameworthiness and the Defeasible Concept of Culpability

The present section concentrates on a more fundamental layer of meaning within the labyrinthine notion of guilt: the concept of personal blameworthiness. On this deeper level, guilt is intimately connected with a subjective default or personal failure in relation to a certain aim or standard, which is why Antoine Mooij speaks of 'guilt by default' (*ἁμαρτία*; *culpa*) in this connection.[220] Personal blameworthiness concerns neither a person's acting or causing *as such* (which was the subject of section III.), nor the quality of the mental state that accompanied the acting or causing (the subject of section IV.), even though both of these aspects of culpability are indeed presupposed. Personal blameworthiness is primarily concerned, instead, with the ability to *avoid* a failure to meet a certain standard, such as a criminally (or otherwise legally) enforced behavioural standard. As was seen in section II, the actus reus of an offence and the requisite mens rea or fault element constitute necessary but not sufficient conditions for liability in criminal law. Proof of these elements merely occasions the conclusion that the defendant prima facie committed an offence. The defendant is then presumed to be criminally liable.

This presumption is belied, however, in the exceptional cases where the defendant convincingly argues (or where the court ex officio finds) that a certain exculpatory defence applies. Exculpatory defences concern exceptional circumstances that warrant the conclusion that the defendant cannot reasonably be blamed for not having *avoided*

[217] Recital 21 of the Preamble to Directive 2014/45 (n 213).
[218] The other distinctive feature being the possibility in criminal law of imposing a prison sentence; see Franssen, 'EU Criminal Law and *Effet Utile*' (n 2) 95–96.
[219] See Rankinen 'Positive Fault Requirements' (n 54) 133–35.
[220] See subsection II.B. above.

the act of criminal wrongdoing.[221] Contrary to other conditions for criminal culpability, the condition of personal blameworthiness manifests only relatively rarely; and when it does, it does so 'negatively', that is, by way of a defence put forward with the aim of demonstrating its *absence*. If successful, such a defence nullifies the defendant's culpability and, consequently, precludes the imputation of criminal liability. On account of this, criminal culpability should be understood as the sort of phenomenon for which HLA Hart coined the term 'defeasible concept': even though all positive conditions for its existence are satisfied, this existence may still be altogether refuted, defeated, if certain exceptional circumstances obtain.[222]

It is worth stressing that the concept of personal blameworthiness – in spite of the earlier qualifications that rather attest to its exceptional status – represents a highly important dimension of the principle of individual culpability. Since it entails, in essence, a prohibition on inflicting a criminal penalty when it cannot reasonably be assumed that the defendant could have avoided his or her wrongful action, this dimension can even be said to lie at the very heart of the Latin adage *nulla poena sine culpa*. The indispensability of personal blameworthiness as a condition that curtails (albeit 'negatively') criminal liability, is all the more obvious in view of what has been discussed in the preceding sections of this chapter. It was seen, not only that the general part of substantive EU criminal law can still at best be said to have a fragmentary and nascent character, but also that the distinctions drawn in EU and national legislation between criminal law proper, on the one hand, and areas of punitive administrative law, on the other, are often rather artificial and arbitrary.[223] And especially in these areas of quasi-criminal law, conditions for establishing culpability and liability for infringements tend to be less strict.[224]

Although it is true that the principle of individual culpability is recognised, by and large, in areas of quasi-criminal law, its efficacy in these areas is generally weaker than in traditional criminal law. For this reason, it seems especially pertinent to look more closely into the role of personal blameworthiness as a constraining condition for

[221] The exculpatory defence of an unavoidable mistake of law (discussed in subsection V.C. below) cancels – as all exculpatory defences do – the presumption of personal blameworthiness. Sometimes, however, this defence has an import for the finding of intention or negligence. In cases where the requisite fault element is connected with a normative offence element, that is, an element that expresses an aspect of the prohibited conduct's wrongfulness, an unavoidable mistake with regard to that aspect may preclude the proof of the fault requirement. See Blomsma, 'Fault Elements in EU Criminal Law' (n 146) 155.

[222] See HLA Hart, 'The Ascription of Responsibility and Rights' (1948–49) 49 *Proceedings of the Aristotelian Society (New Series)* 171, 174–76. See also L Duarte d'Almeida, *Allowing for Exceptions. A Theory of Defences and Defeasibility in Law* (Oxford, Oxford University Press, 2015); cp Packer, *The Limits of the Criminal Sanction* (n 19) 105–08; Nijboer, 'Schuldbegrip en schuldbeginsel' (n 27) 372–73.

[223] Or motivated by primarily instrumental considerations. See Franssen, 'EU Criminal Law and *Effet Utile*' (n 2); E Herlin-Karnell, 'Is Administrative Law Still Relevant? How the Battle of Sanctions Has Shaped EU Criminal Law' in V Mitsilegas, M Bergström and Th Konstadinides (eds), *Research Handbook on EU Criminal Law* (Cheltenham, Edward Elgar Publishing, 2016) 233–48.

[224] As was seen, this is partly a consequence of the fact that such offences are often, in effect, primarily addressed to legal entities (in whose respect constructions of vicarious liability are generally more readily used; see subsections III.A. and C.) and/or to professional agents operating on a certain market (to whom generally higher standards of due diligence apply; cp ECtHR *Cantoni v France* (n 205); and see subsections II.C. and IV.C.), and the fact that these offences often have relatively low evidentiary standards for mens rea requirements, or even lack a mens rea requirement (see subsections IV.B. and C.).

liability for quasi-criminal offences.[225] This will be done in the remainder of the present section. More specifically, the discussion in the following pages will focus on two types of generally recognised exculpatory defences and on two areas of European quasi-criminal law. Section V.B. discusses the role of 'force majeure' or 'duress of circumstances' (as it is most commonly referred to in English criminal law)[226] within the sphere of agricultural EU regulations that are generally enforced through administrative law. Section V.C. focuses on the role of the exculpatory defence of an unavoidable and hence excusable mistake of law (or *error iuris*) within EU competition law.

B. Force Majeure in the Context of Agricultural Aid: *Käserei Champignon Hofmeister*

The concept of 'force majeure' is widely recognised as a defence, also in areas other than criminal law. Provisions in EU legislation occasionally make reference to this concept as a valid reason for negating liability for the infringement of a non-criminal nature. An example of such a provision was at issue in a preliminary ruling by the CJEU of 11 July 2002 that concerned a specific EU agricultural aid scheme.[227] In 1996, Käserei Champignon Hofmeister GmbH and Co KG (KCH) – a long-established German trading company that sells cheese products within Germany and internationally – exported a quantity of a certain cheese product. It did so under cover of an export declaration form, on which the product was assigned to a specific number corresponding to a certain category of agricultural products that was listed on a so-called 'Common Agricultural Policy Goods List'. Pursuant to legislation under the EU's common agricultural policy, the export of this specific category of goods gave rise to entitlement to an export refund. Prior to exporting the goods, KCH requested and received this refund as an advance payment (of approximately 30,000 DM – the currency of Germany at the time) from the Hamburg-Jonas Principal Customs Office (Hauptzollamt Hamburg-Jonas).

[225] On the recognition of exculpatory defences in European criminal law, see generally Blomsma, *Mens Rea and Defences* (n 4) 419–506; Klip, *European Criminal Law* (n 2) 229–31. For the role of personal blameworthiness as a condition for liability in international criminal law, see M Krabbe, *Excusable Evil. An Analysis of Complete Defenses in International Criminal Law* (Cambridge, Intersentia, 2014); cp MI Francisco Francisco, *Aspects of Implementing the Culpability Principle both under International and National Criminal Law* (Nijmegen, Wolf Legal Publishers, 2004).

[226] In continental systems of criminal law, duress is generally considered as an exculpatory defence (as opposed to the justificatory defence of necessity). This is also the view taken in the present chapter. It must be noted, however, that in English and American criminal law, there is a long-standing discussion on the issue of whether duress should be classified as an exculpatory, a justificatory, or even a *sui generis* defence. See Fletcher, 'The Individualization of Excusing Conditions' (n 53); Simester et al, *Criminal Law* (n 15) 717, 799–814; Norrie, *Crime, Reason and History* (n 31) 231–33; Horder, *Excusing Crime* (n 53) 48–52, 63–68. This discussion should be seen in light of the fact that the doctrinal distinction, typical of continental criminal law, between justifications (negating wrongfulness) and excuses (negating blameworthiness) is less firmly rooted (or less rigidly applied) in the Anglo-American criminal law systems. See subsection II.C. above.

[227] CJEU C-210/00 *Käserei Champignon Hofmeister GmbH and Co KG v Hauptzollamt Hamburg-Jonas* (EU:C:2002:440). See for another example CJEU 18 December 2007, C-314/06 *Société Pipeline Méditerranée et Rhône v Administration des douanes et droits indirects and Direction nationale du renseignement et des enquêtes douanières* (EU:C:2007:817).

However, at the time of the export a sample of the exported goods was examined by the customs authorities. The examined sample appeared to contain the ingredient of vegetable fat, on account of which the authorities concluded that the shipped products belonged to a category of agricultural goods with respect to which no export refund could be obtained.

This result implied that the goods were wrongly specified on the export declaration form and that the export refund was 'unduly received' by KCH. Pursuant to Article 7, paragraph 1 of Regulation 1222/94,[228] the Hauptzollamt thereupon demanded the return of the amount of the unduly granted export refund, increased by 15 per cent. In addition, the Hauptzollamt ordered KCH to pay a penalty on the basis of Article 11, paragraph 1, point (a) of Regulation 3665/87.[229] KCH challenged this penalty before the Finance Court (Finanzgericht). KCH claimed that it was not aware, nor could have been aware, of the fact that the shipped products contained the said ingredient when it applied for the export refund. It found out only afterwards – having inquired with the supplying manufacturing company – that the responsible production line manager had erroneously added vegetable fat to the product on his own initiative (for the purpose of improving the product's taste). KCH argued that neither the management of the manufacturing company nor that of KCH could have anticipated such a mistake. KCH submitted that it could only have established this mistake by carrying out checks at the undertaking in which the goods were manufactured.

The Finanzgericht rejected KCH's arguments, subsequent to which the case was submitted to the German Federal Finance Court (Bundesfinanzhof). Before the Bundesfinanzhof, KCH argued, principally, that the provision pursuant to which the Hauptzollamt imposed the contested penalty, contravenes the principle of *nulla poena sine culpa* and should therefore be declared invalid. Alternatively, KCH argued that the imposed penalty was unjustified because KCH could not be blamed for listing incorrect data in the export refund application, considering that it had acted in a situation of 'force majeure' within the meaning of Article 11, paragraph 1, subparagraph 3 of Regulation 3665/87.[230] Although the Bundesfinanzhof made clear that it did not share KCH's views, it decided to stay the proceedings in order to submit two questions to the CJEU for a preliminary ruling. The first question concerned the compatibility of Article 11, paragraph 1 of the aforementioned Regulation with, inter alia, the principle of *nulla poena sine culpa* insofar the provision 'provides for a penalty even where,

[228] Commission Regulation 1222/94/EC of 30 May 1994 laying down common detailed rules for the application of the system of granting export refunds on certain agricultural products exported in the form of goods not covered by Annex II to the Treaty, and the criteria for fixing the amount of such refunds, [1994] L 136/5.

[229] Commission Regulation 3665/87/EEC of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products, [1987] OJ L 351/1. This Regulation was amended by Commission Regulation 2945/94/EC of 2 December 1994 amending Regulation (EEC) No 3665/87 laying down common detailed rules for the application of the system of export refunds on agricultural products, as regards the recovery of amounts unduly paid and sanctions, [1994] OJ L 310/57. Art 11(1) of Regulation 3665/87 at the material time stated: 'Where it has been found that an exporter, with a view to the granting of an export refund, has requested a refund in excess of that applicable, the refund due for the relevant exportation shall be the refund applicable to the actual exportation reduced by an amount equivalent to: (a) half the difference between the refund requested and the refund applicable to the actual exportation; (b) … Where the reduction referred to under (a) or (b) results in a negative amount, the exporter shall pay that negative amount'.

[230] Stating: 'The sanction referred to under (a) shall not apply: in the case of *force majeure* …'.

through no fault of his own, an exporter has applied for an export refund exceeding that applicable'.[231] The second question concerned the interpretation of the concept of force majeure as referred to in the mentioned Regulation.

In answer to the first question, the CJEU rules, first of all, that the sanction imposed on KCH by the Hauptzollamt is of an administrative and not of a criminal nature. The sanction must be seen in the context of the rules under the common agricultural policy that provide for a subsidy scheme in the form of export refunds. The sanctions mentioned in Article 11, paragraph 1 of Regulation 3665/87 serve the primary purpose of preventing any (fraudulent or other) irregularities that prejudice the common policy's budget and general aims, by encouraging exporters to comply with the relevant rules.[232] Moreover, these rules are addressed to traders or exporters who voluntarily choose to benefit from the agricultural aid scheme and who consequently also voluntarily submit to its different requirements and to the penalties that may be imposed when these are not observed.[233] In view of these considerations, the Court concludes – as did Advocate General Christine Stix-Hackl in her Opinion[234] – that the principle of *nulla poena sine culpa* does not apply to the sanction that was inflicted on KCH in the case at hand.[235]

The Court then moves on to the second question referred to it by the Bundesfinanzhof: may an exporter who – in good faith and as a result of inaccurate data supplied by a contracted manufacturing company – enters false information into an export refund application, be said to do so in a situation of 'force majeure' within the meaning of Regulation 3665/87, if the exporter has no means of ascertaining the accurateness of the data supplied, or at least no other means than performing checks at the undertaking in which the goods were manufactured? With regard to this question, the CJEU first calls to mind that, in conformity with earlier judgments, the concept of force majeure within the context of EU regulations under the common agricultural policy must be taken to refer to 'abnormal and unforeseeable circumstances beyond the control of the trader concerned, whose consequences could not have been avoided in spite of the exercise of all due care'.[236] It is furthermore recalled that,

> [e]ven if the fault or error committed by the contracting partner is apt to constitute a circumstance beyond the control of the exporter, they are none the less an ordinary commercial risk and cannot be considered to be unforeseeable in the context of commercial transactions. The exporter is fully at liberty to select his trading partners and it is up to him to take the

[231] See CJEU *Käserei Champignon Hofmeister* (n 227) para 25.

[232] CJEU *Käserei Champignon Hofmeister* (n 227) paras 36–40. See also the Opinion of AG Stix-Hackl of 27 November 2001, C-210/00 *Käserei Champignon Hofmeister GmbH and Co KG v Hauptzollamt Hamburg-Jonas* (EU:C:2001:645) paras 31–36, where it is also stressed that the punitive aspect of the sanction is relatively unimportant, as it does not express any 'social disapproval'. See also Blomsma, *Mens Rea and Defences* (n 4) 24.

[233] CJEU *Käserei Champignon Hofmeister* (n 227) paras 41–42.

[234] Opinion of AG Stix-Hackl (n 232) paras 27–59.

[235] CJEU *Käserei Champignon Hofmeister* (n 227) para 44. The CJEU furthermore concludes that a regulatory system in which the imposition of a penalty is not conditional upon the finding of a fault element (intention or negligence) is not in itself inconsistent with general principles of European law (paras 47–51). All of this, however, does not mean that persons are bereaved of all legal protection, since any penalty must, in any case, rest on a clear legal basis and comply with the principle of proportionality (para 52).

[236] CJEU *Käserei Champignon Hofmeister* (n 227) para 79 (referring to, inter alia, CJEU 9 August 1994, C-347/93 *Belgian State v Boterlux SPRL* (EU:C:1994:314) para 34). On the requirement of having exercised all due care, see also Blomsma, *Mens Rea and Defences* (n 4) 389.

> appropriate precautions, either by including the necessary clauses in the contracts in question or by effecting appropriate insurance …[237]

For this reason, an exporter cannot simply 'hide' behind the fault of a third party with whom the agricultural aid beneficiary maintains contractual relations so as to escape the incurring of a sanction for an infringement pertaining to that aid, because such a fault on the part of a co-contractor 'cannot be regarded as unforeseeable in the context of commercial transactions'.[238] Considering that an exporter has various means to protect him- or herself against the legal consequences that a fault on the part of a third party may entail, such a fault 'falls more within the sphere of the beneficiary than within that of the Community'.[239] Consequently, the CJEU holds that the Bundesfinanzhof's second question must be answered negatively. It may be concluded, therefore, that the CJEU construes the concept of force majeure (or duress of circumstances) rather restrictively.

However, it must be borne in mind that the Court's considerations on force majeure that were referred to above are limited to this concept's meaning and scope within the field of agricultural regulations.[240] The specific context of these regulations, and the aims and objectives underlying them, may be said to at least partly attest to the reasonableness of confining – in this field – the concept of force majeure within rather narrow limits. In the words of Advocate General Stix-Hackl: 'the exporter should be regarded as a partner in the administration of benefits who has to be induced to fulfil his special obligations … under threat of penalty'; and this penalty is 'the legal consequence of his status as guarantor of the correctness of the refund application, which would appear to be more akin to the civil law institution of a contractual penalty than to a penal sanction'.[241]

Moreover, the administrative penalties that are provided for by the regulations under the EU's common agricultural policy do not stand out as markedly severe. It is in any case safe to say that sanctions in other fields of non-criminal, regulatory law – such as the field of EU competition law to which we will turn in the following subsection – can clearly be far more punitive in nature. However, this does not render the foregoing exposition redundant: *sensu stricto*, the principle of individual culpability precludes the imposition of *any* sanction on a person in cases where it can reasonably be assumed that this person could not have avoided his or her wrongful action. Pursuant to the third dimension of the principle of individual culpability, personal blameworthiness is a necessary condition for the imposition of a sanction, irrespective of whether the sanction is a severe or a lenient one.[242] And the possibility of rebutting the presumption

[237] CJEU *Käserei Champignon Hofmeister* (n 227) para 80.

[238] CJEU *Käserei Champignon Hofmeister* (n 227) para 86. See likewise the opinion of AG Stix-Hackl (n 232) paras 97–99.

[239] CJEU *Käserei Champignon Hofmeister* (n 227) para 85 (with reference to CJEU 12 May 1998, C-366/95 *Landbrugsministeriet, EF-Direktoratet v Steff-Houlberg et al* (EU:C:1998:216), para 28). See likewise the Opinion of AG Stix-Hackl (n 232) paras 103–104.

[240] See the Opinion of AG Stix-Hackl (n 232) para 95: '[T]he concept of *force majeure* does not have exactly the same scope in different areas of the law and in its various spheres of application, so that its precise meaning must be determined by reference to the legal context within which it is intended to operate.'

[241] Opinion of AG Stix-Hackl (n 232) para 41.

[242] The question as to what level of severity of sanction is appropriate in a given case belongs to the fourth dimension of the principle of individual culpability, which is the subject of section VI. Yet, no sanction, however mild, can be considered appropriate when personal blameworthiness fails.

of blameworthiness – and hence the possibility of invoking exculpatory defences – is especially important in fields of regulation where relatively low evidentiary thresholds apply to mens rea elements, or where there is no mens rea requirement for liability at all.[243]

C. Mistake of Law under EU Competition Law: *Schenker and Co*

EU competition law is reputed to be a complicated field of law where new developments arise in rapid succession and where – consequently – legal errors are rather easily made. In a preliminary judgment of 18 June 2013, the CJEU answered the question whether an 'unobjectionable' mistake with respect to a point of law could or should preclude the imposition of a fine based on the antitrust provision of Article 101 TFEU.[244] The request for a preliminary ruling was made by the Austrian Supreme Court (Oberster Gerichtshof) in proceedings between, on the one side, the Austrian Federal Competition Authority (Bundeswettbewerbsbehörde) and the Austrian Federal Cartel Counsel (Bundeskartellanwalt) and, on the other side, Schenker and Co AG and 30 other freight-forwarding undertakings that were members of an interest group going by the name Spediteur-Sammelladungs-Konferenz (SSK). These proceedings concerned the finding of an infringement of Article 101 TFEU and of national law provisions on cartels, and fines imposed pursuant to these provisions.

The SSK was established in 1994, one year before Austria became a Member State of the European Community. The SSK members made agreements on fixed tariffs for domestic freight-forwarding services throughout Austria with the aim of ensuring freight rates that were competitive with rates for rail and other forms of inland transport.[245] In 1996, the Austrian Cartel Court (Kartellgericht) officially declared the SSK a so-called 'minor cartel', a type of cartel that was allowed under the national Law on Cartels (*Kartellgesetz*) of 1988.[246] Pursuant to paragraph 16 of that law, 'minor cartels' are cartels that have a share of less than five per cent of the entire domestic market. Subsequent to the Kartellgericht's declaration, the SSK members continued to take measures to ensure the SSK's compatibility with Austrian competition law. The members constantly monitored their market shares. Furthermore, they repeatedly consulted their competition counsel from an Austrian law firm in order to obtain up-to-date advice in light of new legal and factual developments. This legal advice, however, concerned the question of how the SSK members could ensure their remaining within the 'minor cartel' exception under Austrian competition law, but failed to consider obligations and prohibitions stemming from EU law that had meanwhile become applicable in Austria.

[243] Art 11(1) of Regulation 3665/87 (n 229) does not require the finding of a fault element for the imposition of a sanction; it does, however, provide for a considerably higher sanction in cases where the relevant infringement is committed intentionally. On the notion of strict liability, see subsections II.C. and III.A. above.

[244] CJEU 18 June 2013, C-681/11 *Bundeskartellanwalt v Schenker and Co AG* (EU:C:2013:404). See on Art 101 TFEU also subsection III.C. above.

[245] SB Völcker, '*Ignorantia Legis Non Excusat* and the Demise of National Procedural Autonomy in the Application of the EU Competition Rules: *Schenker*' (2014) 51(5) *Common Market Law Review* 1497, 1499.

[246] This law was in force until 2006, when it was replaced by the *Kartellgesetz* 2005.

It was only over a decade later that doubts were first raised concerning the lawfulness of SSK's existence under EU competition law. This happened in late 2007, during a meeting of the SSK board with a representative of the law firm that had been issuing the legal advice to the SSK members. In view of the doubts raised, it was decided to dissolve the SSK with immediate effect. One of the freight-forwarding companies involved, Schenker and Co AG, thereupon applied to the Bundeswettbewerbsbehörde within the framework of a so-called 'leniency programme' (which had been introduced in Austria in 2006).[247] The decision on this application came early 2010. On 18 February of that year, the Bundeswettbewerbsbehörde requested the Kartellgericht to declare that Schenker had infringed Article 101 TFEU and national competition rules, but without fining it, and to impose a fine on all remaining former SSK members for their respective contributions to 'a single, complex and multi-faceted infringement of national and European Union law on cartels by agreeing on tariffs for domestic consolidated consignment transport throughout Austria'.[248]

One year later, the Kartellgericht rejected the request. It based the rejection on the argument that its 1996 ruling – in which the SSK was found to be a lawful 'minor cartel' – already 'implied' that the SSK did not contravene European law, as the SSK had no relevant effect on trade between EU Member States; moreover, the SSK members had obtained advice from a reliable legal counsel, specialised in matters of competition law. With regard to the requested 'mere declaration' in respect of Schenker, the Kartellgericht ruled that it was not entitled to find an infringement of Article 101 TFEU without also imposing a fine, arguing that only the Commission is invested with the competence to take such a declaratory decision. The Bundeswettbewerbsbehörde appealed the Kartellgericht's ruling to the Oberster Gerichtshof, after which the Commission decided to intervene in the appeal procedure as an *amicus curiae*. The Oberster Gerichtshof stayed the proceedings and requested a preliminary ruling. One of the two questions referred to the CJEU concerned the possibility of imposing a fine on an undertaking found to have infringed Article 101 TFEU in cases where this undertaking has unobjectionably erred with regard to the lawfulness of its conduct, for example because it has relied in good faith on expert legal advice or on a ruling of a national competition authority.[249]

In her Opinion, Advocate General Juliane Kokott starts from the view that 'although antitrust law is not part of the core area of criminal law, it is recognised as having a character similar to criminal law'.[250] Certain principles stemming from criminal law must therefore be assumed to apply also in competition law. One of these is the principle of *nulla poena sine culpa*, which the Advocate General believes to be intrinsic to the presumption of innocence and to be implicitly contained in Article 48, paragraph 1 of

[247] On compliance and leniency programmes in competition law, see generally Frenz, *Handbook* (n 117) 854–55, 863–65, 1009–20.

[248] CJEU *Schenker and Co* (n 244) para 23.

[249] The second question was whether or not national authorities are entitled to forbear from imposing a fine on an undertaking found to have infringed EU competition, on the ground that this undertaking participated in a leniency programme.

[250] Opinion of 28 February 2013, C-681/11 *Bundeskartellanwalt v Schenker and Co AG* (EU:C:2013:126), para 40.

the EU's Charter of Fundamental Rights (CFR) and in Article 6, paragraph 2 ECHR.[251] The applicability of the principle of *nulla poena sine culpa* within the context of competition law is further evidenced, according to Kokott, by the fact that Article 23, paragraph 2 of Regulation 1/2003 states that fines may be imposed by the Commission only for intentionally or negligently committed infringements of EU antitrust law.[252] The applicability of the principle implies that certain forms of error of law must preclude the attribution of liability and, consequently, the imposition of a penalty. Kokott stresses, however,

> that not every error of law is capable of precluding completely the liability of the undertaking participating in the cartel and thus the existence of a punishable infringement. Only where the error committed by the undertaking regarding the lawfulness of its market behaviour was *unavoidable* – sometimes also called an *excusable* error or an *unobjectionable* error – has the undertaking acted without fault and it cannot be held liable for the cartel offence in question. Such an unavoidable error of law would appear to occur only very rarely. It can be taken to exist only where the undertaking concerned took all possible and reasonable steps to avoid its alleged infringement of EU antitrust law.[253]

The Advocate General then addresses the issue of whether, and under what conditions, an undertaking's reliance on legal advice may exonerate this undertaking from liability. Under Regulation 1/2003, undertakings are themselves responsible for monitoring the compatibility of their market behaviour with EU antitrust law, which impels undertakings to obtain specialised legal advice. Kokott reasons that '[i]f an undertaking relies, in good faith, on – ultimately incorrect – advice provided by its legal adviser, this must have a bearing in cartel proceedings for the imposition of fines'.[254] Under certain conditions, this should result in the conclusion that the undertaking has a valid defence in the form of an excusable mistake of law and that, consequently, liability is barred. The Advocate General advises that, for this result to obtain, six cumulative minimum requirements must be satisfied.[255] Good-faith reliance on legal advice may only result in exoneration, for example, if the advice relied on is provided by a specialist legal counsel, is not manifestly incorrect, and contains a complete and express account of all relevant legal aspects. Moreover, undertakings must always 'be aware that certain anti-competitive practices are, by their nature, prohibited, and in particular that no one is permitted to participate in "hardcore restrictions", for example in price agreements'.[256]

The Advocate General subsequently considers under what conditions an undertaking's reliance on rulings or decisions of national competition authorities may lead to an exoneration. Considering the increased importance of the role of national competition authorities under the decentralised enforcement regime introduced by Regulation 1/2003, Kokott reasons that legitimate expectations may more readily be

[251] Opinion of AG Kokott (n 250) para 41.
[252] Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1. See Opinion of AG Kokott (n 250) para 42.
[253] Opinion of AG Kokott (n 250) paras 45–46.
[254] Opinion of AG Kokott (n 250) para 58.
[255] See opinion of AG Kokott (n 250) paras 62–73.
[256] Opinion of AG Kokott (n 250) para 70.

created by decisions taken by national competition authorities than by expert legal advice.[257] Also in this respect, she lists a number of minimum requirements which must be met in order for an undertaking to have a valid defence.[258] Some of these parallel the requirements for good-faith reliance on legal advice. It is furthermore required, inter alia, that the authority's decision concerns 'exactly the same matters of fact and law in respect of which the undertaking concerned invokes an error of law precluding liability'.[259] She ultimately concludes that several of the requirements are not satisfied in the case of the former SSK members and that, consequently, 'the undertakings concerned have not committed an excusable error of law', which means that 'any error regarding the lawfulness of their market behaviour may be held against them'.[260]

The CJEU reaches the same conclusion in its preliminary ruling. Interestingly, however, the CJEU arrives at this conclusion by an entirely different route. Whereas the Advocate General's reasoning centres on the protective role of the principle of *nulla poena sine culpa* in curtailing liability in antitrust law, the Court's reasoning is anchored in an almost diametrically opposed principle, the instrumental principle of *effet utile*.[261] The Court rationalises that, although the Commission may – pursuant to Article 23, paragraph 2 of Regulation 1/2003 – only impose fines for infringements of antitrust law if these are committed intentionally or negligently, the same restriction does not apply to national competition authorities.[262] But *if* a Member State chooses to limit the power of its competition authority to impose penalties to cases of intentional or negligent infringement, the standard of proof for these fault elements must not be higher than the standards which are employed by the Commission, 'so as not to jeopardise the effectiveness of European Union law'.[263] And with regard to errors of law, the CJEU states the following:

> In relation to the question whether an infringement has been committed intentionally or negligently and is, therefore, liable to be punished by a fine in accordance with the first subparagraph of Article 23(2) of Regulation No 1/2003, it follows from the case-law of the Court that that condition is satisfied where the undertaking concerned *cannot be unaware of the anti-competitive nature of its conduct*, whether or not it is aware that it is infringing the competition rules of the Treaty. … Therefore, the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is

[257] Opinion of AG Kokott (n 250) para 85.

[258] See opinion of AG Kokott (n 250) paras 87–96.

[259] Opinion of AG Kokott (n 250) para 91.

[260] Opinion of AG Kokott (n 250) para 97. With regard to the second question referred to the CJEU, Kokott concludes that Regulation 1/2003 (n 252) does not prohibit national competition authorities from (merely) finding an infringement of antitrust law without imposing a fine, 'provided that the principles of equivalence and effectiveness enshrined in EU law are respected'; see paras 103–14.

[261] See Völcker, '*Ignorantia Legis Non Excusat*' (n 245) 1504. The CJEU refers to the first sentence of recital 1 of Regulation 1/2003 (n 252): 'In order to establish a system which ensures that competition in the common market is not distorted, Articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community.'

[262] CJEU *Schenker and Co* (n 244) para 35: 'It is not apparent from the wording of Article 5 of the regulation that conditions relating to intention or negligence have to be met in order for the measures of application which are provided for by the regulation to be adopted.'

[263] See CJEU *Schenker and Co* (n 244) para 36.

> based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct (emphasis added).[264]

The Court subsequently concedes that a national competition authority may in exceptional cases refrain from imposing a fine despite the finding of an infringement, in particular when the 'principle of protection of legitimate expectations' is at issue.[265] However, the margins for this possibility seem extremely narrow: according to the CJEU, legitimate expectations cannot, in any event, be derived from expert legal advice, or from a decision taken by a national competition authority.[266] In answer to the referring court's first question, the Court quite unequivocally states that an undertaking which has infringed Article 101 TFEU 'may not escape imposition of a fine' even where the infringement has resulted from an error of law 'on account of the terms of legal advice given by a lawyer or of the terms of a decision of a national competition authority'.[267] This robust conclusion seems to shut the door on any excusable 'mistake of law' defence with regard to infringements of Article 101 TFEU.

Unsurprisingly, many commentators have noted and criticised the CJEU's rather severe or even uncompromising approach in the *Schenker* case, and have questioned the Court's commitment to respecting the principle of individual culpability in matters of antitrust law. Sven B Völcker, for example, states that '[i]n marked contrast to the Advocate General, the Court appears far more interested in establishing the supremacy of the principle of "uniform and effective application of EU competition law" than acknowledging [the principle of] nulla poena sine culpa'[268] (to which the 'principle of protection of legitimate expectations' referred to by the CJEU is not equivalent).[269] Now, of course it could be argued that the CJEU's ruling should be interpreted to the effect that a mistake of law defence is precluded *only* in cases where the anticompetitive behaviour is sufficiently *evident* to sustain the finding that the undertaking in question cannot have been unaware of the anticompetitive nature of its conduct. However, considering the Commission's and the EU Courts' expanding interpretation of the notion of 'anticompetitive conduct', it is not at all clear in what situations – if there are any at all – the

[264] CJEU *Schenker and Co* (n 244) paras 37–38. The Court refers in this connection to its previous judgments of 8 November 1983, Case 96/82 *IAZ International Belgium NV et al v Commission* (EU:C1983:310) para 45; 9 November 1983, Case 322/81 *Nederlandsche Banden Industrie Michelin NV v Commission* (EU:C1983:313) para 107; and 14 October 2010, C-280/08 P *Deutsche Telekom v Commission* (EU:C:2010:603), para 124.

[265] CJEU *Schenker and Co* (n 244) para 40.

[266] See CJEU *Schenker and Co* (n 244) paras 41–43. With regard to the second question that was posed by the Austrian Oberster Gerichtshof, the CJEU concludes that national competition authorities are permitted to confine themselves, by way of exception, to finding an infringement without imposing a fine 'if the undertaking concerned has participated in an national leniency programme'; see paras 44–50.

[267] CJEU *Schenker and Co* (n 244) para 51.

[268] Völcker, '*Ignorantia Legis Non Excusat*' (n 245) 1510. See also Van Kempen and Bemelmans, 'EU Protection of the Substantive Criminal Law Principles' (n 100) 256: 'After all, the culpability then centres on the fact that one did not refrain from certain conduct, although one could assume that one was still operating within the rules of the law. The Court would then thus apply a certain rule of conduct not laid down by law as such.' And see ES Lachnit, 'Laten we geen boete opleggen … Het arrest Schenker: de mogelijkheden voor een beroep op dwaling en afzien van boeteoplegging in het Europese mededingingsrecht' (2013) 8 *Nederlands Tijdschrift voor Europees Recht* 279; P Rojac and O Lynskey, '*Schenker*; Expert Legal Advice Cannot be Relied upon to Exempt an Undertaking from Competition Law Sanctions' (2013) 5(1) *Journal of European Competition Law and Practice* 27; Frenz, *Handbook* (n 117) v, 1020–33.

[269] See Völcker, '*Ignorantia Legis Non Excusat*' (n 245) 1508–09.

anticompetitive nature of conduct is not to be regarded as sufficiently conspicuous so as to preclude an excusable mistake of law.[270]

What seems at any rate a justified conclusion to be drawn is that the role of the concept of personal blameworthiness in curtailing (and sometimes precluding) liability is significantly more modest in the quasi-criminal domain of EU competition law than is generally the case already in criminal law. As was seen in subsection V.A. above, the concept of personal blameworthiness functions as a 'negative' condition for liability in criminal law, in the sense that this condition is, in principle, presumed to be fulfilled, *unless* a recognised exculpatory defence applies that attests to the absence of personal blameworthiness. However, even though the maxim that *ignorantia iuris non excusat* underlies the legal systems of all EU Member States, an unavoidable and therefore excusable mistake regarding the unlawfulness of one's conduct is at least recognised as an exculpatory defence in the criminal law systems of most Member States.[271] The conditions which must be satisfied for such a defence to apply are generally rather strict in criminal law – especially within sub-fields of a 'regulatory' nature, where offences are typically addressed primarily to professional agents.[272]

Seen from the perspective of legal certainty, and considering the generally applicable 'duty to know the law', it is quite understandable that relatively stringent conditions apply for a valid mistake of law defence in criminal law.[273] And in view of the distinctly regulatory character of EU antitrust law and the legitimate interest in a uniform and effective application thereof, one might, moreover, rightfully argue that it would be justified and advisable to raise the evidential threshold for a valid mistake of law defence even a bit higher in respect of antitrust offences. However, to effectively shut the door on virtually any possibility of successfully invoking such a defence in antitrust proceedings is clearly incompatible with the principle of individual culpability. More specifically, it contravenes this principle's third dimension, according to which liability may only be imputed to a person if the presumption that this person could have avoided his or her wrongful action is not defeated by a valid exculpatory defence.

And considering the unmistakably punitive nature of EU competition law, there is much to be said for a more wholehearted commitment to the principle of individual culpability in this field, and thus for a more generous recognition of the exculpatory defence of an unavoidable mistake of law. In fact, it is hard to see how or why the two sets of cumulative minimum requirements for a valid mistake of law defence that were formulated by Advocate General Kokott in her thoughtful Opinion, could not or should not have been gratefully adopted by the CJEU. The requirements show quite

[270] See Völcker, '*Ignorantia Legis Non Excusat*' (n 245) 1510–12. Völcker also points out (at 1512–13) that it is unclear how one should deal with a case in which the undertaking erred in good faith, not with regard to the lawfulness of its conduct, but with regard to the applicability of one of the exceptions of Art 101(3) TFEU.

[271] See Blomsma, *Mens Rea and Defences* (n 4) 464–76.

[272] Conditions for defences tend to be stricter for professional agents or officials on account of their '*Garantenstellung*'; see subsection II.C. above. Issues of *error iuris* are usually dealt with by the ECtHR on the basis of the criterion of foreseeability within the context of the principle of legality enshrined in Art 7 ECHR; see eg ECtHR *Cantoni v France* (n 205) and ECtHR 17 May 2010, *Kononov v Latvia* (App No 36376/04), [2010] ECHR 667. On the concept of 'regulatory criminal law', see subsection III.A. above.

[273] See Blomsma, *Mens Rea and Defences* (n 4) 467–69.

some resemblance to the conditions that usually apply to a defence of an unavoidable mistake of law within criminal law, which may indicate that the requirements listed by Advocate General Kokott should also prove to be sufficiently practicable.[274] Moreover, in light of their concise and stringent formulation, the fear that the adoption of these requirements will jeopardise legal certainty in the field of European competition law seems unwarranted, or at least premature.[275] Lastly, due to its *exculpatory* (and hence not *justificatory*) nature, the potential impact of a mistake of law defence is by definition limited: where it applies, it defeats the presumption of personal blameworthiness, but does not affect the wrongfulness of the behaviour concerned.[276]

VI. Fourth Dimension: Proportionate Penalties

A. Introduction: The Relational Dimension of Individual Culpability

The fourth and last dimension of the principle of individual culpability leads to the domain that Antoine Mooij has denoted as 'guilt of settlement' (*ὀφειλόμενον*; *debitum*). This dimension of the principle is inherently *relational*.[277] Guilt needs to be settled. Culpability within this context means, therefore, that something is owed to another, or is owed to 'the Other' (society). And what is owed is related to the degree of culpability; in this connection, aspects of what Mooij has termed 'guilt of action' and 'guilt by default' also come into play. The culpability principle requires that punishment does not exceed the offender's just deserts, regardless of whether imposing additional or more severe punishment enhances social utility. The proportionality requirement *as such* is a generally acknowledged dimension of the principle of individual culpability. Sanctions must not be disproportionate – but disproportionate in relation *to what* exactly?

This is a controversial matter. It is disputed, for example, whether a penalty may or may not exceed a certain level of severity that is indicated (in whatever mysterious way) by the measure of the offender's guilt. The answer to this question depends, of course, in large part on the answer to a further question, namely: what does 'the offender's guilt' exactly refer to here? If the labyrinthine notion of guilt is taken here in the rather strict sense of the degree of the offender's 'personal blameworthiness', it seems – as was argued in subsection II.B. above – that the principle of individual culpability would overcharge the administration of criminal justice. The fact that the notion of guilt at play in the determination of appropriate penalties (guilt in the sense of 'guilt of settlement') is inherently 'relational' rather indicates that the requirement of

[274] See Frenz, *Handbook* (n 117) 1025–33.

[275] Cp, however, Th von Danwitz, 'Ignorantia Legis Non Excusat' (2013) 4(5) *Journal of European Competition Law and Practice* 389, 390: 'Even if one might not agree with the Court's findings, the clearness of the decision bears an important advantage in terms of legal certainty. Indeed, a different approach would have raised more and rather difficult legal issues regarding the minimum requirements and the assessment of expert legal advice … in what is now twenty-eight national jurisdictions.'

[276] Blomsma, *Mens Rea and Defences* (n 4) 538–39.

[277] See also Duff, *Answering for Crime* (n 26) 23–30.

proportionality has regard to a more extensive notion of culpability that encompasses aspects of 'guilt of action' and 'guilt by default', in addition to more objective factors such as the seriousness of the offence and its impact on society.[278]

To this must be added that the meaning or substance of the requirement of proportionality can vary significantly depending on the context in which the requirement is operative. Within a legislative context, the requirement is relevant in connection with the determination of what types of penalty and what maximum level of severity of the considered penalties (in terms of the duration of the deprivation or restriction of physical freedom, or in terms of the amount of financial deprivation, for example) could be deemed appropriate for a certain offence, taking account of general and abstract factors such as the seriousness of the conduct and the nature and weight of the legal interest the protection of which formed the primary reason for the conduct's penalisation. Evidently, the requirement of proportionality has rather different contours within the more concrete and tangible context of measuring out appropriate penalties in individual cases. The determination of appropriate sanctions in individual cases allows for much more case-specific particularities and subjective factors to be taken into account, such as the measure of the defendant's personal blameworthiness.[279]

All of this, of course, still tells us nothing about the role of the requirement of proportionate penalties in the vast domain of European (quasi-)criminal law. The European Criminal Policy Initiative's 'Manifesto' – that was referred to in section I above – stipulates that 'the European legislator has to justify that the requirements in European legislation as to the sanctions permits [*sic*] the imposition of penalties which correspond to the guilt of the individual and which are not disproportionate to the criminal offence'.[280] With reference to a number of EU legal acts concerning criminal offences, the Initiative states that it is 'alarming that the legislator does not pay attention to the fact that the penalty scale should be proportionate to the dangerousness of the offence'.[281]

[278] See Mooij, *Intentionality, Desire, Responsibility* (n 21) 260; see subsection II.B.

[279] With respect to other (less case-sensitive) dimensions of the principle of individual culpability, the differences between the legislative context of drafting offence definitions and the adjudicative context of hearing and deciding individual cases may of course be considerably smaller. In the determination of the requisite mens rea element for a particular offence, eg, the legislator makes an active and important contribution to the effectuation of the second dimension of the principle of individual culpability.

[280] European Criminal Policy Initiative, 'A Manifesto on European Criminal Policy' (n 6) 708.

[281] European Criminal Policy Initiative, 'A Manifesto on European Criminal Policy' (n 6) 712, referring to Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, [2002] OJ L 164/3, and to the (then) Proposal for a Council Framework Decision on preventing and combating trafficking human beings, and protecting victims, COM(2009) 136 final. In a recent study by the Initiative, it is concluded that the instrument of 'minimum maximum penalties' – used by the EU legislator in directives adopted under Art 83 TFEU – does not effectively contribute to the harmonisation of criminal sanctions; instead, it leads to an overall increase of the level of punitiveness, and it often has a negative impact on the coherence of national systems and on the proportionality of national rules on sanctions. For this reason, the Initiative proposes an alternative instrument for the harmonisation of sanctions that is based on a model of categories of relative severity; see H Satzger, 'The Harmonisation of Criminal Sanctions in the European Union. A New Approach' (2019) 2 *Eucrim* 115. See also M Kaiafa-Gbandi, 'The Post-Lisbon Approach towards the Main Features of Substantive Criminal Law: Developments and Challenges' (2015) 5(1) *European Criminal Law Review* 3, 10–11 and 18; and HG Nilsson, 'Some Reflections on the Development of an EU Criminal Policy, on Directives in Criminal Law and Sanctions Contained Therein' in M Ulväng and I Cameron (eds), *Essays on Criminalisation and Sanctions* (Uppsala, Iustus Förlag, 2014) 163–84, 178–81.

In the following pages it will be assessed whether this or similar criticism applies to sanctions in fields of quasi-criminal law. The famous *Greek Maize* case may serve as a point of departure. In this judgment the CJEU ruled that Member States,

> whilst the choice of penalties remains within their discretion, … must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements under national law of a similar nature and importance and which, in any event, make the penalty *effective, proportionate and dissuasive* (emphasis added).[282]

The phrase that penalties must be 'effective, proportionate and dissuasive' has rapidly developed into a mantra of the EU courts and legislature. The terms have been interpreted in different ways. What seems clear, at any rate, is that the requirement of proportionality places restrictions on the level of dissuasiveness of a given penalty (and perhaps also on its effectiveness). In her Opinion for a number of cases concerning criminal proceedings, Advocate General Juliane Kokott stated that a proportionate penalty is one that is 'appropriate (that is to say, in particular, *effective* and *dissuasive*) for attaining the legitimate objectives pursued by it, and also necessary. Where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous'.[283] This definition primarily concerns the notion of proportionality on the abstract level of legislation. On the concrete level of individual cases, however, the principle of individual culpability is generally considered to require that penalties are proportionate to the seriousness of the offence and to the culpability of the defendant. In this connection, Andrew von Hirsch and Andrew Ashworth state the following in their seminal work *Proportionate Sentencing*:

> Once one has created an institution with the condemnatory implications that punishment has, then it is a requirement of justice, not merely of efficient crime prevention, to punish offenders according to the degree of reprehensibleness of their conduct. Disproportionate punishments are unjust not because they possibly may be ineffective or counterproductive, but because they purport to condemn the actor for his conduct and yet visit more or less censure on him than the degree of blameworthiness of that conduct would warrant.[284]

Von Hirsch and Ashworth explicitly relate the level of censure warranted by the 'degree of blameworthiness' of the relevant conduct to the 'seriousness of the offence';[285]

[282] CJEU *Greek Maize* (n 90) para 24. On this judgment see Klip, *European Criminal Law* (n 2) 72–82.

[283] Opinion of 14 October 2004, C-387/02, C-391/02 and C-403/02 *Criminal Proceedings against Silvio Berlusconi, Sergio Aldechi* and *Marcello Dell'Utri et al* (EU:C:2004:624) para 90. Cp K Nuotio, 'A Legitimacy-based Approach to EU Criminal Law: Maybe We are Getting There, After All' (2020) 11(1) *New Journal of European Criminal Law* 20, 23–24: 'Proportionality has, as is generally known, two possible interpretations. There is act-proportionality which requires that the punishment should be proportionate to the gravity of the offence. The second interpretation is means-end-proportionality. This second interpretation of proportionality would obviously be close to the effectiveness test. In criminal law, act-proportionality is particularly significant, since it reveals the penal value of the act in question. It is rather obvious that sentences that are both effective and proportionate may help with the internalization of those values and also give reasons for potential perpetrators not to engage in the forbidden conduct. Proportionality and effectiveness are thus internally linked.'

[284] A von Hirsch and A Ashworth, *Proportionate Sentencing. Exploring the Principles* (Oxford, Oxford University Press, 2005) 134.

[285] See Von Hirsch and Ashworth, *Proportionate Sentencing* (n 284) 137–62; cp M Thorburn, 'Proportionate Sentencing and the Rule of Law' in L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice. Essays in Honour of Andrew Ashworth* (Oxford, Oxford University Press, 2012) 269–84.

the notion of blameworthiness in this context, therefore, corresponds with the aforementioned 'extensive' and relational meaning of culpability that appertains to the fourth dimension of the principle of *nulla poena sine culpa*. In the remainder of this section, the focus will be on the meaning and role of the proportionality principle in areas of quasi-criminal law. As a matter of course, it will not be possible to provide a complete and detailed account of this fourth dimension of the principle of individual culpability within European quasi-criminal law; as with respect to the three dimensions that were discussed in the preceding sections, we will have to content ourselves with a rather pointillist sketch. Subsection V.B. contains a brief discussion of the Commission's method of setting fines for infringements of EU competition law. Subsection V.C. revisits the phenomenon of 'dual-track' enforcement systems;[286] it investigates how the requirement of proportionate sanctioning, in conjunction with the principle of *ne bis in idem* as laid down in Article 50 CFR and in Article 4 of Protocol No 7 to the ECHR, serves its purpose of curtailing liability in cases of dual proceedings.

B. Proportionality of Fines in EU Competition Law: The 2006 Fining Guidelines

Article 49, paragraph 3 CFR states that '[t]he severity of penalties must not be disproportionate to the criminal offence'. Although this provision explicitly concentrates on criminal offences, the requirement of proportionality of sanctions is taken to apply to quasi-criminal offences as well.[287] The present subsection discusses the proportionality requirement specifically in relation to pecuniary sanctions that can be imposed for infringements found in EU competition law, a field of quasi-criminal law that was encountered already in many previous subsections in this chapter. Article 49 CFR is referred to, albeit rarely, in judgments of the CJEU and GCEU concerning competition law cases.[288] Pursuant to Article 23, paragraph 2 of Regulation 1/2003, the Commission is authorised to impose fines on undertakings or associations of undertakings found to have intentionally or negligently infringed Article 101 or 102 TFEU.[289] In order to enhance the transparency and impartiality of its decisions, a four-page document containing 'Guidelines on the method of setting fines' in pursuance of the mentioned provision in Regulation 1/2003 ('*Fining Guidelines*') was published by the Commission in 2006.[290] According to these *Fining Guidelines*, it is the Commission's duty

> to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles.

[286] Touched upon already in subsection IV.C.

[287] See P De Hert, 'EU Criminal Law and Fundamental Rights' in V Mitsilegas, M Bergström and Th Konstadinides (eds), *Research Handbook on EU Criminal Law* (Cheltenham, Edward Elgar Publishing, 2016) 105–24, 122–23.

[288] See Veenbrink, *Criminal Law Principles* (n 115) 206.

[289] Formerly Arts 81 and 82. See Art 23(2)(a) of Regulation 1/2003 (n 252). See also subsection V.C. above.

[290] Guidelines on the method of setting fines imposed pursuant to Article 23(2) of Regulation No 1/2003 (*Fining Guidelines*), [2006] OJ C 210/2. These replaced the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 (1962) and Article 65(5) of the ECSC Treaty, [1998] OJ C 9/3.

> For this purpose, the Commission must ensure that its action has the necessary deterrent effect. … Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles [101 and 102 TFEU] (general deterrence).[291]

The rather strong emphasis which is placed on the importance of (specific and general) deterrence, may at least partially explain the already frequently observed fact that the fines imposed by the Commission for anticompetitive behaviour have steadily increased over the last few decades and have reached a very high level.[292] The Commission's *Fining Guidelines* have also been endorsed by the CJEU and the GCEU in their respective case law on antitrust law; the EU courts, however, leave the Commission quite a bit of discretion in applying the guidelines.[293] We are, it seems, impelled, therefore, to look somewhat closer into the meaning and weight afforded to the requirement of proportionate sanctions in this context. Although this requirement is not explicitly mentioned anywhere in the *Fining Guidelines*, some aspects of it are implicitly referred to. This is the case, for example, where it is stated that 'the Commission must have regard both to the gravity and to the duration of the infringement',[294] and where certain mitigating factors are listed on account of which a fine may be decreased in respect of an individual undertaking.[295] These aspects are included in the 'two-step methodology' to be followed by the Commission in setting fines to be imposed on undertakings or associations of undertakings in individual cases.

In a first step, the Commission determines a 'basic amount' for the fine by reference to the value of sales of goods and services, insofar as these sales relate to the anticompetitive behaviour in the relevant market. As a rule, the basic amount is calculated by taking a proportion (of up to 30 per cent) of the value of sales of the preceding full business year,[296] multiplied by the number of years during which the relevant undertaking or association of undertakings has participated in the infringement. In order to ensure the desired deterrent effect, the resultant amount is subsequently further increased by a certain percentage of the sales value.[297] In a second step, the Commission determines the definite amount of the fine to be imposed by taking into account a number

[291] *Fining Guidelines* 2006 (n 290) para 4 (references omitted).

[292] See, eg, W Bosch, 'The Role of Fines in the Public Enforcement of Competition Law' in K Hüschelrath and H Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe. Legal and Economic Perspectives* (Heidelberg, Springer, 2014) 53–61. In addition to the quasi-criminal EU regulation of cartels (and the possibility of civil damages actions), many Member States have introduced (criminal) offences targeting anticompetitive behaviour of corporate and/or individual actors; see Harding, 'The Relationship Between EU Criminal Law and Competition Law' (n 113) 250–51, and Th Ackermann, 'The Interaction of Public and Private Antitrust Enforcement. The Calculation of Fines and Damages' in K Hüschelrath and H Schweitzer (eds), *Public and Private Enforcement of Competition Law in Europe. Legal and Economic Perspectives* (Heidelberg, Springer, 2014) 63–76.

[293] See Veenbrink, *Criminal Law Principles* (n 115) 207–17.

[294] *Fining Guidelines* 2006 (n 290) para 2. This requirement stems from Art 23(3) of Regulation 1/2003 (n 252).

[295] See *Fining Guidelines* 2006 (n 290) paras 29 and 35.

[296] The percentage taken depends on, inter alia, the harmful nature and geographic scope of the infringement in question; see *Fining Guidelines* 2006 (n 290) paras 22–23.

[297] Namely by an amount ranging between 15 and 25 per cent of the sales value; *Fining Guidelines* 2006 (n 290) para 25.

of aggravating and mitigating circumstances. Aggravating circumstances include, inter alia, continuance or recurrence of infringements after their detection, and refusals to cooperate with the Commission.[298] Mitigating circumstances include, for example, a merely negligent or a substantially limited involvement in the infringement, and an effective cooperation with the Commission.[299] At this stage, the Commission may even increase the amount once more, so as to optimise the fine's deterrent effect.[300] However, the final amount of the fine must not, in any event, exceed 10 per cent of the total turnover in the preceding business year of the undertaking or association of undertakings.[301]

As said, both EU courts have endorsed the Commission's *Fining Guidelines*. With regard to cartel offences, the courts accordingly often distinguish between the stage of determining the 'objective gravity' of the offence and the stage of determining its 'relative gravity'; moreover, room is left for the possibility of adjusting the fine on the basis of circumstances not taken into account in the two previous stages.[302] The objective gravity relates to the overall seriousness of the offence, which is assessed on the basis of circumstances that are common for all undertakings that participated in the cartel; the relative gravity, on the other hand, refers to the seriousness of the contribution of an individual undertaking in relation to that of the other cartelists.[303] In the stage of determining the relative gravity of the offence, the fine is thus individualised with reference to aggravating and mitigating factors that are unique to the conduct of one participating undertaking. Although it seems that this approach corresponds rather neatly with the two-step method of setting fines as described in the *Fining Guidelines*, a recent survey of the relevant case law conducted by Marc Veenbrink has revealed that this case law is rather confusing and is inclined to produce unpredictable or even arbitrary ways of determining fines.[304]

It is shown, for example, that the distinction between the objective and the relative gravity of anticompetitive behaviour is often applied inconsistently where the courts scrutinise the Commission's method of determining the amount of a fine in individual cases. On the one hand, the courts tend to rather benevolently gloss over mistakes pertaining to the manner in which individualising factors are taken into account by the Commission. On the other hand, the case law testifies to a certain formalistic tenor in respect of the courts' assessment of complaints lodged by undertakings. Complaints against a fine imposed by the Commission are occasionally rather easily refuted when the arguments raised in their support are not presented in the correct

[298] See *Fining Guidelines* 2006 (n 290) para 28.

[299] See *Fining Guidelines* 2006 (n 290) para 29. The Commission is required to apply the leniency rules set out in the so-called Leniency Notice (para 34) and it may decrease the fine if the relevant undertaking would otherwise not be able to pay it (para 35). Lastly, the Commission may ultimately decide to impose only a 'symbolic' fine (para 36).

[300] *Fining Guidelines* 2006 (n 290) paras 30–31.

[301] *Fining Guidelines* 2006 (n 290) paras 32–33. This requirement stems from Art 23(2) of Regulation 1/2003 (n 252).

[302] See Veenbrink, *Criminal Law Principles* (n 115) 208; and see, eg, GCEU 15 July 2015, T-418/10 *voestalpine AG and voestalpine Wire Rod Austria GmbH v Commission* (EU:T:2015:516), paras 417–23.

[303] This factor was applied already in CJEU *Suiker Unie et al* (n 121) para 623.

[304] See Veenbrink, *Criminal Law Principles* (n 115) 207–17.

manner or order (for example, when they are not placed under the right 'heading').[305] Moreover, complaints as to the disproportionate character of a fine may be dismissed on the mere ground that the fine in question does not exceed 10 per cent of the relevant undertaking's total turnover in the preceding business year. In other words, satisfaction of the requirement of Article 23, paragraph 2 of Regulation 1/2003 is seen, in some cases, as a guarantee of proportionality.[306]

These examples of formalistic reasoning seem incompatible with the basic rule that the (objective and relative) gravity of an infringement of EU competition law depends on 'the particular circumstances of the case' in question. Accordingly, the assessment of the proportionality of fines imposed for such infringements requires an examination in light of *all* relevant factors which the Commission must take into account.[307] Although these factors are many and varied, there are also factors which, according to the EU courts' case law, do not necessarily need to be taken into account in the determination of an appropriate fine.[308] It may, at any rate, be said that both the GCEU and the CJEU tend to subject decisions of the Commission to impose a fine pursuant to Article 23, paragraph 2 of Regulation 1/2003 to a 'restrained scrutiny'. When the legality of such fining decisions is brought up for review, the EU courts generally confine themselves to verifying whether the Commission considered all relevant factors, that is, whether it followed its own *Fining Guidelines*; aside from this, the courts will

[305] See Veenbrink, *Criminal Law Principles* (n 115) 209–10, with reference to GCEU 15 July 2015, T-413/10 and T-414/10 *Socitrel/Sociedade Industrial de Trefilaria, SA and Companhia Previdente-Sociedade de Controle de Participações Financeiras, SA v Commission* (EU:T:2015:500) paras 297–98.

[306] See Veenbrink, *Criminal Law Principles* (n 115) 215–16, with reference to, inter alia, CJEU 26 January 2017, C-644/13 P *Villeroy and Boch SAS v Commission* (EU:C:2017:59) para 81; GCEU 9 September 2015, T-92/13 *Koninklijke Philips Electronics NV v Commission* (EU:T:2015:605) paras 214–215. In other cases, however, it is – rightfully – stated that satisfaction of the condition laid down in Art 23(2) of Regulation 1/2003 (n 252) does *not* preclude an undertaking from being able to argue that the imposed fine is disproportionate; see, eg, GCEU 12 December 2012, T-410/09 *Almamet GmbH Handel mit Spänen und Pulvern aus Metall v Commission* (EU:C:2012:676), para 228.

[307] For an enumeration of relevant factors and appertaining case law, see Veenbrink, *Criminal Law Principles* (n 115) 220 and 393–405. Cp paras 98–103 of AG Dámaso Ruiz-Jarabo Colomer's Opinion (n 126) concerning the *Aalborg-Portland* case that dates from before the Commission's *Fining Guidelines* of 2006 (n 290) and which was discussed in subsection III.C. above: 'the penalty must be proportionate to the gravity of the infringement and to the further circumstances, both subjective and objective, which are present in each case … The Court of Justice has held that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, and has further stated that no binding or exhaustive list of criteria has been drawn up. … The requirement that the penalty be proportionate to the gravity of the infringement has the consequence that when an infringement has been committed by a number of persons, it is necessary to examine, using the abovementioned guidelines, the relative gravity of the participation of each. That is a requirement of the principle of equal treatment, which demands that the fine be the same for all undertakings in the same situation and prevents those in a different situation from being punished with a similar penalty.'

[308] Interestingly, the CJEU stated in its ruling of 25 March 1996 (dec) C-137/95 P *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO) et al v Commission* (EU:C:1996:130) para 57, that 'the Court of First Instance was not required to verify, in order to determine the gravity of the infringement, whether it had been committed intentionally or negligently, still less to distinguish between the two cases'; see Frese, *Sanctions in EU Competition Law* (n 115) 120–21. Under the Commission's 2006 *Fining Guidelines* (n 290), however, negligence may be a mitigating circumstance 'where the undertaking provides evidence that the infringement has been committed as a result of negligence' (para 29). See further Veenbrink, *Criminal Law Principles* (n 115) 224–25.

normally only find reason to quash or amend the Commission's decision in case of a manifest error.[309]

Although one can certainly point to judgments evidencing a more comprehensive scrutiny of imposed fines by the EU courts,[310] the overall purport of their case law – in conclusion – gives cause for some concern, especially when we recall some of the conclusions that were drawn earlier on. As was seen in subsection III.C., liability for infringements of Articles 101 and 102 TFEU is established at the level of *undertakings*; a fine that is proportionate with reference to the relevant undertaking or association of undertakings may, however, have disproportionate consequences for the legal (and possibly natural) persons in respect of whom the Commission's fining decisions (and the EU courts' judgments) are enforced. It was furthermore seen that, under EU competition law, a parent company may be held vicariously liable for an infringement committed by its subsidiary, even when there has been no involvement or guilt with respect to the infringement on the part of the parent company. And as was mentioned, the average severity of fines imposed by the Commission for anticompetitive behaviour has increased rather spectacularly over the last few decades. As a corollary of the rather dominant focus which is placed on the desired deterrent or 'dissuasive' effect of the fines imposed, the importance of the protective function of the requirement of proportionate sentencing may occasionally be easily disregarded.[311]

C. *Ne Bis In Idem* and Dual-Track Liability Regimes: *A and B v Norway* and *Garlsson Real Estate*

As was seen in subsection IV.C., the EU legislature and the legislatures of certain Member States may subject an infringement to a 'dual-track' approach consisting of a combination of an administrative and a criminal liability regime.[312] Imposing penalties for one and the same offence under both administrative and criminal law is in fact a rather widespread practice in the EU Member States, especially in fields of tax law and environmental law.[313] These dual-track systems allow for a stratified enforcement system, for instance in the sense that the applicable 'track' in concrete cases depends on whether the infringement concerned is committed intentionally, or committed

[309] See B Vesterdorf, 'The Court of Justice and Unlimited Jurisdiction: What Does it Mean in Practice?' (2009) 2 *Global Competition Policy* 2–3; M Baran and A Doniec, 'EU Courts' Jurisdiction over and Review of Decisions Imposing Fines in EU Competition Law' (2010) 3(3) *Yearbook of Antitrust and Regulatory Studies* 235, 238–39; Veenbrink, *Criminal Law Principles* (n 115) 211–17; Frese, *Sanctions in EU Competition Law* (n 115) 123.

[310] See, eg, Baran and Doniec, 'Jurisdiction over and Review of Decisions' (n 309) 245; Veenbrink, *Criminal Law Principles* (n 115) 216.

[311] See generally V Franssen, *The Principles of Corporate Sentencing in EU Law* (Oxford, Hart Publishing, *forthcoming*). On the (increased) focus on punitiveness and *effet utile* in EU competition law, see, eg, Franssen, 'Corporate Criminal Liability' (n 8) 298–303; C Harding, 'The Relationship Between EU Criminal Law and Competition Law' (n 113) 269–70.

[312] See the concluding pages of subsection IV.C. which discussed the EU's dual-track approach with regard to market abuse offences under Directive 2014/57 (n 213) and Regulation 596/2014 (n 174).

[313] See the Opinion of AG Pedro Cruz Villalón of 12 June 2012, C-617/10 *Åklagaren v Hans Åkerberg Fransson* (EU:C:2012:340) para 83.

recklessly or negligently. However, dual-track approaches may also, in certain cases, give rise to parallel or consecutive proceedings – and so possibly to an accumulation of (punitive) sanctions – with regard to what, on balance, constitutes one infringement. Salient examples of such sanction accumulation can be found in a field of quasi-criminal law that has already been referred to multiple times in previous sections of this chapter: EU competition law dealing with antitrust infringements. Referring to the regulation of business cartels in an international context, Christopher Harding states that

> [a] single international cartel, if detected and then subject to legal enforcement action, may attract a range of different measures, across a number of jurisdictions, which may be applied to a number of actors of both a corporate and an individual human nature, either sequentially or simultaneously. The complete programme of sanctions in the case of one cartel may be co-ordinated to some extent, but to an extent is also likely to be haphazard and unpredictable …[314]

In other words, differing 'multiplying factors' may account for sanction accumulation in cases where multiple legal systems with an interest in doing so claim jurisdiction and commence proceedings with regard to a single infringement. The 'multi-jurisdictional patchwork' – consisting of variable rules, policies and interests that appertain to the different proceedings – often renders it difficult or even unfeasible to satisfy the requirements of legal certainty, equality and proportionate sentencing.[315] These cases – like all cases where infringements are subject to multiple proceedings, whether nationally or internationally – are particularly prone to give rise to issues of double jeopardy, and thus of issues regarding the principle of *ne bis in idem*. This principle can be said to be rather intimately connected with the requirement of proportionate sentencing and thus with the principle of individual culpability, at least with respect to proceedings that may lead to an accumulation of (criminal and/or administrative) sanctions.[316]

Quite obviously, the principles of *ne bis in idem* and individual culpability differ significantly, both in terms of their substance and rationale, and in terms of the contexts in which they are operative. The principle of individual culpability serves to secure that no punishment is inflicted on the guiltless, and that the guilty receive no harsher punishment than may be justified on the basis of the measure of their culpability (taken here in the more objective, 'relational' sense that was referred to in subsection VI.A.). The principle of *ne bis in idem*, on the other hand, serves to guarantee that those who, following prosecution, are either acquitted or convicted of a certain offence *once*, are not subsequently submitted to the unpleasant or possibly even tormenting experience of being tried or punished for the same offence *anew*.[317] So, whereas the principle of individual culpability exercises its protective authority during the entire phase

[314] Harding, 'Sanction Accumulation' (n 115) 164.

[315] See Harding, 'Sanction Accumulation' (n 115) 172, 186. Over and against the rather cluttered and unpredictable system currently in place, Harding argues in favour of an internationally or regionally co-ordinated, more exclusive model of regulation for internationally operating cartels, ideally in the shape of 'a one-stop enforcement shop, which could estimate both victimhood and an appropriate quantum and kind of sanction at that level' (at 187).

[316] See Van Kempen and Bemelmans, 'EU Protection of the Substantive Criminal Law Principles' (n 100); Herlin-Karnell, 'Is Administrative Law Still Relevant?' (n 223) 243–44.

[317] Unless the national law allows a reopening of the case 'if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case'; Art 4(2) Protocol No 7 ECHR. Cp Art 52(3) CFR.

preceding a final judgment on the defendant's liability, the principle of *ne bis in idem* is only operative *as from* the very moment of that final judgment.

We should furthermore note that, in line with this 'temporal' difference, there is a difference regarding the rationale of both principles: it is a concern for *legal certainty* and *res iudicata*, rather than a concern for individual culpability, that primarily grounds the principle of *ne bis in idem*. However, the principles coincide in at least one important respect: both principles serve to protect against the infliction of *undeserved* penalties. Commencing new proceedings in defiance of the principle of *ne bis in idem* infringes on the right of the person involved to legal certainty, and causes undeserved distress. Moreover, new proceedings may (again) culminate in the imposition of a sanction, and may therefore easily render the total amount of punishment inflicted for one and the same infringement *disproportionate* and hence, to that extent, undeserved. The principles of *ne bis in idem* and *nulla poena sine culpa* intersect exactly at the point where both seek to prevent overreaching reactions to a given infringement that lead to disproportionate punishment.

The requirement of proportionate sentencing and the principle of *ne bis in idem* have both found expression in the CFR. The proportionality requirement is found, as was seen before, in Article 49, paragraph 3 CFR. Article 50 CFR contains the principle of *ne bis in idem*, guaranteeing the right of any person not 'to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. The CJEU has adopted this principle also in the quasi-criminal law domain of EU competition law.[318] Article 4, paragraph 1 of Protocol No 7 to the ECHR contains a similar definition of the principle of *ne bis in idem*.[319] There is, however, a notable difference in scope.[320] The protection offered under the ECHR is limited to the right not to be tried or punished more than once *within* one and the same Member State of the Council of Europe. Article 50 CFR, in contrast, applies to both national and transnational situations ('within the Union').[321]

As was mentioned before, dual-track approaches that subject a certain offence to both a criminal and an administrative enforcement and liability regime may in certain

[318] See eg CJEU 14 February 2012, C-17/10 *Toshiba Corporation et al v Úřad pro ochranu hospodářské soutěže* (EU:C:2012:72) para 940: '[T]he principle [of *ne bis in idem*] thus precludes an undertaking being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged.'

[319] The principle is furthermore enshrined in Art 54 of the CISA Convention implementing the Schengen Agreement (n 154). On the different versions of the principle of *ne bis in idem* at the European level, see JAE Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?' (2013) 9(4) *Utrecht Law Review* 211.

[320] Pursuant to Art 52(3) CFR, the level of protection offered by Art 50 CFR may not be lower than the minimum standard of Art 4(1) of Protocol No 7. Accordingly, also Member States that have not (yet) ratified Protocol No 7 (currently: Germany, the United Kingdom and the Netherlands) are bound by this minimum standard (save insofar as these Member States choose to apply a weaker version of the principle of *ne bis in idem* with respect to cases that do not pertain to EU law – cp n 321 below).

[321] Pursuant to Art 51(1) CFR, the scope of Art 50 CFR – and of all other provisions in the Charter – is limited to situations concerning EU law. However, it would seem impractical and – in the long run – untenable for a Member State to apply different standards of the *ne bis in idem* principle depending on whether a case concerns EU law or non-EU law. See Van Kempen and Bemelmans, 'EU Protection of the Substantive Criminal Law Principles' (n 100) 262.

cases unlock parallel or consecutive proceedings and may lead to an accumulation of sanctions. Should such approaches categorically be said to unjustifiably contravene the principle of *ne bis in idem*? And, if not, under what conditions can dual-track approaches be said to sufficiently respect the rights enshrined in Article 4, paragraph 1 of Protocol No 7 ECHR and Article 50 CFR? These questions were dealt with by the Grand Chamber of the ECtHR in its landmark judgment of 15 November 2016 in the case of *A and B v Norway*.[322] The underlying case concerned the offence of large-scale tax evasion with respect to which both an administrative fine pursuant to the Norwegian Tax Assessment Act of 1980 (*Ligningsloven*) and a prison sentence were imposed on the applicants. Before the ECtHR, the applicants complained that they had been prosecuted and punished twice in respect of the same offence under the Tax Assessment Act, and that this amounts to a breach of the principle of *ne bis in idem*.

The satisfaction of the principle's '*idem*' condition was undisputed: the factual circumstances underlying the criminal prosecution and the decision to impose an administrative tax fine were clearly sufficiently similar to sustain the conclusion that the penalties applied concerned the 'same' offence.[323] Nor was it a complicated task for the Court to determine that both sets of proceedings must be regarded as 'criminal' for the purposes of Article 4 of Protocol No 7 ECHR.[324] The arguments presented to the Court primarily concerned the principle's '*bis*' aspect, that is, the question of whether there had been a 'duplication' of proceedings with regard to the one offence at issue. In this connection, the Grand Chamber concedes – caving in to the pressure exerted by several contracting states defending their practice of double-track enforcement systems – that a combination of criminal and administrative procedures with regard to the same offence does not *eo ipso* amount to a duplication of proceedings as prohibited by Article 4 of Protocol No 7 to the ECHR.[325] According to the Court, this provision does not preclude dual proceedings that constitute 'complementary legal responses to socially offensive conduct … provided that the accumulated legal responses do not represent an excessive burden for the individual concerned'.[326]

The Court further notes that, in order to comply with the requirements under Article 4, paragraph 1 of Protocol No 7, the dual proceedings must be shown to satisfy the overarching criterion of being 'sufficiently closely connected in substance and in time'. In an effort to specify the meaning of this rather vague criterion, the Grand Chamber revisits a number of previous judgments in which the criterion has already been

[322] ECtHR [GC] 15 November 2016, *A and B v Norway* (App Nos 24130/11 and 29758/11) [2016] ECHR 987.

[323] See ECtHR *A and B v Norway* (n 322) paras 140–141 and 148. The '*idem*' aspect is defined by both the CJEU and the ECtHR in terms of the identity of factual circumstances underlying the offences, (largely) irrespective of their legal classification or the legal interests protected. See CJEU 9 March 2006, C-436/04 *Criminal proceedings against Leopold Henri Van Esbroeck* (EU:C:2006:165) para 42; and ECtHR 10 February 2009, *Sergey Zolotukhin v Russia* (App No 14939/03), [2009] ECHR 252, para 84. In EU competition law, however, the protected legal interest is (still) a relevant factor in assessing the 'idem' aspect; see CJEU *Toshiba Corporation et al* (n 318); Veenbrink, *Criminal Law Principles* (n 115) 365–67.

[324] See ECtHR *A and B v Norway* (n 322) paras 136–139 and 148. Also in this respect, the ECtHR and the CJEU apply the same set of criteria – the so-called *Engel* criteria – in their respective case law; see n 98 and accompanying text above.

[325] See ECtHR *A and B v Norway* (n 322) paras 94–100, 104 and 117–20. See Veenbrink, *Criminal Law Principles* (n 115) 35–38.

[326] ECtHR *A and B v Norway* (n 322) para 121.

applied.[327] On the basis of these earlier judgments, the Court concludes that the criterion demands that the respondent state convincingly demonstrate, in particular, that the dual proceedings in question form 'an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice'.[328] In addition, the Court enumerates certain 'material factors' which must be taken into account when assessing whether a 'sufficiently close connection in substance' obtains. These factors include, inter alia, the following:

> [W]hether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved … [A]nd, *above all*, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to *ensure that the overall amount of any penalties imposed is proportionate* (emphasis added).[329]

The judgment has met with rather sharp criticism. According to Giulia Lasagni and Sofia Mirandola, the Grand Chamber's decision has effectively down-scaled the protection offered by the *ne bis in idem* principle under Article 4 of Protocol No 7 ECHR.[330] Moreover, the judgment has introduced criteria for the assessment of the compatibility of dual criminal and administrative proceedings that 'are either "empty shells" or very ambiguous and difficult to apply in practice, and could possibly lead to arbitrary results'.[331] Subsequent case law of the ECtHR has not remedied these shortcomings. Worse still, in a number of later judgments and decisions, the ECtHR seems to have weakened the importance of some of the 'material factors' that were expressly mentioned in the *A and B v Norway* judgment. Among these, interestingly and tellingly, is the criterion regarding the availability of an 'offsetting mechanism' designed to guarantee the proportionality of the overall amount of penalties that may be imposed in a dual-track system. In other words, even the very factor that was accorded preponderant weight

[327] See ECtHR *A and B v Norway* (n 322) paras 108–134. The Court refers, ia, to ECtHR *Zolotukhin v Russia* (n 323), ECtHR 30 May 2000, *RT v Switzerland* (App No 31982/96), ECtHR 13 December 2005 (dec) *Nilsson v Sweden* (App No 73661/01) *Reports* 2005-XIII, and ECtHR 20 May 2014, *Nykänen v Finland* (App No 11828/11).

[328] ECtHR *A and B v Norway* (n 322) para 122.

[329] ECtHR *A and B v Norway* (n 322) para 132. In applying these factors to the case at hand, the Grand Chamber ultimately finds that Art 4 of Protocol No 7 ECHR has not been breached in respect of the applicants (paras 144–153).

[330] G Lasagni and S Mirandola, 'The European ne bis in idem at the Crossroads of Administrative and Criminal Law' (2019) 2 *Eucrim* 126. See also the dissenting opinion of Judge Pinto de Albuquerque; and see MJJP Luchtman, 'The ECJ's recent case law on ne bis in idem: Implications for law enforcement in a shared legal order' (2018) 55(6) *Common Market Law Review* 1717.

[331] Lasagni and Mirandola, 'The European ne bis in idem' (n 330) 128. These authors argue – with reference also to, inter alia, ECtHR 16 April 2019, *Bjarni Ármannsson v Iceland* (App No 72098/14) para 53, and ECtHR 6 June 2019, *Antoine Nodet v France* (App No 47342/14) para 47 – that, eg, the condition of foreseeability is rendered almost meaningless by the fact that the ECtHR considers this condition satisfied on the mere ground that the national law provides for the possibility of dual proceedings. See also Luchtman, 'The ECJ's recent case law on ne bis in idem' (n 330) 1727.

in *A and B v Norway* appears to have a less decisive meaning than initially assumed.[332] Lasagni and Mirandola conclude that,

> like in other matters, the Court's scrutiny seems to take the form of a global assessment. Although it does verify the observance of each specific condition, neither of them is a *conditio sine qua non*. It is only their combination that decides whether the proceedings are sufficiently connected as a whole or not. Not to mention that such a condition [of an offsetting mechanism] becomes wholly irrelevant where the first procedure has resulted in an acquittal. In this latter case, there will not only be no sanction to offset, but a subsequent finding of guilt in the second set of proceedings will risk violating the presumption of innocence under Art. 6(2) ECHR.[333]

If we consider the rather widespread use of dual-track enforcement systems both in EU law and in the domestic legal systems of many EU Member States, it becomes clearly expedient, indeed pressing, to examine how the CJEU interprets and applies the requirement of proportionate punishment with respect to instances of sanction accumulation in the grey area between administrative and criminal law. It must be noted that already in 2013 – that is, three years before the ECtHR delivered its judgment in the case of *A and B v Norway* – the CJEU ruled that dual-track systems do not, in and of themselves, amount to a violation of the principle of *ne bis in idem*. In its well-known judgment in the case of *Åkerberg Fransson*, the CJEU held that Article 50 CFR does not preclude the successive imposition of an administrative penalty and a criminal penalty for a single offence 'as long as the remaining penalties are effective, proportionate and dissuasive', and provided that 'the first penalty is not criminal in nature'.[334]

The possibilities for Member States to subject offences to dual-track enforcement systems were further expanded five years later. In three judgments, all delivered on 20 March 2018, the CJEU explicitly considers to what extent the fundamental right enshrined in Article 50 CFR may legitimately be *restricted* in light of the requirements set forth in Article 52, paragraph 1 CFR. One of these judgments is the preliminary ruling in the case of *Garlsson Real Estate*.[335] The case concerned offences of market manipulation under (then still) Directive 2003/6.[336] Pursuant to national legislation that

[332] See ECtHR 4 December 2018 (dec) *Matthildur Ingvarsdottir v Iceland* (App No 22779/14), in which case the ECtHR concluded that the dual proceedings were sufficiently closely connected in substance despite the absence of such an 'offsetting mechanism'.

[333] Lasagni and Mirandola, 'The European ne bis in idem' (n 330) 128–29 (references omitted).

[334] CJEU 26 February 2013, C-617/10 *Åklagaren v Hans Åkerberg Fransson* (EU:C:2013:105) paras 36 and 37. See also CJEU 27 May 2014, C-129/14 PPU *Criminal proceedings against Zoran Spasic* (EU:C:2014:586) paras 55–59, dealing with the possibility – under Art 54 of the CISA Convention (n 154) – of a second criminal prosecution in cases where the first prosecution for the same offence had taken place in another Member State and resulted in a conviction and the imposition of a criminal sanction, which was, however, never executed. See JAE Vervaele, 'Schengen and Charter-related ne bis in idem protection in the Area of Freedom, Security and Justice: *M* and *Zoran Spasic*' (2015) 52 *Common Market Law Review* 1339.

[335] CJEU 20 March 2018, C-537/16 *Garlsson Real Estate SA et al v Commissione Nazionale per le Società e la Borsa (Consob)* (EU:C:2018:193). The other two judgments are CJEU 20 March 2018, C-524/15 *Criminal proceedings against Luca Menci* (EU:C:2018:197), concerning market abuse, and CJEU 20 March 2018, C-596/16 and C-597/16 *Enzo Di Puma v Commissione Nazionale per le Società e la Borsa (Consob)* and *Commissione Nazionale per le Società e la Borsa (Consob) v Antonio Zecca* (EU:C:2018:192), concerning tax fraud.

[336] See n 174. This Directive – substituted by Regulation 596/2014/EU in 2014 – was discussed already in subsection IV.B. above. See also Luchtman and Vervaele, 'Enforcing the Market Abuse Regime' (n 213); Veenbrink, *Criminal Law Principles* (n 115) 43–46.

had been adopted by the Italian state in order to transpose this Directive into national law, an administrative penalty of several millions of euros was inflicted on Mr Stefano Ricucci and two companies that stood under his direction (Magiste International SA and Garlsson Real Estate SA) for the offences in question. In addition, Mr Ricucci was criminally prosecuted for the same offences. These parallel criminal proceedings resulted in a final judgment by which the criminal court sentenced Mr Ricucci to a term of imprisonment (which sentence was never executed due to a pardon that was later granted to him).

Before the Italian Court of Cassation, Mr Ricucci submitted that the principle of *ne bis in idem* had been breached in his regard, as he had been tried and punished twice for the same acts. The Court of Cassation thereupon decided to request a preliminary ruling from the CJEU. One of the questions referred to the CJEU was whether or not Article 50 CFR permits the imposition of an administrative penalty on a person in respect of an offence of which this same person has already been convicted by a final judgment of a criminal court.[337] In answer to this question, the CJEU notes, first, that a limitation of the principle of *ne bis in idem* must meet an 'objective of general interest' within the meaning of Article 52, paragraph 1 CFR. This condition is satisfied, according to the CJEU, where Member States, in order to 'protect the integrity of the financial markets of the European Union and public confidence in financial instruments', provide for double-track systems that pursue 'complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue'.[338]

It is stated, second, that dual-track enforcement systems that allow for a duplication of proceedings and penalties of a criminal nature must comply with the principle of proportionality referred to in Article 52, paragraph 1 CFR, which is to say that this possibility of dual proceedings and penalties must 'not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued'.[339] In order to satisfy this requirement, national legislation must provide for clear and precise rules that allow individuals to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties of a criminal nature. By implication, national legislation must ensure an effective coordination between both tracks, so as to reduce the additional disadvantage of dual proceedings for the persons involved above what is strictly necessary for achieving the relevant objectives of general interest.[340] Moreover,

> the duplication of penalties of a criminal nature requires rules allowing it to be guaranteed that the severity of the sum of all of the penalties imposed corresponds with the seriousness of the offence concerned, that requirement resulting not only from Article 52(1) of the Charter, but also from the principle of proportionality of penalties set out in Article 49(3) thereof. Those rules must provide for the obligation for the competent authorities, in the event of the imposition of a second penalty, to ensure that the severity of the sum of all of the penalties imposed does not exceed the seriousness of the offence identified.[341]

[337] A second question was whether or not Art 50 CFR may be directly relied upon by an individual before a national court.
[338] CJEU *Garlsson Real Estate et al* (n 335) para 46.
[339] CJEU *Garlsson Real Estate et al* (n 335) para 48.
[340] CJEU *Garlsson Real Estate et al* (n 335) paras 51–55.
[341] CJEU *Garlsson Real Estate et al* (n 335) para 56.

In other words, national legislation must provide for an offsetting mechanism designed to ensure that the severity of the penalty that was imposed first is fully taken into account when a second penalty is calculated. With respect to the case underlying the request for a preliminary ruling, the CJEU finds that the safeguards against excessive severity of the cumulated penalties were insufficient, because the offsetting mechanism in place under Italian law related only to the duplication of pecuniary penalties but not to the accumulation of a term of imprisonment and an administrative fine of a criminal nature.[342] In respect of Mr Ricucci, the CJEU furthermore notes that the duplication of proceedings can anyway not be considered 'strictly necessary in order to achieve the objective [of general interest]' – and should thus be regarded as prohibited by Article 50 CFR – if, according to the referring court, the outcome of the initial, criminal proceedings was already 'such as to punish the offence committed in an effective, proportionate and dissuasive manner'.[343]

When compared to the approach taken by the ECtHR in *A and B v Norway* and in subsequent case law, it may seem that the CJEU employs a somewhat stricter proportionality requirement insofar as its ruling in the *Garlsson Real Estate* case may be said to indicate that criminal proceedings take precedence over (quasi-criminal) administrative proceedings. This impression is corroborated by the two other judgments of 20 March 2018 concerning the compatibility of dual-track enforcement regimes with the requirements under Articles 50 and 52 CFR. In one of these, the CJEU held that the principle of *ne bis in idem* (also) precludes the initiation of (punitive) administrative proceedings following a final *acquittal* in criminal proceedings with regard to the same offence.[344] In the other judgment, by contrast, the CJEU concluded that the initiation of criminal proceedings *after* the imposition of an administrative sanction (of a 'criminal' nature) does not amount to a violation of Article 50 CFR.[345]

However, the three CJEU rulings of 20 March 2018 do not make entirely clear when and why a duplication of proceedings and penalties should be considered incompatible with Article 50 CFR. Do these judgments imply that Article 50 CFR is to be interpreted as precluding the bringing of administrative proceedings following criminal proceedings with respect to the same offence (only) if these criminal proceedings ended in the imposition of an 'effective, proportionate, and dissuasive' punishment? Or should the principle of *ne bis in idem* rather be taken to prohibit additional administrative proceedings (only) when they follow criminal proceedings that resulted in an acquittal? Although these alternative interpretations are not necessarily mutually exclusive, neither are they, of course, completely congruous.[346] Be that as it may, it appears warranted to

[342] CJEU *Garlsson Real Estate et al* (n 335) para 60.

[343] CJEU *Garlsson Real Estate et al* (n 335) para 57. The fact that the prison sentence imposed on Mr Ricucci was never executed is considered irrelevant in this regard; see para 62. With regard to the second question asked by the Italian Court of Cassation (see n 337 above), the CJEU concludes that the right conferred by Art 50 CFR is directly applicable by individuals before national courts; see para 68. AG Manuel Campos Sánchez-Bordona reached the same conclusions in his Opinion of 12 September 2017, C-537/16 *Garlsson Real Estate SA et al v Commissione Nazionale per le Società e la Borsa (Consob)* (EU:C:2017:668).

[344] CJEU *Di Puma* (n 335).

[345] CJEU *Menci* (n 335).

[346] See Lasagni and Mirandola, 'The European ne bis in idem' (n 330) 131, who argue that 'it appears at least peculiar that the CJEU explicitly highlighted this more demanding meaning of the proportionality requirement precisely in *Garlsson*, that is in the field of market abuse, where the duplication of punitive proceedings is a choice that does not find its legal basis in purely national law (as in the case of VAT examined in *Menci*), but derives from the transposition of Directive 2003/6/EC (the validity of which was not questioned by the Court)'.

conclude that the CJEU has attuned its interpretation of the principle of *ne bis in idem* to that of the ECtHR, and vice versa.

Already for some years, both European courts have acknowledged that, subject to certain conditions, dual-track punitive enforcement systems are not at variance with the principle of *ne bis in idem*, even when these systems may lead to a duplication of proceedings and penalties in relation to one and the same offence. This implies that the protective efficacy of Article 4, paragraph 1 of Protocol No 7 ECHR and Article 50 CFR has been reduced in relation to the level of protection that was upheld still in previous case law.[347] As was expounded before, the principle of *ne bis in idem* overlaps with the principle of *nulla poena sine culpa* insofar as both seek to prevent disproportionate punishment. It was seen that both the ECtHR and the CJEU emphasise that where dual-track systems allow for an accumulation of sanctions, these systems should provide for an offsetting mechanism designed to ensure that the overall amount of penalties imposed is proportionate.

It may be said, insomuch, that both courts at least recognise the importance of the fourth and last dimension of the principle of individual culpability with regard to offences that may give rise to multiple proceedings and to sanction accumulation. The status and the exact meaning of the requirement of proportionality of sanctions, however, remain rather uncertain. For instance, it is not clear what exactly is comprehended by the requirement's *correlative* in contexts of double-track enforcements systems: to what extent does the requirement that an aggregate of sanctions is proportionate to 'the seriousness of the offence' imply that (the measure of) personal blameworthiness must be taken into account?[348] Do considerations of subjective aspects of guilt have a role to play at all in these regulatory contexts? And lastly, it is not clear whether – and if so, under what conditions – *effet utile*-oriented interests may even override the demand of proportionate sanctioning altogether.[349]

VII. Conclusion

This contribution has concentrated on the role of the principle of individual culpability, or *nulla poena sine culpa*, in European criminal law and – especially – in a number of

[347] Such as ECtHR *Zolotukhin v Russia* (n 323). Cp Lasagni and Mirandola, 'The European ne bis in idem' (n 330) 132: '[T]he case law of both European courts on the legitimacy of double-track punitive systems seems … to glide towards a downward competition. Ruling in favour of the admissibility of double-track systems (under certain conditions), both courts have lowered the level of protection previously granted to individuals, and shown that the equivalence clause is in itself insufficient to ensure an adequate level of fundamental rights safeguards.' Cp Luchtman, 'The ECJ's recent case law on ne bis in idem' (n 330) 1748: 'What is important to stress in that regard is that the ECJ – not the ECtHR – has upheld the almost binary status of the ne bis in idem guarantees. A second prosecution or sanction after a final first one is a limitation of the principle, requiring a solid justification. The ECJ has managed to avoid an open conflict with the ECtHR, but has also kept its options open to raise the standards over time. That is quite a remarkable – maybe even an impressive – balancing exercise.'

[348] See subsection VI.A. above. Cp the reference to 'the harm caused … by the offence committed' in CJEU *Garlsson Real Estate* (n 335) paras 59 and 63.

[349] Lasagni and Mirandola, 'The European ne bis in idem' (n 330) 129. See also Luchtman, 'The ECJ's recent case law on ne bis in idem' (n 330) 1755; Nuotio, 'A Legitimacy-based Approach to EU Criminal Law' (n 283).

fields of European punitive-administrative or 'quasi-criminal' law. As is well-known, prior to the entry into force of the Lisbon Treaty in 2009, there was a long and fierce debate on the issue of whether or not the EU was entitled to create punitive enforcement measures regarding matters in respect of which the EU lacked an explicit competence to adopt criminal legislation, that is, matters that fell outside the scope of the intergovernmental 'third pillar'. The dispute dates back, at least, to 1992, in which year the CJEU delivered its landmark judgment in the case of *Germany v Commission*.[350] In this judgment, the CJEU affirmed the EU's competence to provide for administrative sanctions in order to protect the internal market. According to a much-heard criticism, the fact that these sanctions do not officially count as 'criminal' sanctions does not in itself make it any less likely that they satisfy the *Engel* criteria and thereby qualify as 'penalties' for the purposes of Articles 6 and 7 ECHR.[351] Moreover, the adoption of quasi-criminal punitive measures indicated for many a type of 'function creep' that could potentially lead to a supranational system of sanctions throughout the EU.[352]

As is known, however, these and other criticisms have not stopped the EU from expanding its competences. The Lisbon Treaty has significantly expanded the EU's legislative competence in matters of criminal law. Consequently, the EU has increasingly obliged its Member States to criminalise certain conduct in order to enhance the *effet utile* of EU law.[353] This fact has not, however, rendered the function of administrative sanctions less important. As was seen, the EU legislature has in recent years, for example, repeatedly resorted to a 'dual-track' enforcement mechanism consisting of a combination of administrative and criminal liability regimes.[354] Over the past few decades, EU Member States have as a result implemented a vast number of both criminal and quasi-criminal enforcement mechanisms stemming from different subfields of European law. According to Ester Herlin-Karnell, the possibility of providing for administrative sanctions 'played an important role in expanding the competences of the EU and thereby, prior to the Lisbon Treaty, made possible a quasi-criminal law system at the expense of the due process safeguards traditionally associated with criminal law'.[355] Concurrently, it may be asked whether systems of EU quasi-criminal law have also come at the expense of *substantive* criminal law safeguards.

The present contribution has attempted to dig out whether and to what extent the demands ensuing from the classical substantive criminal law principle of *nulla poena sine culpa* are recognised and adhered to in EU quasi-criminal law. The analysis was divided into five parts: after a propaedeutic discussion of the principle's origins and of the ways in which the principle is reflected in contemporary criminal law systems in section II, four dimensions of the principle of *nulla poena sine culpa* were addressed

[350] CJEU 27 October 1992, C-240/90 *Germany v Commission* (EU:C:1992:408); see also the conclusion of AG Francis Jacobs of 3 June 1992, C-240/90 *Germany v Commission* (EU:C:1992:237).

[351] ECtHR *Engel et al v the Netherlands* (n 98). As was seen in subsection III.B. above, the *Engel* criteria were adopted by the CJEU in its judgment in the *Bonda* case (n 98).

[352] Herlin-Karnell, 'Is Administrative Law Still Relevant?' (n 223) 234–35. See also E Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford, Hart Publishing, 2012) 10–41.

[353] See Franssen, 'EU Criminal Law and *Effet Utile*' (n 2).

[354] See subsections IV.C. and VI.C. above.

[355] Herlin-Karnell, 'Is Administrative Law Still Relevant?' (n 223) 237.

individually in sections III to VI. The first dimension concerns the condition that a liable subject can legitimately be considered as the 'author' (or *Urheber*) of the offence in question. As appears from the ECtHR's case law, this means that, in principle, one can be held criminally liable only for one's *own* misconduct. It was seen, however, that this requirement applies less strictly in the quasi-criminal law domain of EU competition law. Liability for infringements of Articles 101 and 102 TFEU is established at the level of undertakings or 'economic units'. Under this 'economic approach', a group of persons may in certain cases be held collectively liable for a single infringement. And in parent-subsidiary relations, a parent company may in certain cases be held vicariously liable for an infringement committed by its subsidiary, even when there has been no involvement or guilt with respect to the infringement on the part of the parent.[356]

The second dimension of the principle of individual culpability relates to mens rea; it concerns the condition that the liable subject is found to have committed the offence in question intentionally, recklessly, or at least negligently.[357] Leaving exceptions aside, it was seen that the mens rea requirement of intention marks a notable distinction between EU criminal law and EU quasi-criminal law. When the EU obliges its Member States to criminalise certain behaviour, this obligation normally only concerns intentional manifestations of that behaviour. Criminalisation of reckless and/or seriously negligent behaviour, by implication, is only seldom required. By contrast, liability for unintentional behaviour is rather common in areas of quasi-criminal law; in some of these areas, liability may even extend to 'mere' or 'ordinary' negligence, whereas at least 'serious' negligence is required in EU criminal law. In other words, mens rea requirements are generally less stringent within areas of quasi-criminal law than is typically the case within criminal law. Moreover, it was seen that with regard to some quasi-criminal offences, the requisite mens rea element may rather easily be inferred from objective circumstances, or may even be presumed to be fulfilled – provided, that is, that this presumption is rebuttable.

The third dimension of the principle of *nulla poena sine culpa* concerns the condition of personal blameworthiness. Someone is personally blameworthy for his or her wrongful action if it can reasonably be assumed that he or she could have avoided the action. In criminal law, personal blameworthiness is normally presumed when a subject is found to have fulfilled the elements of an offence definition; this presumption is defeated, however, if a generally recognised exculpatory defence applies. The possibility of rebutting the presumption of blameworthiness – and hence of invoking exculpatory defences – is especially important in fields of quasi-criminal law where relatively low evidentiary thresholds apply to mens rea elements. However, it was seen that the concept of force majeure (or duress of circumstances) is construed rather restrictively by the CJEU in the context of regulation under the EU's common agricultural policy. Moreover, it was seen that the CJEU seems to have effectively shut the door on virtually any possibility of successfully forwarding the defence of an excusable mistake of

[356] In other words: the range of persons who may potentially be designated as infringers of EU competition rules is wider than the range of persons to whom – in accordance with the classical view in criminal law – perpetratorship may potentially be attributed. See subsection III.C. above.

[357] This is, of course, not to deny the existence of (sometimes numerous) strict liability offences in criminal and/or quasi-criminal law systems in different Member States. See subsections II.C. and III.A. above.

law with regard to antitrust offences. It therefore seems that the third dimension of the culpability principle is only very partially recognised in EU quasi-criminal law.

The fourth dimension of the principle of *nulla poena sine culpa*, lastly, concerns the condition that penalties are proportionate to the liable subject's culpability in a 'relational' sense that includes the gravity of the relevant offence. The requirement of proportionate sentencing is laid down in Article 49 CFR, and ever since the CJEU delivered its ruling in the *Greek Maize* case,[358] the EU courts and legislature have persistently demanded that sanctions in areas of EU law are 'effective, proportionate and dissuasive'. With regard to the pecuniary sanctions that are imposed by the Commission for cartel offences, it was seen that the Commission seems to lend preponderant importance to the deterrent or dissuasive effect which these quasi-criminal penalties are intended to produce. Correspondingly, it seems that relatively little attention is generally paid to the requirement of proportionality.[359] It was furthermore seen that, according to both the CJEU and the ECtHR, dual-track liability regimes are not necessarily precluded by the principle of *ne bis in idem*. Where dual-track systems allow for an accumulation of (criminal and administrative) sanctions for one and the same infringement, the national law in question must provide for an offsetting mechanism designed to ensure that the overall level of penalties imposed is proportionate to the seriousness of the offence. What this exactly means in practice, however, is not very clear.[360]

In conclusion: although it is true that the principle of *nulla poena sine culpa* is recognised, by and large, in areas of quasi-criminal law, the efficacy of this principle is generally considerably weaker in these areas than in traditional criminal law. The requirements that ensue from the four dimensions of the principle of individual culpability – and that serve the protective function of curtailing liability for infringements – are generally stronger, and applied more strictly, in criminal law. This need not be an alarming conclusion per se. After all, legal principles were seen to be 'open-ended' phenomena, which is to say that they, by definition, are open to a variety of interpretations.[361] The principle of *nulla poena sine culpa* may accordingly assume slightly different meanings, and be attributed varying degrees of normative force, depending on the type and underlying rationale of the legal (sub)domain in which the principle is operative. Arguably, most areas of quasi-criminal law have a predominantly 'regulatory' character; and given that regulatory legal domains are known to accord much weight to instrumental considerations and *effet utile* concerns, it may seem only natural that correspondingly less weight is accorded to protective requirements, such as those embodied by the principle of individual culpability.

However, the findings that were summarised above may still be a cause for concern. It was seen that the distinctions drawn in EU law and national law between criminal law proper, on the one hand, and punitive administrative law, on the other,

[358] CJEU *Commission v Hellenic Republic* (n 90).

[359] The fact that liability for infringements of Arts 101 and 102 TFEU is established at the level of undertakings implies that a fine may have disproportionate consequences for the legal (and possibly natural) persons in respect of whom the Commission's fining decisions are enforced. Moreover, it was seen that the EU courts tend to subject the Commission's fining decisions to a restrained scrutiny; see subsection VI.B. above.

[360] See, eg, n 332 above.

[361] See Peters, *Het rechtskarakter* (n 17) and subsection II.A. above.

are often rather artificial and arbitrary.[362] For example, the different forms of anti-competitive conduct that are penalised under EU competition law are classified as administrative offences; however, this 'wholesale' allocation to administrative law is hardly self-explanatory (and even less so in light of the EU's increased 'appetite for criminal law').[363] It is at least not contrived to consider 'hard-core' cartel offences as wrongs that are *mala in se* and that are therefore suitable candidates for criminalisation.[364] Moreover, on a far more abstract note: the findings of this chapter may perhaps be said to bear witness to a tendency in contemporary Western societies towards disregarding or even disparaging inner qualities, and towards overrating outward phenomena.[365] In contrast to outward qualities – that have the advantage of being available, at least potentially, for immediate observation – inner qualities are intricate, intangible, and are consequently often considered 'troublesome'. The classical (Kantian) concept of 'imputability' and the appertaining notions of action, fault and culpability have consequently come under increasing pressure.[366] But as Paul Ricoeur reminds us, disregarding inner qualities – and thus disregarding the principle of *nulla poena sine culpa* – comes at a price:

> The recent history of what is called the law of responsibility, in the technical sense of the term, has tended to make room for the idea of a responsibility without any fault … The perverse effect consists in the fact that, the more we extend the sphere of risks, the more pressing and urgent is the search for someone responsible, that is, someone, whether a physical or a legal person, capable of indemnifying and making reparation. … When so disconnected from a problematic of *decision*, action finds itself placed under the sign of a fatalism that is the exact opposite of responsibility. Fate implies no one, responsibility someone.[367]

[362] See subsection III.A. above.

[363] See Franssen, 'EU Criminal Law and *Effet Utile*' (n 2) 92, 98–99; and see subsection IV.C.

[364] In the United States, cartel activity has been treated as criminal offending already since the late 19th century. And several EU Member States have introduced criminal offences that target certain aspects of 'hard-core' cartel activity. See Harding, 'The Relationship between EU Criminal Law and Competition Law' (n 113).

[365] See AWM Mooij, 'On (Free) Will' in F de Jong (ed), *Overarching Views of Crime and Deviancy. Rethinking the Legacy of the Utrecht School* (The Hague, Eleven International Publishing, 2014) 421–33; See also Mooij, *Intentionality, Desire, Responsibility* (n 21).

[366] See subsection II.B. above.

[367] Ricoeur, *The Just* (n 29) 25–26.