

A Matter of Measure: Proportionality of Penalties and the Soft Dialogue Among Courts in the EU

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ABSTRACT: This paper analyses the role of the principle of proportionality of penalties in shaping the constitutional architecture of EU enforcement. Building on the recognition of direct effect to a particular manifestation of the proportionality requirement in *NE* judgment (C-205/20) by the Court of Justice of the European Union, the article explores how proportionality operates as a criterion for allocating powers between national trial and constitutional courts in fields falling within the notion of ‘criminal matter’. Particular attention is paid to the tensions arising from the hypothetical EU-mandated disapplication of disproportionate sanctions, especially in light of domestic principles such as legality, separation of powers, and – most of all – equality before the law. Against this background, the paper uses the Italian Constitutional Court’s judgment no. 7 of 2025 as a lens to examine the systemic consequences of an expansive reading of proportionality and its direct effect. It argues that this interpretative amplification of proportionality’s effectiveness raises broader questions concerning the balance between decentralized judicial enforcement of the Charter and centralized constitutional coordination at national level.

KEYWORDS: proportionality of penalties – Art 49(3) CFREU – direct effect – courts dialogue – Charter of Fundamental Rights – criminal law safeguards.

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1. Background

At the core of the present investigation lies the *NE* ruling of the Court of Justice of the European Union (CJEU), which ‘overturned’ its earlier decision in *Link Logistic*.¹ In *NE*, the Court clarified that the principle of proportionality of penalties, as enshrined in the provision of a singular directive, which nonetheless reflects and reiterates the one contained in Article 49(3) of the Charter of Fundamental Rights of the European Union (CFREU), has direct effect. As a result, domestic courts are mandated, within the scope of EU law, to disapply national provisions that lead to disproportionate penalties – but only to the extent necessary to ensure proportionate enforcement.

Allegedly following the CJEU’s ruling – but partially extending its reach – the Italian Constitutional Court, in its judgment no. 7 of 2025, addressed, for the first time since the recognition of the direct effect of the principle, a case concerning the compatibility, in criminal matter, of EU-mandated disapplication of disproportionate sanctions with fundamental constitutional principles, including rule of law, separation of powers, and equality before the law. These concerns are particularly significant considering the broad scope of ‘criminal matter’ as defined by the European Court of Human Rights according to the *Engel criteria*, under the autonomous Convention concept.

Nevertheless, it is difficult to ignore that the reasoning of the Italian Constitutional Court is based on a somewhat ‘extensive’ interpretation of the CJEU’s ruling, which seems to go beyond what was explicitly stated therein. That is, the assertion of the direct effect of Article 49(3) of the Charter (and not only of the article that incorporates it into the specific directive relevant to the case at hand), of which, however, there is no trace – at least explicitly – in the CJEU’s judgment.

This paper thus aims, on one hand, to examine the Italian Constitutional Court’s attempt to reconcile the primacy of EU law and the direct effect of the principle of proportionality in criminal matters – and ultimately of a provision of the CFREU – with the national constitutional architecture governing criminal law, drawing on dialogue between courts to find a way to handle this delicate balance – between effective, decentralized enforcement and centralized constitutional coordination. On the other hand, however, it aims to highlight the broadening of the scope of the Court of Justice’s ruling, which ultimately led to a broad application of its findings, seeking to test the validity and compatibility of such an interpretation with the system.

2. The *strange case* of the direct effect of the principle of proportionality of penalties

The debate on the proportionality of criminal sanctions is undoubtedly central, from both a strictly criminal and a constitutional perspective, and has gained further importance

¹ The cited judgments are, respectively, Case C-205/20 *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, EU:C:2022:168 and Case C-384/17 *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v Budapest Rendőrfőkapitánya*, EU:C:2018:810.

with the process of European integration and the explicit affirmation of the principle in the Charter of Fundamental Rights of the EU. An affirmation that has no equivalent in other international human rights instruments,² and that addresses both legislators, with a view to guiding their power to define crimes and penalties in abstract terms, and judges, to orient their power to impose penalties in specific cases, in concrete terms.

The requirement set out in Article 49(3) of the Charter, according to which ‘the severity of penalties must not be disproportionate to the criminal offence’ – thus requiring sanctions to be suitable, necessary, and not excessively burdensome in relation to the legitimate objectives pursued by the law –, is often incorporated into secondary legislation in specific provisions that replicate its scope, using the established triad, which forms part of a ‘model provision on EU substantive criminal law’, that criminal – as well as non-criminal but punitive³ – sanctions must be ‘effective,

² Cfr D Brodowski, ‘Proportionality of Sanctions in Member States’ Criminal Justice: The CJEU’s Stance Against Overcriminalisation’ (2025) 15 *European Criminal Law Review* 280; D Brodowski, *Die Evolution des Strafrechts* (Nomos 2023) 271; A Duff, ‘Proportionality and the Criminal Law: Proportionality of What to What?’ in E Billis, N Knust and JP Rui (eds), *Proportionality in Crime Control and Criminal Justice* (Hart Publishing 2021) 29; D Rebut, ‘Article 49. Principes de légalité et de proportionnalité des délits et des peines’ in F Picod, C Rizcallah and S Van Drooghenbroeck (eds), *Charte des droits fondamentaux de l’Union européenne* (Bruylant 2020) 1195.

³ A basic preliminary issue in applying EU fundamental rights protections concerns the scope of sanctions that qualify as ‘criminal’ for purposes of Charter application. This issue assumes particular importance given that many Member States distinguish formally between criminal penalties and administrative sanctions, yet both may possess punitive characteristics that trigger fundamental rights protections. The Court of Justice, following the jurisprudence of the European Court of Human Rights, applies the so-called *Engel criteria* to determine whether a sanction falls within the material scope of criminal law guarantees, regardless of its formal domestic classification. These criteria, established by the ECtHR in *Engel v Netherlands* (1976), and incorporated by the CJEU case-law starting from the *Bonda* judgment (Case C-489/10 *Bonda*, EU:C:2012:319, para 36 and ff, but an early statement to this effect was already to be found in Case C-45/08 *Spector Photo Group*, EU:C:2009:806, para 42) examine: *i*) the legal classification of the offense under domestic law; *ii*) the nature of the offense; and *iii*) the degree of severity of the penalty that the person concerned risks incurring. While the first criterion is relevant but not determinative, the second and third criteria possess weight in determining whether sanctions possess a criminal character. The nature of the offense is assessed by examining whether it applies to all citizens generally or only to specific groups with particular status. The severity of the sanction is evaluated not only by reference to the maximum penalty prescribed but also by considering the actual penalty imposed and whether it includes deprivation of liberty. This functional approach to defining criminal sanctions ensures that fundamental rights protections cannot be circumvented through formal reclassification. Administrative sanctions that possess punitive characteristics – such as substantial pecuniary penalties, reputational consequences, or potential conversion into custodial measures – thus fall within the protective ambit of the CFREU as well. This interpretation harmonizes EU law with the autonomous concepts developed under the European Convention on Human Rights, promoting coherence across the European fundamental rights architecture. The application of *Engel criteria* assumes particular significance in contemporary regulatory frameworks where administrative sanctions increasingly supplement or replace traditional criminal penalties. The ECJ’s willingness to pierce this formal veil and examine the substantive punitive character of sanctions ensures that all criminal guarantees recognized at European level – including proportionality requirements, pertinent to the matter at hand – apply regardless of legislative labelling. See, for all, M Donini and L Foffani, *La materia penale tra diritto nazionale ed europeo* (Giappichelli 2018); A Cavaliere, ‘Osservazioni intorno al concetto di

proportionate, and dissuasive'.⁴

This debate raises the question, with potential repercussions on domestic criminal justice systems, of whether a principle such as that laid down in Article 49(3) CFREU can be considered as directly applicable in the Member States, thus allowing the disapplication of uncompliant national provisions by ordinary judges. This issue must be addressed in connection not only with the canonical distinction between principles and rights in the Charter, but also with questions such as the legal grounds for criminal sanctions, respect for the principle of equality, the relationship between domestic law and European Union law (especially in criminal matter), and even the

"materia penale", tra Costituzione e CEDU' (2023) *Archivio penale*; A Pisaneschi, 'La sentenza 68 del 2021. Le sanzioni amministrative sostanzialmente penali ed il giudicato' (2021) *Osservatorio AIC* 262; V Marcenò, 'Un altro passo verso l'assimilazione delle sanzioni amministrative sostanzialmente penali alle sanzioni penali. Il limite del giudicato cede ancora, ma solo a seguito di una valutazione sanzione per sanzione' (2021) *Nomos* 1; G Martinico, 'Conflitti interpretativi e concorrenza fra corti nel diritto costituzionale europeo' (2019) *Diritto e Società* 691; V Marcenò, 'Il dilemma della materia penale: di alcune tensioni costituzionali attraverso lo studio di un suo specifico istituto, la confisca' (2018) 7 *Federalismi.it* 1; L Masera, *La nozione costituzionale di materia penale* (Giappichelli 2018); E Bindi and A Pisaneschi, *Sanzioni Consob e Banca d'Italia. Procedimenti e doppio binario al vaglio della Corte Europea dei Diritti dell'Uomo* (Giappichelli 2018); F Mazzacuva, *Le pene nascoste. Topografia delle sanzioni punitive e modulazione dello statuto garantistico* (Giappichelli 2017); S Cimini, *Il potere sanzionatorio delle amministrazioni pubbliche* (Editoriale Scientifica 2017). See also V Reding, 'On Substantive Criminal Law of the European Union' in A Klip (ed), *Substantive Criminal Law of the European Union* (Maklu 2011) 11; K Margaritis, 'The Interrelation between the EU Charter of Fundamental Rights and the Schengen Agreement: the *Ne Bis in Idem* Example through the CJEU Case Law' (2021) 21 *International and Comparative Law Review* 2, 29–42; O Tsolka, 'Direct Effect of the "Proportionality Requirement of [Criminal] Sanctions": Considerations on the European Court of Justice Overruling in the Case "NE II" (C-205/20)' (2022) 12 *European Criminal Law Review* 131–149; O Spataro, 'La proporzionalità della sanzione nella prospettiva della Corte di Giustizia dell'Unione Europea: riflessioni a partire da un'importante sentenza della Grande Sezione' (2023) *dirittifondamentali.it* 458.

⁴ Using the *Greek Maize* formula, whose components are strictly interconnected and which, from its statement by the ECJ in 1989 (Case C-68/88 *Commission v Greece*, EU:C:1989:339) has become a 'recurring refrain' in EU secondary law as well as in the Court's case law. See, on the matter Brodowski (n 2) 280; S Montaldo, 'Domestic Sanctions and the Greek Maize Obligation to Impose Effective, Proportionate and Dissuasive Penalties: Empowering National Courts' in L Grossio, S Montaldo and V Mitsilegas (eds), *Proportionality of Criminal Penalties in EU Law* (Hart Publishing 2025) 217; S Montaldo, 'Handle with Care! The Direct Effect of the Requirement of Proportionality of Sanctions and the Remedy of Disapplication: *NE v. Bezirkshauptmannschaft Hartberg-Fürstenfeld*' (2023) 60 *Common Market Law Review* 863. On the elaboration of model provisions for EU criminal law, see the report Presidency of the Council of the European Union, *The future of EU criminal law Report of the Presidency: Towards updated model provisions*, Document 16103/24, of 4 December 2024, 4. On the risk of privileging effectiveness over competing proportionality considerations see also F Giuffrida, 'Effectiveness, Dissuasiveness, Proportionality of Sanctions and Assimilation Principle: The Long-Lasting Legacy' in V Mitsilegas, A Di Martino and L Mancano (eds), *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis* (Hart Publishing 2021) 107. On the relatively clear nature of the threefold obligation in the abstract, yet often ambiguous in the specific case, see M Dougan, 'From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law' in M Cremona (ed), *Compliance and Enforcement in EU Law* (Oxford University Press 2012) 84.

compatibility of the usual criteria on which the direct effects of the Charter are based with rules such as those under consideration.

This debate is reflected in recent case law from the Court of Justice, with the *NE* case representing the culmination of a gradual shift in position on the issue. However, this conclusion is not without its ambiguities and problems.

2.1 The *NE II* judgement and its shift in perspective

The landmark judgment of the Court of Justice in *NE*, delivered by the Grand Chamber on March 8, 2022, represents a watershed moment in European criminal law approach to proportionality of penalties. The case arose from Austrian legislation implementing Directive 2014/67/EU on the enforcement of posted workers' rights, which imposed severe pecuniary sanctions for documentation failures related to posted workers.⁵

The referring Court, an Austrian administrative tribunal, confronted Mr. NE's challenge to a 54.000 euros penalty imposed for documentation violations concerning posted workers from a Slovak company operating in Austria. This case reached the CJEU through a second preliminary reference, following an earlier ordinance, dated 19 December 2019 (C-645/18),⁶ in which the Court had declared the Austrian sanctions regime disproportionate in relation to Article 56 TFEU (freedom to provide services). However, the Austrian legislature failed to amend the legislation despite the Court's findings, despite its established incompatibility with EU law; thus giving rise to doubts among Austrian courts as to how to respond to this legislative inertia.

The national court question was whether the requirement set out in Article 20 of the Directive (which replicates the one set out in the Charter), that penalties be proportionate, enjoys direct effect and whether national courts should disapply conflicting national law to restore proportionality.

The *NE* case required the Court to confront and ultimately overrule its recent precedent in *Link Logistic* (C-384/17, 2018).⁷ In that case, the Fifth Chamber had held that a directive provision requiring Member States to impose 'effective, *proportionate* and dissuasive' sanctions did not possess direct effect. The Court reasoned that such provisions conferred broad discretionary power to Member States regarding sanction design and failed to establish specific criteria for assessing proportionality, thus lacking the precision and unconditionality required for direct effect. This is also because the opposite interpretation would, in practice, lead to the

⁵ The Austrian law prescribed a minimum sanction for each worker regarding whom documentation requirements were violated, with no ceiling on aggregate sanctions and an additional 20% surcharge in case of unsuccessful appeals; sanctions that could be converted into imprisonment upon non-payment.

⁶ Case C-645/18 *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld and Finanzpolizei*, EU:C:2019:1108.

⁷ *Link Logistic* (n 1).

elimination of the discretionary power conferred solely on national legislators, who are responsible for establishing an appropriate system of penalties, undermining the principle of criminal legality and separation of powers.⁸

National judges confronting manifestly disproportionate sanctions were thus left without clear remedies beyond consistent interpretation, which itself encounters limits when faced with unambiguous legislative text.⁹ And this becomes even more significant considering that – although the *NE* case surely concerns manifestly disproportionate sanctions – the legal issue under analysis goes beyond that range of situations, as it concerns even non-manifestly disproportionate penalties. Moreover, *Link Logistic* appeared to contradict the Court's earlier jurisprudence on the direct effect of other vaguely formulated principles, including the requirement of 'effective' sanctions under Article 325 TFEU (protection of EU financial interests) as recognized in the *Taricco* case.¹⁰

⁸ Ibid paras 52–54.

⁹ On the topic see, for all, G Repetto, 'What is (if any) the Place of Consistent Interpretation of EU Law in the New' Case-law of the Italian Constitutional Court? Some Remarks for a Further Discussion' (2025) *Review of European Litigation – Special Issue* 1. It should also be noted that the remedy of consistent interpretation *vis-à-vis* disproportionate sanctions has been addressed by the CJEU, in a ruling issued later than *NE*, Case C-40/21 *Agenția Națională de Integritate*, EU:C:2023:367, which specifically concerned a non-criminal penalty. In the mentioned ruling, the Court recalls that, even with regard to the proportionality of penalties, 'the national courts are bound to interpret, where possible, national law in a manner consistent with EU law and that, although the obligation to interpret national law in a manner consistent with EU law cannot serve as the basis for an interpretation of national law *contra legem*, those national courts, including those ruling at last instance, must alter their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with EU law (see, to that effect, judgments of 8 May 2019, *Związek Gmin Zagłębia Miedziowego*, C-566/17, EU:C:2019:390, paras 48 and 49, and of 4 March 2020, *Telecom Italia*, C-34/19, EU:C:2020:148, para 60 and the case-law cited)' (para 71).

¹⁰ Cfr. Case C-42/17 *Criminal proceedings against M.A.S. and M.B.*, EU:C:2017:936, paras 38–39. In the literature see C Amalfitano, *Primato del diritto dell'Unione europea e controlimiti alla prova della "saga Taricco"* (Giuffrè 2018); C Amalfitano, 'Il ruolo dell'art. 325 TFUE nella sentenza Taricco e le sue ricadute su rispetto del principio di legalità penale. Possibile una diversa interpretazione ad opera della Corte di giustizia?' (2016) *forumcostituzionale.it*; G Di Federico, 'La "saga Taricco": il funzionalismo alla prova dei controlimiti (e viceversa)' (2018) *federalismi.it*; P Mori, 'La Corte costituzionale chiede alla Corte di giustizia di rivedere la sentenza Taricco: difesa dei controlimiti o rifiuto delle limitazioni di sovranità in materia penale?' (2017) 100 *Rivista di Diritto Internazionale* 407; P Mori, '*Taricco II* o del primato della Carta dei diritti fondamentali e delle tradizioni costituzionali comuni agli Stati membri' (2017) *Osservatorio europeo. Il diritto dell'Unione europea*; D Burchardt, 'Belitting the Primacy of EU Law in *Taricco II*' (Verfassungsblog, 7 December 2017), at verfassungsblog.de. On this matter, it would have also been difficult to justify treating the prohibition of disproportionate sanctions differently from other negative obligations, such as the principle of non-discrimination or the prohibition of quantitative restrictions and measures having equivalent effect, which the Court has recognised as directly effective since its early case-law; see Montaldo (n 4) 217. As for the longstanding case-law, according to which prohibitions, if unconditional, are 'complete, legally perfect and consequently capable of producing direct effects' see Case C-28/67 *Firma Molkerei-Zentrale Westfalen/Lippe GmbH*, EU:C:1968:17.

The Grand Chamber, substantially following Advocate General Bobek's reasoning,¹¹ actually overruled *Link Logistic*. The Court held that Article 20 of Directive 2014/67, requiring 'effective, proportionate and dissuasive' sanctions, possesses direct effect, enabling individuals to invoke it before national courts. The Court grounded this conclusion on three main elements.

First, the proportionality requirement – a negative rather than positive obligation – is *unconditional*, constituting an absolute prohibition against disproportionate sanctions rather than a policy objective subject to Member State discretion. While States retain discretion in sanction design, this discretion operates within the non-negotiable boundary of proportionality.¹²

Second, the requirement is sufficiently *precise*. The Court acknowledged that proportionality assessments require judicial evaluation of particular circumstances, but emphasized that such evaluation follows established methodologies amenable to judicial review.¹³ Courts regularly apply proportionality analysis across multiple legal domains, demonstrating its operational feasibility.

Third – and most significantly – the Court anchored the proportionality requirement in Article 49(3) CFREU, which provides that 'the severity of penalties must not be disproportionate to the criminal offence'.¹⁴ The Court – albeit apparently in an *obiter dictum* – characterized this provision as having 'imperative character' and noted that the directive provision 'merely recalls' this fundamental guarantee. By

¹¹ In his Opinion of 23 September 2021, Advocate General Bobek invited the Court to depart from *Link Logistic* and to recognize the direct effect of proportionality requirements in criminal sanctions. He argued that the prohibition of disproportionate sanctions is sufficiently clear, precise, and unconditional to serve as a judicially enforceable standard, reflecting a general principle of EU law codified in Art 49(3) CFREU. Recognizing direct effect, he maintained, would enhance legality and individual protection without undermining legal certainty, as national courts are equipped to ensure consistent application. Importantly, such direct effect would not require the wholesale disapplication of domestic sanctioning regimes, but rather a targeted ('surgical') judicial intervention limited to the disproportionate elements, thereby preserving both proportionality and effectiveness.

¹² *NE* (n 1) paras 22–26.

¹³ *Ibid* para 27.

¹⁴ *Ibid* para 31: 'it should be recalled that observance of the principle of proportionality, which constitutes a general principle of EU law, is binding on Member States when they are implementing that law, including in the absence of harmonisation of EU legislation in the field of sanctions applicable (see, to that effect, judgments of 26 April 2017, *Farkas*, C-564/15, EU:C:2017:302, paragraph 59, and of 27 January 2022, *Commission v Spain* (Obligation to provide tax information), C-788/19, EU:C:2022:55, paragraph 48). Where, in the context of such implementation, Member States adopt penalties of a particularly criminal nature, *they must comply with Article 49(3) of the Charter of Fundamental Rights of the European Union* ('the Charter'), according to which the severity of penalties must not be disproportionate to the offence. *That principle of proportionality, which Article 20 of Directive 2014/67 merely reiterates, is imperative in nature*' (emphasis added).

linking, in its reasoning, the directive requirement to a Charter right with constitutional status, the Court seems to elevate proportionality beyond a mere directive obligation to a fundamental right constraint on national sanctioning power.¹⁵

The Court then addressed the remedial consequences of direct effect. National judges must disapply the part of the national legislation from which the disproportionate character of the sanctions derives, so as to ensure the imposition of proportionate sanctions which remain, at the same time, effective and dissuasive. This formulation contemplates partial rather than total disapplication: judges should excise disproportionate elements while preserving the sanction regime's effectiveness.

Addressing concerns about legality and legal certainty in criminal matter, the Court emphasized that these principles require clear legislative formulations enabling individuals to foresee conduct consequences, not that judicial proportionality review violates legality. And this becomes all the more evident, considering that – drawing a distinction between *NE* and *Taricco II* – disapplication on grounds of proportionality applies *in bonam partem*. The legal certainty principle demands that sanctions remain within proportionate bounds, which judicial enforcement of the proportionality requirement actually promotes. Moreover, the principle of equal treatment is satisfied when similarly situated individuals receive similar treatment, which uniform judicial application of proportionality standards ensures.

2.2 Implications of *NE* ruling

The *NE* judgment's implications can extend far beyond posted workers' documentation requirements. By grounding the core principle in Article 49(3) CFREU rather than solely in the directive's specific proportionality clause (the only one that is, however, formally recognized as having direct effect in the ruling), the Court seems to suggest that this fundamental right possesses direct effect across all contexts falling within the scope of EU law.¹⁶ This principle would apply not only to sanctions prescribed by directives explicitly requiring proportionate penalties but also to any criminal or quasi-criminal sanction imposed when Member States act within the scope of EU law.¹⁷

¹⁵ See also F Viganò, 'La proporzionalità della pena tra diritto costituzionale italiano e diritto dell'Unione europea: sull'effetto diretto dell'art. 49, paragrafo 3, della Carta alla luce di una recentissima sentenza della Corte di giustizia' (2022) *Sistema Penale* 1; G Tesaro, *Manuale di diritto dell'Unione europea* (Editoriale Scientifica 2023) 271.

¹⁶ In the sense of recognizing a similar scope to the ruling, see, *ex multis*, Brodowski (n 2) 286; B Nacar, 'Il principio di proporzionalità sanzionatoria quale criterio per la disapplicazione parziale della sanzione penale, fra diritto unionale, principi costituzionali e disciplina codicistica' (10 June 2024) *Iudicium*; Montaldo (n 4) 863; Tsolka (n 3) 131–149; Spataro (n 3); Viganò (n 15); G Parodi, 'Effetti diretti della carta dei diritti fondamentali dell'unione europea e priorità del giudizio costituzionale' (2022) 4 *Rivista AIC* 133.

¹⁷ On the field of application of the Charter see F Picod, 'Article 51. Champ d'application' in Picod, Rizcallah and Van Drooghenbroeck (n 2) 1223 and, in the case-law, the landmark Case C-617/10

On the one hand, it should be noted that, for the purposes of recognizing direct effects, both the question referred by the referring court and the operative part of the judgment refer exclusively to the provision of the directive at issue requiring the proportionality of penalties (Article 20 of Directive 2014/67/EU). On the other hand, however, it cannot be ignored that the Court still links this principle to Article 49(3) of the Charter, recognizing its imperative value and sufficient precision, but without expressly declaring its direct applicability.

Nevertheless, it is also relevant to note that, upon closer scrutiny, the mentioned Article 20 has a completely overlapping content to that of Article 49(3) CFREU, or even a more generic one, so that it would be difficult – if not pointlessly formalistic

Åkerberg Fransson, EU:C:2013:105, paras 17–23, according to which – as stated in Art 51 – the provisions of the Charter are addressed to the Member States only when they are implementing European Union law. Meaning that, pursuant to the Court’s settled case-law, ‘the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations’. In *Åkerberg Fransson* is also stated that ‘That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 DEB [2010] ECR I-13849, paragraph 32). According to those explanations, ‘the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’. Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 *Curra and Others* [2012] ECR, paragraph 26)’. On that basis, according to the ECJ’s further case-law, the Charter applies to both ‘agency situations’ and ‘derogation situations’, even though such typology has proved to be insufficient in the most complex and ‘penumbral’ cases. Therefore, the ECJ, providing additional guidance to the assessment of the Charter’s scope of application, stated that in order to determine whether a national measure is implementing EU law pursuant to Art 51(1) of the Charter, it must be ascertained, *inter alia*, whether the national legislation at issue is intended to implement a provision of EU law, what the character of that legislation is, and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of EU law on the matter or capable of affecting it (see, *ex multis*, Case C-40/11 *Iida*, EU:C:2012:691, para 79; Case C-562/12 *Liivimaa Lihaveis*, EU:C:2014:2229, para 62; Case C-218/15 *Paoletti and Others*, EU:C:2016:748, para 14). Nevertheless, the link between EU law and the national legislation at issue must detain a certain level of ‘specificity in normative terms’, which must be assessed by examining whether the national measure in question is aimed at fulfilling ‘a specific obligation’ imposed by EU law. On the topic, see K Lenaerts, ‘The Role of the EU Charter in the Member States’ in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 19; P Benedikt, ‘Mapping the Scope of Application of EU Fundamental Rights: A Typology’ (2018) 3 *European Papers* 133; K Lenaerts and JA Gutiérrez-Fons, ‘The EU Internal Market and the EU Charter: Exploring the “Derogation Situation”’ in F Amtenbrink, G Davies, D Kochenov and J Lindeboom (eds), *The Law of the EU Internal Market and the Future of European Integration: Essays in Honour of Laurence W Gormley* (Cambridge University Press 2019) 49–64.

– to consider that only the former is directly applicable, while the latter, contained in the Charter, is not.

It should also be noted that the Court of Justice in *NE*, in relation to the proportionality of penalties, identifies *Link Logistic* as a precedent to be superseded, despite the fact that the two directives at issue, both of which contain such requirement, are different in content and scope. It would therefore be short-sighted to consider that the investigation of the direct effect of the requirement is confined to the specific provision of the directives at issue; rather, it should be considered that the assessment concerns the principle itself, which remains the same regardless of the sectoral scope of application of the directive incorporating it.¹⁸

It can be assumed that the Court did not refer immediately to the direct applicability of the provision of the Charter, to avoid opening the way – explicitly and once for all – to the many implications that recognizing such an effect to the principle at issue may have on national criminal law systems.

Yet the way for such questions has been paved.

The *NE* decision, in this view, would empower national judges to act as frontline enforcers of fundamental rights, entrusted with the authority to partly disapply legislative provisions producing disproportionate results. This represents a significant expansion of judicial power in criminal matter, traditionally an area where legislative primacy and the strict requirements flowing from the legality principle constrain judicial discretion. Yet, the transformation of proportionality from an interpretive principle into a directly enforceable right can potentially alter the constitutional balance between legislative and judicial powers in Member States.

3. Tensions with national constitutional structures: the Italian example.

The direct effect of the proportionality requirement, recognized in *NE* (albeit with reference to the provision of the sector-specific directive, which nevertheless incorporates and reproduces that laid down in Article 49(3) of the CFREU) faces relevant theoretical issues in Member States featuring centralized constitutional review systems, of which Italy provides a paradigmatic example. The Italian Constitution establishes a concentrated model of constitutional adjudication wherein the Constitutional Court has exclusive jurisdiction to declare legislation unconstitutional with *erga omnes* effect. Article 134 of Italian Constitution vests this power solely in the Constitutional Court, while ordinary judges lack authority to disapply legislation on constitutional grounds (thus beyond the limits of consistent interpretation).

¹⁸ See, among others, *NE* (n 1) para 29. On the topic see, in the literature, *ex multis*, L Grossio, *Proportionality of Criminal Offences and Penalties in EU Law: A Hybrid Principle* (Hart Publishing 2025); M Pelissero, ‘The Influence of Proportionality of Penalties Derived from EU Law on Domestic Legislation and Sentencing’ in Grossio, Montaldo and Mitsilegas (n 4), 233; Montaldo (n 4) 217.

This institutional architecture reflects a deliberate constitutional choice: the *incidente di legittimità costituzionale* (incidental constitutional review) procedure enables ordinary judges who doubt about the compatibility of legislation with the constitution to suspend proceedings and refer questions to the Constitutional Court, which is the only court entitled to annul unconstitutional legislation.

Italian criminal law additionally emphasizes strict legality and culpability principles enshrined in Articles 25(2) and 27 of the Constitution. These provisions require precise legislative definition of crimes and penalties, prohibit retroactive criminal laws, and mandate that penalties serve rehabilitative purposes. The principles of precision and ‘strict application’ (*‘determinatezza’* and *‘tassatività’*) demand that criminal statutes employ sufficiently determinate language to enable citizens to predict the consequences of their conduct and constrain judicial discretion.

Proportionality in punishment derives from the combined operation of Articles 3, 25, and 27 of the Constitution.¹⁹ The Constitutional Court has developed extensive jurisprudence requiring that penalties bear rational relationship to offense gravity, that similarly severe offenses receive comparable treatment, and that sanctions not exceed what is necessary to achieve legitimate criminal objectives.²⁰ However, this proportionality review generally operates through constitutional adjudication resulting in legislative invalidation, not through individualized judicial adjustment of statutory penalties.

Similarly, another interesting example is the French one. In France, proportionality of penalties has constitutional status under Article 8 of the 1789 *Déclaration des droits de l’homme et du citoyen*, which requires sanctions to be ‘strictly and evidently necessary’, a principle consistently enforced by the *Conseil constitutionnel* in both abstract review and *question prioritaire de constitutionnalité* (QPC), including in sanctioning regimes and cumulative penalties.²¹

Alongside this centralized constitutional control, the French system also entrusts ordinary courts with a significant role in the application of proportionality at the level of individual cases. In particular, administrative courts, under the guidance of the *Conseil d’État*, carry out an *in concreto* review of administrative sanctions and may

¹⁹ See, *ex plurimis*, N Recchia, ‘Giudizio di proporzionalità e principi penalistici: identità, complementarità o alternatività?’ in G Dodaro and EM Mancuso (eds), *Uguaglianza, proporzionalità e solidarietà nel costituzionalismo penale contemporaneo* (Edizioni DipLap 2018) 101–108; N Recchia, *Il principio di proporzionalità nel diritto penale. Scelte di criminalizzazione e ingerenza nei diritti fondamentali* (Giappichelli 2020); N Recchia, ‘Principio di proporzionalità e scelte di criminalizzazione’ (2020) 12 *Diritto Penale e Processo* 1615–1622.

²⁰ See F Viganò, ‘La proporzionalità nella giurisprudenza recente della Corte costituzionale: un primo bilancio’ (2025) *Sistema penale* 1.

²¹ Conseil Constitutionnel DC n° 2005-520 (22 July 2005); QPC n° 2016-545/546 (24 June 2016); QPC n° 2018-745 (23 November 2018); see J-H Robert, ‘La punition selon le Conseil constitutionnel’ (2009) 26 *Cahiers du Conseil constitutionnel* (Dossier: *La Constitution et le droit pénal*), available at webview.conseil-constitutionnel.fr.

annul or reduce penalties that are manifestly disproportionate in light of the circumstances of the case.²²

Although ordinary judges cannot annul statutes *erga omnes*, their ability to apply constitutional standards through case-by-case adjudication – whether by annulling, reducing, or maintaining sanctions within constitutionally defined limits – contributes to a concrete and decentralized implementation of the principle of proportionality. This mechanism does not replace constitutional review but rather complements it at the level of individual enforcement, reflecting a system that combines strongly centralized constitutional adjudication with limited, functionally differentiated forms of judicial proportionality control in ordinary litigation.²³

The authorization for judges to disapply statutory penalties deemed disproportionate under the EU law principle of criminal proportionality – provided for by individual provisions of secondary legislation (and indirectly by Article 49, para 3, CFRUE), or even directly by Article 49(3) itself – would therefore create several tensions with Italian constitutional principles, enabling diffuse judicial (*de facto* ‘constitutional’) review through the backdoor and putting at risk equal treatment. This is because – whilst it is true that the direct effect is generally a well-established principle in the EU legal order and uncontested mechanism, and so far the duty of disapplication of national provisions stemming from it has not been questioned as impairing the constitutional architecture of Member States – in this case it concerns a constitutional principle which, by its very nature, requires the court to exercise discretion in assessing what does and does not exceed the limits of proportionality. These tensions will be examined in greater detail in the following sections.²⁴

²² Conseil d’État (France), Section, *Lebon*, (9 June 1978) 05911 *Recueil Lebon*; Conseil d’État, Assemblée du contentieux, *Dahan* (13 November 2013) 347704 *Recueil Lebon*; see C Barrois de Sarigny, ‘Le contrôle de la proportionnalité par le juge Administratif’ (2020) 24 *Revue justice actualités* 26–29; A Planchard, ‘Le contrôle de proportionnalité des sanctions disciplinaires franchit les portes des prisons’ (2015) *Revue des droits de l’Homme*, available at journals.openedition.org.

²³ F Rousseau, ‘Le principe de nécessité. Aux frontières du droit de punir’ (2015) 2 *Revue de science criminelle et de droit pénal comparé* 257–271.

²⁴ On the debate concerning the principle of criminal proportionality in Italian literature, see, for all, Viganò (n 20); GL Gatta, ‘Un’importante sentenza della Corte costituzionale sul principio di proporzionalità della pena come criterio di interpretazione restrittiva delle fattispecie penali’ (2025) *Sistema Penale* 129; F Viganò, *La proporzionalità della pena. Profili di diritto penale e costituzionale* (Giappichelli 2021); M Gambardella, ‘Il primato del diritto dell’Unione Europea e la Carta dei diritti fondamentali: il principio di proporzionalità della risposta sanzionatoria’ (2021) 61 *Cassazione Penale* 26; N Recchia, *Il principio di proporzionalità nel diritto penale* (Giappichelli 2020); F Mazzacuva, ‘Il principio di proporzionalità delle sanzioni nei recenti tracciati della giurisprudenza costituzionale: le variazioni sul tema rispetto alla confisca’ (2020) *La Legislazione Penale* 1; A Pugiottio, ‘Cambio di stagione nel controllo di costituzionalità sulla misura della pena’ (2019) 62 *Rivista Italiana di Diritto e Procedura Penale* 785; S Leone, ‘Sindacato di ragionevolezza e *quantum* della pena nella giurisprudenza costituzionale’ (2017) *Rivista AIC* 1; M Cartabia, ‘Ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana’ in A Giorgis, E Grosso and J Luther (eds), *Il costituzionalista riluttante* (Einaudi 2016) 463; F Viganò, ‘Un’importante pronuncia della Consulta sulla proporzionalità della pena’ (2017) 2 *Diritto Penale Contemporaneo* 61; V Manes, ‘Proporzione senza geometrie’ (2016) 6 *Giurisprudenza Costituzionale* 2105. In a comparative

4. The Italian Constitutional Court's response: decision no. 7/2025

In this framework, the tensions between two apparently different approaches to proportionality review emerged in a crystal-clear manner in the Italian Constitutional Court's decision no. 7/2025, issued on January 14, 2025. The case arose from criminal proceedings concerning corporate offenses under Articles 2637 and 2638 of Italian Civil Code (market manipulation and obstruction of regulatory supervision), committed by directors of Banca Popolare di Vicenza. The trial court had imposed a confiscation order of approximately 963 million euros against four individual defendants under Article 2641 of the Civil Code, representing the value of loans the bank had extended to third parties for purchasing the bank's own shares; loans the Court deemed instrumental to the criminal schemes.

The Court of Appeal of Venice lifted the confiscation, deeming it 'manifestly disproportionate' directly evoking Article 49(3) CFREU. The appellate court noted that the defendants had not personally profited from the offenses, that their conduct was already adequately punished through imprisonment, and that confiscating nearly one billion euros from individuals bore no rational relationship to their culpability. Relying on the *NE* judgment, the Court of Appeal directly disapplied Article 2641 as incompatible with the Charter's proportionality requirement.

The Public Prosecutor appealed to the Court of Cassation, arguing that the appellate court had violated the mandatory character Article 2641 and usurped legislative functions reserved to Parliament. The Prosecutor suggested that if doubts existed regarding the proportionality of Article 2641, the proper remedy was constitutional referral, not direct disapplication. The Court of Cassation, Fifth Criminal Section, agreed that the case raised fundamental questions about reconciling EU law supremacy with Italian constitutional structures, prompting constitutional referral.

The referring Court questioned the constitutionality of Article 2641(1)-(2) of the Civil Code insofar as it subjected to mandatory confiscation (including substitute confiscation) both the proceeds and instrumentalities of corporate crimes, which constitutes a criminal penalty 'in substance' according to *Engel criteria*. The contested provisions allegedly breached several constitutional parameters: Articles 3 (equality), 27(1) and (3) (personal responsibility and rehabilitative punishment), 42 (property protection), and 117(1) (obligation to respect international constraints) in relation to Article 1 of Protocol 1 ECHR and Articles 17 and 49(3) CFREU.²⁵

and general perspective, see G Giorgini Pignatiello, EA Imperato and O Pfersmann, *The Principle of Proportionality in Asia, Europe, and North America. A Comparative Perspective between the Rule of Law and States of Emergency* (Giappichelli 2026) *passim*.

²⁵ The referring court emphasized that confiscating instrumentalities equivalent to nearly one billion euros vastly exceeded any rehabilitative or deterrent necessity, effectively imposing perpetual debt servitude on defendants. The confiscation bore no relationship to defendants' personal enrichment (none had occurred) and treated white-collar offenders far more harshly than violent criminals whose sanctions at least bore some proportionality to culpability. See B Nacar, 'CC. n. 7 del 2025: una pronuncia prevedibile e una questione irrisolta' (Penale Diritto e Procedura, 28 maggio 2025), at www.penaledp.it.

Critically, the referring Court explained why it chose constitutional referral over direct disapplication under *NE*. While acknowledging EU law's primacy and the Charter provisions' potential direct effect, it emphasized that Italian constitutional identity includes the legality principle as a 'supreme principle of the constitutional order'. Disapplication by individual judges would create intolerable legal uncertainty, violating defendants' right to know *ex ante* the sanctions to which their conduct may expose them. Only centralized constitutional review could provide the stability, predictability, and equal treatment that criminal justice demands.

4.1. A remedial solution?

The Constitutional Court declared Article 2641 partly unconstitutional, but its reasoning carefully navigated between EU law obligations and Italian constitutional imperatives. The premise is acknowledging the 'dual preliminary' issue: the same legal question could be addressed either through direct disapplication under EU law supremacy or through constitutional review.²⁶ While both remedies serve fundamental rights protection, the Court emphasized that constitutional adjudication offers particularly significant advantages in criminal matters.

First, the Constitutional Court's declarations of unconstitutionality produce *erga omnes* effects, immediately benefiting all similarly situated individuals including those whose judgments have become final (under Article 30(4) of Law 87/1953). Instead, disapplication benefits only the parties involved in the specific case and creates no precedential obligation for other judges, potentially leading to systematic inequality. Second, constitutional review enables comprehensive evaluation of the challenged provisions' compatibility with the full panoply of constitutional principles, not merely isolated EU law parameters. Third, centralized adjudication promotes legal certainty by providing definitive resolution rather than leaving proportionality assessment to potentially divergent judicial evaluations. Judicial disapplication based on case-specific proportionality assessments, while arguably enhancing

²⁶ On the topic see, *ex multis*, Tesaro (n 15) 299; C Amalfitano and L Cecchetti, 'The ECJ's Approach to Dual Preliminary 5 Years after the ItCC's Judgment no. 269/2017' (2023) 15 *Italian Journal Of Public Law* 84; C Amalfitano, 'Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta e tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale' (2020) *Rivista AIC* 296; G Scaccia, 'Sindacato accentrato di costituzionalità vs diretta applicazione della Carta dei diritti fondamentali dell'Unione europea' (Forum di Quaderni Costituzionali, 25 August 2021), available at www.forumcostituzionale.it; G Scaccia, 'Alla ricerca del difficile equilibrio fra applicazione diretta della Carta dei diritti fondamentali dell'Unione europea e sindacato accentrato di legittimità costituzionale. In margine all'ordinanza della Corte costituzionale n. 117 del 2019' (2019) 6 *Osservatorio Costituzionale* 166; Repetto (n 9); F Medico, 'I rapporti tra ordinamento costituzionale ed europeo dopo la sentenza n. 20 del 2019: verso un doppio custode del patrimonio costituzionale europeo?' (2019) 1 *Il Diritto dell'Unione europea* 87; A-O Cozzi, 'Diretta applicabilità e sindacato accentrato di costituzionalità relativo alla violazione della Carta europea dei diritti fondamentali' (Forum di Quaderni costituzionali, 1 February 2018), at www.forumcostituzionale.it.

substantive justice in individual cases, would introduce unpredictability undermining legality's core functions.

In fact, proportionality review in criminal matters operates at two distinct levels: abstract proportionality (whether statutory sanctions broadly correspond to offense gravity) and concrete proportionality (whether sanctions imposed in concrete cases exceed necessity). Constitutional review primarily addresses abstract proportionality, determining whether legislative choices fall within acceptable ranges. This institutional allocation reflects the separation of powers: legislatures determine the range of sanctions; judges apply them; Constitutional Courts ensure that legislative choices remain within constitutional boundaries.

Turning to the merits, the Court held that mandatory confiscation of instrumentalities (and their equivalents) in corporate crime cases violates constitutional proportionality when extended beyond profit to the entire value of means used to commit offenses.²⁷

The Constitutional Court's remedial approach deserves particular attention. Rather than invalidating Article 2641 entirely (which would eliminate all confiscation), the Court engaged in selective invalidation, removing only the provisions mandating substitute confiscation of instrumentalities. This 'surgical' approach – conceptually similar to Advocate General Bobek's metaphor in *NE* – preserved confiscation of actual instrumentalities and of profit while eliminating the disproportionate extension to substitute confiscation of instrumental means.

This solution balances multiple imperatives. It respects legislative prerogatives by maintaining the confiscation regime's basic structure while correcting constitutional defects. It promotes effectiveness by ensuring serious economic crimes remain subject to meaningful asset forfeiture. It achieves proportionality by eliminating provisions capable of imposing unlimited financial liability unrelated to actual benefit

²⁷ The Court drew a critical distinction: confiscating profit (the economic benefit derived from crime) serves primarily restorative and preventive functions, ensuring crime doesn't pay. Such confiscation automatically maintains proportionality because it merely eliminates illicit gain without imposing additional punishment. Confiscating instrumentalities or their equivalent value, however, possesses different character. When instrumentalities constitute inherently dangerous objects (weapons, narcotics), their confiscation serves obvious preventive purposes regardless of value. But when instrumentalities consist of fungible assets like money, mandatory confiscation unrelated to profit acquired assumes primarily punitive character. Such confiscation must therefore respect proportionality principles governing punishment. Article 2641 of the Civil Code's structure failed this test. By mandating confiscation of instruments' full value without permitting judicial adjustment based on offense gravity, culpability, or actual harm, the provision could yield grotesquely excessive results – as the instant case demonstrated. The Court noted that confiscating 963 million euros from individuals for documentation and disclosure violations, however serious, bore no rational relationship to legitimate penal objectives. Converting this to imprisonment under Article 135 of the Criminal Code would yield sentences of staggering length, revealing the sanction's inherent disproportionality. The Court further observed systematic irrationality in treating corporate crimes more harshly than analogous market abuse offenses under the Consolidated Financial Act (in Italian: *Testo unico della finanza*, 'T.u.f.'). In fact, following the Court's earlier decision no. 112/2019 (which invalidated similar provisions regarding market abuse), Parliament had limited confiscation to profit in securities law violations.

obtained. And it provides legal certainty by establishing a clear rule applicable uniformly across all cases.

The Court noted that its approach harmonizes Italian constitutional requirements with Article 49(3) CFREU while respecting institutional structures and constitutional identity. The decision demonstrates that constitutional courts can effectively enforce Charter rights through traditional constitutional adjudication, achieving outcomes compatible with EU law while preserving national procedural and institutional autonomy.

Yet, to do so, the Constitutional Court, while accepting the possibility of disapplication by ordinary judges, emphasized that in such cases the option of raising a constitutional question is deemed preferable. It reaffirms its broader position that in cases of dual preliminary relevance with constitutional tone ‘*tono costituzionale*’, the national judge must assess the most appropriate remedy on a case-by-case basis, balancing the potential for disapplication against the value of centralized constitutional review. This dual-track approach is designed to avoid institutional conflict with the ECJ while reaffirming the Constitutional Court’s ideal role as a coordinating and stabilizing authority.

5. Critical reflections: questioning the (actual) effectiveness of Article 49(3) CFREU

What stands out is, first of all, that the Italian Constitutional Court goes even a step further than the Court of Justice, reading something into its words that is not expressly stated. It affirms, in fact, with utter certainty that the CGEU in its *NE II* judgment, recognized the direct effect of Article 49(3) of the Charter, unlike what actually happens in the aforementioned ruling, where it is the provision of the directive at issue in the case,²⁸ which incorporates and replicates the principle of proportionality, that is recognized as directly applicable.

Article 49(3) CFREU is then treated, regardless of its direct effect or otherwise, as a constitutional parameter, as such directly invocable as a parameter of constitutional legitimacy of internal rules that fall within the scope of EU law (and therefore implement it, pursuant to Article 51 of the Charter),²⁹ as in the case under examina-

²⁸ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, Art 20.

²⁹ The conduct at issue entails infringements of specific EU prudential requirements (the prohibition, under Art 28(1)(b) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, on counting as Common Equity Tier 1 capital treasury shares financed by the issuing bank itself). Secondly, it concerns breaches of the duty of cooperation with the ECB

tion. However, as mentioned above, the Constitutional Court confirmed the understanding of the *NE* ruling according to which the principle of proportionality of penalties has direct effect, referring, however, directly to Article 49(3) CFREU. Confirmed as well is the consequent possibility for ordinary courts to disapply conflicting national provisions without any need to find specific secondary law provision incorporating the principle of proportionality. In other words, according to the Constitutional Court's understanding, what is directly applicable is the principle itself, not its mere reiteration in a directive.

Essentially, the *NE*'s ruling is taken to a further level: the Constitutional Court bypasses the ECJ's reluctance to declare the direct applicability (albeit expressly stating that it is *imperative*) of a provision, such as Article 49(3), provided for in the Charter and commonly framed as a principle rather than an enforceable right.

At the same time, however, it could be inferred that the Court of Justice, by limiting itself to strictly responding to the question raised by the referring court on Article 20 of the Directive alone, affirming its direct effects without explicitly mentioning the equivalent provision of the Charter in the operative part, turned an 'half-blind' eye to the issue, avoiding to expose itself in a clear-cut way on an issue of such magnitude, whilst still providing a glimpse into its view.

5.1 Between justiciability and programmatic norms: the Charter's internal tension

The ECJ's reluctance can be explained in light of the controversial nature and effect that characterizes the provisions of the Charter, such as Article 49(3).

Needless to say, the twin principles of *primauté* (supremacy) and direct effect ensure that EU law operates uniformly across Member States and that individuals can invoke EU law rights before national courts. The principle of supremacy, first articulated in *Costa v ENEL* (Case C-6/64),³⁰ establishes that EU law takes precedence over conflicting national legislation, including constitutional provisions. Direct effect, first recognized in *Van Gend & Loos* (Case C-26/62),³¹ enables individuals to invoke EU law provisions directly before national courts when such provisions are sufficiently clear, precise, and unconditional.³²

incumbent upon supervised entities within the Single Supervisory Mechanism, as laid down by EU secondary legislation (Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities).

³⁰ Case C-6/64 *Flaminio Costa v ENEL*, EU:C:1964:66.

³¹ Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1.

³² R Schütze, *European Union Law* (Oxford University Press 2021) 155; R Schütze, 'Direct Effects and Indirect Effects of Union Law' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law. Vol. I: The European Union Legal Order* (Oxford University Press 2018) 265; S Douglas-

Besides, ECJ case law has shown a lenient approach to the direct effect test over time: a provision has direct effect when it is capable of being applied in a specific case, by a court.³³ It can be observed, as noted in the literature, that direct effect has been recognized to many treaty *prohibitions*, including to some of the most general ones, and some general (and vague) ‘principles’ of EU Law.³⁴

The legal force of the Charter of Fundamental Rights of the European Union (CFREU) following the Treaty of Lisbon in 2009 added a crucial dimension to this ‘constitutional’ architecture. Article 6(1) of the Treaty on European Union grants the Charter the same legal value as the Treaties, thereby elevating fundamental rights to primary law status.

The compatibility of direct effects with fundamental rights protection raises several outstanding issues. On the one hand, the direct effect of Charter provisions strengthens individual rights by enabling immediate judicial enforcement. On the other hand, questions arise concerning the institutional balance between the Court of Justice of the European Union and national Constitutional Courts, particularly regarding the interpretation and enforcement of rights that may have counterparts in national constitutional traditions.³⁵

Scott, ‘The European Union and Fundamental Rights’ in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law. Vol. I: The European Union Legal Order* (Oxford University Press 2018) 383; E Cannizzaro, *Il diritto dell’integrazione europea* (Giappichelli 2022) 311; Tesaurò (n 15) 257; V Zagrebelsky, R Chenal and L Tomasi, *Manuale dei diritti fondamentali in Europa* (Il Mulino 2025) 86.

³³ According to part of the literature, the direct effect does not depend on a European norm granting a subjective right, but it is the subjective right a result of a directly effective norm. See Schütze, *European Union Law* (n 32) 161; *contra* K Lenaerts and T Corthaut, ‘Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law’ (2006) *European Law Review* 287.

³⁴ Cfr. Case C-144/04 *Mangold v Helm*, EU:C:2005:709. For a critical view see A Dashwood, ‘From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity’ (2006) 9 *Cambridge Yearbook of European Legal Studies* 81. In ECJ case law, see also Case C-74/76 *Iannelli & Volpi SpA v Ditta Paolo Meroni*, EU:C:1977:51; Case C-43/75 *Defrenne v Sabena*, EU:C:1976:56; Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group*, EU:C:1990:209; Case C-85/96 *Martinez Sala v Freistaat Bayern*, EU:C:1998:217; Case C-2/74 *Reyners v Belgian State*, EU:C:1974:68; Case C-13/68 *Salgoil v Italian Ministry of Foreign Trade*, EU:C:1968:54; Case C-41/74 *van Duyn v Home Office*, EU:C:1974:133. In the literature see, *ex multis*, Schütze (n 32) 161; M Ruffert, ‘Rights and Remedies in European Community Law: A Comparative View’ (1997) *Common Market Law Review* 307; P Pescatore, ‘The Doctrine of “Direct Effect”: An Infant Disease of Community Law’ (1983) *European Law Review* 155; B de Witte, ‘Direct Effect, Primacy and the Nature of the Legal Order’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 323; P Craig, ‘Once Upon a Time in the West: Direct Effect and the Federalisation of EEC Law’ (1992) *Oxford Journal of Legal Studies* 453; A Schrauwen and J Prinssen, *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Europa Law Publishing 2004); N Ghazaryan, ‘Who are the “Gatekeepers”? In Continuation on the Debate on the Direct Applicability and the Direct Effect of EU International Agreements’ (2018) 37 *Yearbook of European Law* 27; L Squintani and J Lindeboom, ‘The Normative Impact of Invoking Directives: Casting Light on the Direct Effect and the Elusive Distinction between Obligations and Mere Adverse Repercussions’ (2019) 38 *Yearbook of European Law* 18.

³⁵ F Donati, ‘I principi del primato e dell’effetto diretto del diritto dell’Unione in un sistema di tutele concorrenti dei diritti fondamentali’ (2020) *federalismi.it* 104; M Brkan, ‘The Essence of the

The applicability of the Charter is first and foremost shaped by the principle of conferral. Article 51 delineates its scope, providing that the Charter's provisions are binding on the institutions, bodies, offices and agencies of the Union and on the Member States only when the latter are acting within the scope of EU law. These actors are required to *respect* the rights and *observe* the principles enshrined in the Charter, and to promote their application within the limits of their respective competences and in compliance with the constraints laid down in the Treaties. Paragraph 2 of the same provision, in continuity with Article 6 TEU, further clarifies that the Charter neither extends the scope of application of Union law nor introduces new competences or tasks for the Union, thus placing a structural limit on the natural expansive force of fundamental rights.³⁶

Within this framework, Article 51 introduces a fundamental distinction between 'rights' and 'principles', a distinction that acquires substantive significance when

Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning' (2019) 20 *German Law Journal* 864; V Piccone, 'Diritti fondamentali e tutele nel difficile "crossroads" fra le Corti' (2019) *federalismi.it*; B Nascimbene, 'Carta dei diritti fondamentali, applicabilità e rapporti fra giudici. La necessità di una tutela integrata' in C Amalfitano, M D'Amico and S Leone (eds), *La Carta dei diritti fondamentali dell'unione europea nel sistema integrato di tutela. Atti del convegno svoltosi nell'università degli studi di Milano a venti anni dalla sua proclamazione* (Giappichelli 2022) 37; P Mori, 'Il rapporto tra la corte di giustizia e le giurisdizioni nazionali nell'interpretazione della carta dei diritti fondamentali: la posizione della Corte di giustizia' in Amalfitano, D'Amico and Leone (n 35) 183; B Nascimbene, 'Carta dei diritti fondamentali, applicabilità e rapporti fra giudici: la necessità di una tutela integrata' (2021) 6 *European Papers* 81–99; Cozzi (n 26) 7; Scaccia (n 26) 247; D Gallo, 'L'evoluzione dell'effetto diretto e dei suoi rapporti con il primato e l'immediata applicazione del diritto UE negli ordinamenti nazionali' in G Palmisano (ed), *Il diritto internazionale ed europeo nei giudizi interni* (Editoriale Scientifica 2020) 131; Parodi (n 16) 128.

³⁶ See CI Nagy, 'The Diagonal Application of the EU Charter of Fundamental Rights: From "Displacement" through "Agency" to "Scope" and Beyond' (2024) 25 *German Law Review* 155. Outside these limits, for part of the literature, the Charter could be deemed applicable, but its application is 'voluntary', not binding or mandatory, and therefore it does not enjoy the principle of primacy or the possibility of referral to the Court for a preliminary ruling (cfr. Nascimbene (n 35) 85; A Adinolfi, 'La rilevanza della Carta dei diritti fondamentali nella giurisprudenza interna: qualche riflessione per un tentativo di ricostruzione sistematica' (2018) 1 *Studi sull'integrazione europea* 29; V Sciarabba, 'Le questioni pregiudiziali (...o di costituzionalità), anche in tempo di COVID, non sono un *passe-partout* (a commento dell'ordinanza della Corte di giustizia del 10 dicembre 2020, causa C-220/20)' (Giustizia insieme, 1 febbraio 2021), at www.giustiziainsieme.it. On the scope and value of the Charter see also A Tizzano, 'L'application de la Charte de droits fondamentaux dans les Etats membres à la lumière de son article 51, paragraphe 1' (2014) 3 *Il diritto dell'Unione europea* 429; LS Rossi, 'Stesso valore giuridico dei trattati?, Rango, primato ed effetti diretti della Carta dei diritti fondamentali dell'Unione europea' (2016) 2 *Il diritto dell'Unione europea* 329; K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 377; S Van Drooghenbroeck and C Ritzcallah, 'Article 52-1 – Limitations aux droits garantis' in F Picod, C Ritzcallah and S Van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne* (Bruylant 2020) 1249; R Palladino, 'Diritti, principi ed effetto diretto orizzontale delle disposizioni (in materia sociale) della Carta dei diritti fondamentali dell'Unione europea' (2019) 1 *Il diritto dell'Unione europea* 175.

read in conjunction with Article 52 of the Charter and the related Explanations,³⁷ that the Court of Justice and the national courts are required to take due account of.³⁸

A combined reading of Articles 51 and 52 reveals a differentiated legal status. Pursuant to Article 52(5), principles must be implemented through legislative or executive acts of the Union institutions or of the Member States when they are implementing Union law. They may be relied upon before a court solely for the purposes of interpretation and legality review of legislative and implementing acts, but they cannot serve as a basis for direct claims seeking positive action by public authorities. This results in a regime of ‘limited justiciability’, which entails the absence of direct effect and the need for an intermediate normative act giving concrete expression to their content.³⁹

Rights, by contrast, are characterised by a sufficient degree of precision to theoretically allow individuals to invoke them directly. In such cases, a provision of the Charter may constitute an immediate source of subjective rights enforceable before a court, with the consequent obligation on the judge to disapply incompatible national legislation.⁴⁰

The distinction between rights and principles thus may lie precisely in the capacity of a provision to produce direct effects and to confer immediately enforceable subjective legal positions upon individuals. Principles, to paraphrase the classic case law of the Union, lack full prescriptive force and are not, as such, capable of grounding rights that national courts are required to safeguard.⁴¹

This position, however, appears to stand in some tension with earlier case law of the Court of Justice, notably the *Defrenne* judgment of 1976. On that occasion, the Court held that the classification of a primary law provision as a ‘principle’ does not

³⁷ Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14 December 2007.

³⁸ This regulatory scheme is the outcome of a compromise reached during the second Convention responsible for revising the Charter and reflects the need to reconcile the protection of fundamental rights with respect for the balance of competences, but which is nonetheless criticised in the literature; see Palladino (n 36) 179. On such distinction see also E Cannizzaro, ‘La Carta dei diritti fondamentali e la determinazione della intensità della sua tutela’ (Eurojus, 7 December 2020), at rivista.eurojus.it; Scaccia (n 26) 247; Cozzi (n 26) 7; C Hilson, ‘Rights and Principles in EU Law: A Distinction without Foundation?’ (2008) 15 *Maastricht Journal of European and Comparative Law* 193; S Prechal, ‘Rights v. Principles, or How to Remove Fundamental Rights from the Jurisdiction of the Courts’ in JW De Zwaan and FA Nelissen (eds), *The European Union. An Ongoing Process of Integration. Liber Amicorum A.E. Kellerman* (TMC Asser Press 2004) 177; L Goldsmith, ‘A Charter of Rights, Freedoms and Principles’ (2001) 38 *Common Market Law Review* 1201.

³⁹ Palladino (n 36) 181; Cozzi (n 26) 7; G Braibant, *La Charte des droits fondamentaux de l’Union européenne. Témoignage et commentaires* (Seuil 2001) 46; T Van Danwitz and K Paraschas, ‘A Fresh Start for the Charter Fundamental Questions on the Application of the European Charter of Fundamental Rights’ (2017) 35 *Fordham International Law Journal* 1396; J Krommendijk, ‘Principled Silence or Mere Silence on Principles? The Role of the EU Charter’s Principles in the Case Law of the Court of Justice’ (2015) 11 *European Constitutional Law Review* 321.

⁴⁰ The Court of Justice has clarified this point, for instance with regard to Art 21(1) of the Charter on the prohibition of age discrimination, recognising its direct invocability; see Case C-176/12 *Association de médiation sociale*, EU:C:2014:2, para 47.

⁴¹ Nascimbene (n 36) 88.

allow its direct effect to be excluded a priori, emphasizing instead that such terminology could indicate the fundamental importance of the provision and that reducing it to a merely vague guideline would risk undermining the very foundations of the Community legal order. Compared with that approach, the current framework of the Charter thus marks a significant shift towards a clearer separation between immediately enforceable rights and programmatic principles.⁴²

Ultimately, the Explanations themselves attest to the non-exhaustive nature of the distinction, indicating, for instance, the rights of the elderly (Article 25), of persons with disabilities (Article 26) and environmental protection (Article 37) as principles, while acknowledging that certain Charter provisions may contain elements of both rights and principles, as is the case with Articles 23, 33 and 34. In the absence of clear and predetermined criteria, it therefore falls to the Court of Justice of the European Union to determine, on a case-by-case basis, the nature of each provision and the corresponding regime of protection, thereby completing through its case law the process of concretisation of the Charter of Fundamental Rights.

The determination of whether a provision possesses direct effect requires examination of whether the provision is sufficiently clear and precise, ‘imperative’ in character, and it is unconditional, meaning its application is not subject to further implementing measures.⁴³ These requirements must be assessed with particular care in the criminal law context – a legal domain in which, given the individual rights at stake, States have traditionally guarded their sovereignty – where the principles of legality, legal certainty, and predictability demand rigorous scrutiny.

When it comes to criminal law safeguards, the Court adopts a fairly cautious approach. Among the cases in which the court has gone so far as to recognize the direct effect of criminal law safeguards provided for in the Charter – apart from the

⁴² CGEU, C-43/75 *Defrenne v Société anonyme belge de navigation aérienne Sabena*, EU:C:1976:56, 8 April 1976; cfr. Cozzi (n 26) 10; Palladino (n 36) 182. Further guidance – as the Authors point out – on the distinguishing criteria may be drawn from the Opinions of the Advocates General, particularly Opinion of AG Cruz Villalón in Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others*, EU:C:2013:491 and opinion of AG Mengozzi in Case C-647/13 *Office national de l’emploi v Marie-Rose Melchior*, EU:C:2014:2301. There, principles are described, on the one hand, as characterised by an indeterminate content, amounting to a political mandate addressed to public authorities to adopt the measures necessary to ensure a right, and, on the other hand, by the presence of clauses referring to Union law and to national legislation and practice. These elements, however, are not always decisive, since similar features may also be found in provisions that the Court qualifies as genuine fundamental rights.

⁴³ See, for all, Case C-176/12 *Association de médiation sociale*, EU:C:2014:2; Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßmann*, EU:C:2018:871; N Lazzarini, ‘*Association de médiation sociale*: la Corte di giustizia rompe (in parte) il silenzio sugli effetti orizzontali della Carta’ (2014) *Diritticomparati.it*; L Cecchetti, ‘Unravelling Horizontal Direct Effect in EU Law: The Case of the Fundamental Right to Paid Annual Leave between “Myth” and “Practice”’ (2023) 41 *Yearbook of European Law* 42–83; G Alpa, ‘Remarks on the Direct Horizontal Application of the Provisions of the European Charter of Fundamental Rights’ (2024) 35 *European Business Law Review* 977–988.

Taricco case in which the direct effect of another vaguely formulated sanction-related principle was at issue, i.e. the ‘effectiveness’ of penalties under Article 325 TFEU –⁴⁴ are, for example, those regarding Article 47 of the Charter, as recognized in *Egenberger* (C-414/16, paragraph 78).⁴⁵ In this case-law the Court relies on the direct effect of Article 47 of the Charter to allow the disapplication of conflicting national provisions, even reading specific provisions of EU secondary law in light of Article 47 of the Charter (as in *Torubarov*; *Deutsche Umwelthilfe* and, more recently *Alace and Canpelli*; and *Barouk*).⁴⁶ In all these cases, it is the Court’s reliance on Article 47 of the Charter that enables national courts to disapply conflicting national provisions. The EU secondary law provisions at stake, in fact, were not sufficiently clear, precise and unconditional to allow disapplication in themselves and without additional reference to Article 47 of the Charter.⁴⁷

And therefore, given the vagueness of the case law, it is difficult for the assessment to yield definitive results when faced with a requirement such as that of the proportionality of the penalties. Indeed, arguments can be found to support either position and, as it is often the case with the guarantees enshrined in the Charter, a definitive assessment is difficult to reach, relying more on practical reasoning than on rock-solid legal precision on a case-by-case basis.

5.2. Article 49(3) and direct effect: the case for...

Recognizing Article 49(3) CFREU direct effect would imply substantial normative and functional considerations. First, proportionality in punishment constitutes a fundamental principle of criminal justice recognized across all European legal traditions. The principle’s centrality to human dignity and rule of law justifies robust protection through immediately enforceable individual rights rather than mere interpretive guidelines.

⁴⁴ See (n 10).

⁴⁵ Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257.

⁴⁶ The mentioned judgements are Case C-556/17 *Torubarov*, EU:C:2019:626; Case C-752/18 *Deutsche Umwelthilfe*, EU:C:2019:1114; Joined Cases C-758/24 and C-759/24 *Alace and Canpelli*, EU:C:2025:591; Case C-283/24 *Barouk*, EU:C:2025:236.

⁴⁷ *Barouk* (n 46) paras 41–42, for example, merely cites as a precedent the judgment *Torubarov* (n 46) para 73, in which, on closer inspection, reference is made to the direct effect of the provision of the specific directive at issue (Art 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection), albeit read in the light of Art 47 CFREU; the reference to the latter provision, as often happens, is therefore only indirect. Moreover, in Case C-544/23 *Baji Trans*, EU:C:2025:614, paras 111–112, the provision of Art 49(1) CFREU is recognised as having direct effect. It is, however, to note that the Court, in stating that Art 49(1) of the Charter has direct effect, refers to the conditions for direct effect by citing the ‘general’ conditions (clarity, precision and unconditional nature), rather than those that had hitherto been characteristic of the Charter (‘imperative’ and unconditional nature). For an overview of further and more general case studies, see Parodi (n 16) 133, in which the author also includes *NE* case.

Second, direct effect enhances fundamental rights protection by enabling immediate judicial remedies without awaiting legislative reform or Constitutional Courts' judicial review. National legislatures may prove recalcitrant in revising disproportionate sanction regimes, particularly when political pressures favour 'tough on crime' postures. Empowering judges to enforce proportionality provides crucial safeguards against legislative excess or inertia.

Third, from the *NE*'s ruling perspective, judicial proportionality review reinforces rather than undermines legality. Legality's core concern is preventing arbitrary state punishment power; ensuring sanctions remain proportionate to offenses advances this objective by constraining potential governmental abuse. Individuals possess stronger guarantees when assured that sanctions, whatever their formal statutory levels, will be adjusted to proportionate bounds.

Fourth, recognizing direct effect aims at promoting uniform fundamental rights protection across the European Union. Without enforceable proportionality standards, Member States could impose draconian sanctions in areas governed by EU law, undermining harmonization objectives and creating unequal rights protection depending on accident of geography. Direct effect enables consistent Charter application across the Union.

Fifth, the principle of effectiveness (*effet utile*) supports direct applicability. EU law's practical efficacy requires that individuals can invoke and enforce their EU rights before national courts. If Charter fundamental rights lack direct effect, their practical significance diminishes substantially, reducing the Charter to aspirational rhetoric rather than enforceable law.

Sixth, judicial capacity to apply proportionality standards, by this perspective, should not be doubted. Courts routinely engage in proportionality analysis across multiple legal domains. While proportionality assessments involve value judgments and multi-factor analysis, they are not indeterminate: established methodologies provide structured frameworks channelling judicial discretion.

This approach would be similar to that adopted overseas. In fact, The U.S. Constitution's Eighth Amendment prohibition of 'excessive fines' offers a useful comparative lens on proportionality in monetary sanctions and asset forfeiture, despite major structural differences from European systems. U.S. Supreme Court case law highlights, however, the practical difficulties of applying proportionality to punitive or quasi-punitive measures.

Rooted in English common law, the Excessive Fines Clause long received limited attention and applied only to federal action.⁴⁸ This changed with *Timbs v Indiana*

⁴⁸ MJ Ryan and WW Berry III, *The Eighth Amendment and Its Future in a New Age of Punishment* (Cambridge University Press 2020) *passim*.

(2019),⁴⁹ where the Court incorporated the Clause against the states via the Fourteenth Amendment, recognizing it as a fundamental right.

Substantively, *United States v. Bajakajian* (1998)⁵⁰ established a multi-factor proportionality test, requiring comparison between the severity of the offense and the forfeiture or fine, considering the nature of the crime, its connection to other illegal conduct, statutory penalties, and the harm caused.⁵¹

Despite *Timbs*, enforcement remains uneven. Courts apply *Bajakajian* inconsistently, defer heavily to legislative judgments, and procedural barriers often prevent effective challenges.⁵²

The U.S. experience thus mirrors European debates under Article 49(3) CFREU: both systems struggle with indeterminate proportionality standards, institutional allocation of review, and the gap between formal rights and effective judicial enforcement. The American case illustrates that proportionality guarantees require active, sustained judicial engagement to be meaningful.

The *NE* judgment's subtle endorsement of direct disapplication moves European practice toward American-style diffuse review, creating precisely the concerns that motivated the Italian Constitutional Court's decision 7/2025.

5.3. ... And the case against

Notwithstanding these considerations, substantial arguments challenge recognizing Article 49(3) direct effect, particularly in criminal matter. First, the principle of legality in criminal law demands exceptional clarity and precision in defining punishable conduct and applicable sanctions.

⁴⁹ Cfr. *Timbs v. Indiana*, 139 S. Ct. 682 (2019). The case concerned forfeiture of a \$42,000 vehicle for a minor drug offense, which the Court deemed subject to Eighth Amendment scrutiny. In *Timbs*, Supreme Court unanimously held that the Excessive Fines Clause applies to States through the Fourteenth Amendment's Due Process Clause. See WA Logan, 'Timbs v. Indiana: Toward the Regulation of Mercenary Criminal Justice' (2019) 32 *Federal Sentencing Reporter* 3; BA Colgan, 'The Excessive Fines Clause: Challenging the Modern Debtors' Prison' (2018) 65 *UCLA Law Review* 2; RJ Weiss, 'The Forfeiture Forecast after Timbs: Cloudy with Chance of Offender Ability to Pay' (2020) 61 *Boston College Law Review* 3073; BA Colgan, 'The Burdens of the Excessive Fines Clause' (2021) 63 *William & Mary Law Review* 407; JL Asbridge, 'Fines, Forfeitures, and Federalism' (2025) 111 *Virginia Law Review* 67.

⁵⁰ Cfr. *United States v. Bajakajian*, 524 U.S. 321 (1998). Earlier, *Austin v. United States*, 509 U.S. 602 (1993) held that civil in rem forfeitures qualify as 'fines' when they are punitive rather than purely remedial, adopting a functional approach that prioritizes substance over form – an approach analogous to the *Engel criteria* in European law. However, *Austin* remanded for lower courts to determine whether the specific forfeitures were excessive, declining to articulate comprehensive proportionality standards. This left considerable doctrinal uncertainty regarding how courts should assess civil forfeitures' excessiveness, uncertainty that *Bajakajian* subsequently addressed in the criminal forfeiture context.

⁵¹ NV Demleiter, 'Will the Supreme Court Rein in "Excessive Fines" and Forfeitures?' (2019) 32 *Federal Sentencing Reporter* 8.

⁵² Civil forfeiture proceedings, in fact, often conclude without judicial hearings, property owners frequently lack resources to litigate, and government retains forfeited property pending appeals. See Logan (n 39).

Second, separation of powers concerns warrant careful attention. Determining appropriate punishment levels represents a quintessentially legislative function involving policy choices about deterrence philosophy, resource allocation, and societal values. When judges disapply or modify statutory sanctions, they effectively substitute judicial for legislative policy judgments. This judicial incursion into criminal policy-making raises – despite its pro-defendant effect – democratic legitimacy questions.⁵³

While it is true that the remedy of selective disapplication developed by the Court of Justice merely requires national courts to set aside those specific provision elements that give rise to the conflict with EU law – and thus does not entail judicial law-making, since the resulting sanctioning regime continues to rely on normative choices already made by the national legislature – the Court’s reasoning may prove less persuasive in more indeterminate normative settings or where several alternative solutions are available.⁵⁴ In such cases, national courts may be required to exercise a degree of discretion that stretches the limits of judicial interpretation and may significantly reshape domestic law.

This highlights the importance of judicial dialogue, including constitutional adjudication, as a means of addressing the most complex cases and mitigating the tensions inherent in the application of this remedy.

Third, equal treatment problems (enshrined in Article 20 of the Charter as the principle of equality before the law) emerge from diffuse proportionality review. Individual judges may reach divergent conclusions regarding particular sanctions proportionality, leading to systematic inequality where similarly situated defendants receive different treatment depending on their judges’ views, especially given that proportionality assessments involve multi-factorial balancing without mechanical decisional algorithms, and that a shared European approach to proportionality review remains lacking.⁵⁵

Two defendants convicted of identical offenses under identical circumstances might receive different sanctions depending on whether their respective judges deem statutory penalties disproportionate. Even if appellate review eventually harmonizes divergent approaches, transitional periods would witness systematic inequality. Moreover, the finality of judgments would prevent retroactive correction of earlier disproportionate sanctions once courts subsequently recognize their excessiveness.

⁵³ See Pelissero (n 18) 242, according to whom, unlike the Court’s *ne bis in idem* case-law – where proportionality merely prevents the duplication of penalties already imposed for the same conduct – the 2022 judgment allows national courts to set aside statutory penalty thresholds independently of any prior sanction. This considerably expands judicial discretion in sentencing and therefore gives rise to more serious concerns under the principle of legality than those raised by the *ne bis in idem* doctrine.

⁵⁴ See Montaldo (n 4) 217, according to whom, however, ‘any substantial and concrete risk of violation of key components of the rule of law such as the principle of separation of powers could be solved by resorting to the *MAS* case-law and to the related limits to disapplication’.

⁵⁵ See M Lanotte, ‘La proporzionalità della sanzione: un principio ritrovato? Note a margine della sentenza *NE*’ (2023) *Quaderni AISDUE* 367.

Without centralized guidance, regional and individual variations fragment the uniform application of criminal law. Concentrated constitutional review avoids these problems by providing authoritative, uniformly applicable precedent.⁵⁶

Fourth, Article 49(3) CFREU's language may lack the precision required for direct effect. The provision states that 'the severity of penalties must not be disproportionate to the criminal offence' – a negative formulation prohibiting excess but providing limited positive guidance regarding appropriate sanction levels. While the Court of Justice characterized such requirement – which is incorporated in Article 20 of the Directive 2014/67 (requiring that 'penalties provided for shall be effective, *proportionate* and dissuasive'), deemed directly applicable – as sufficiently precise, reasonable disagreement exists regarding whether it provides adequately determinate standards for judicial application.

Fifth, institutional competence considerations lean in favour of judicial restraint. Legislatures and Constitutional Courts possess superior capacity to gather empirical evidence about sanction effectiveness, to balance competing criminal philosophies, and to make systematic policy choices in the first case, or to correct a disproportionate penalty with *erga omnes* effect in the latter. Judges deciding individual cases lack comparable institutional resources and perspective. Excessive judicial intervention in sanction design may produce suboptimal outcomes from systemic perspectives even if improving justice in particular cases.

Nevertheless, not all Charter norms should possess direct effect; many require legislative implementation giving concrete content to abstract principles.⁵⁷ But fundamental rights protecting human dignity in core areas receive direct effect when sufficiently determinate, particularly when addressing state power over individuals in criminal contexts.

Article 49(3) of the Charter, however, while surely protecting essential aspects of human dignity, puts to the test the criteria, resulting from constant jurisprudential elaboration, that characterize direct effectiveness. This is because, although it can be argued that it complies with them, it still requires a comparative assessment implying a wide margin of discretion, with the highlighted significant repercussions in terms of equal treatment. The principle in question therefore remains ambiguous, perhaps escaping precise classification due to its breadth and its repercussions on the system.

6. Reconciling direct effect of proportionality with constitutional structures

The Italian Constitutional Court's approach in Decision 7/2025 suggests potential reconciliation paths. Rather than dismissing what can be inferred from the *NE* judgment, denying that the principle in question might have direct effect (which is, on the contrary, explicitly asserted, even beyond the words of the CJEU), or insisting

⁵⁶ Viganò (n 15).

⁵⁷ Cannizzaro (n 32) 251; N Póltorak, *The Application of the Rights and Principles of the Charter of Fundamental Rights* (EUI Working Paper RSC 34-2021) 2.

that direct disapplication provides the sole remedy, the Court acknowledges both EU law supremacy and the value of constitutional adjudication. This approach permits judges to choose between direct disapplication and constitutional referral based on context-specific considerations. Yet it invites judges to carefully consider – deeming it preferable – the option to refer the matter to the Constitutional Court and obtain *erga omnes* correction of the disproportionate penalty.

Several factors might guide this choice. Direct disapplication appears more appropriate when: *i*) the disproportionality is manifest and undebatable; *ii*) the case involves individual circumstances making sanctions particularly excessive; *iii*) delay pending constitutional adjudication would cause irreparable harm; and *iv*) the legal question is narrow and fact-specific. Constitutional referral appears preferable when: *i*) the disproportionality involves systemic rather than case-specific factors; *ii*) the question implicates fundamental constitutional principles beyond EU law parameters; *iii*) the issue affects numerous pending and future cases requiring uniform resolution; and *iv*) remedial solutions require legislative-type choices among multiple alternatives.

This flexible approach respects both EU law primacy and national constitutional identity. The ECJ jurisprudence requires that EU law receive effective application and that individuals enjoy Charter rights protection. These requirements do not, however, preclude the possibility of intervention by the Constitutional Court, provided that judges are not radically deprived of their power of disapplication.⁵⁸ This solution appears, in fact, to be the result of a ‘consensual’ compromise between ordinary courts and the Constitutional Court, since the latter cannot impose it on the former, nor are there any binding forms of enforcement where the former decide to proceed with non-application outside the criteria developed by the Court.

This reconciliation can find support in ECJ jurisprudence on national procedural autonomy. While EU law imposes substantive requirements, Member States generally retain discretion regarding procedures for enforcing EU rights, subject to equivalence and effectiveness principles. Constitutional referral procedures satisfy these principles when they provide effective fundamental rights protection without discriminating against EU law claims, nor prohibiting the power of disapplication or preliminary referral to the Court of Justice. The Constitutional Court’s expedited review and *erga omnes* effect actually provide superior protection compared to disapplication benefiting only immediate parties.⁵⁹

⁵⁸ Pursuant to ECJ, Joined Cases C-188/10 and C-189/10 *Aziz Melki and Sélim Abdeli*, EU:C:2010:363.

⁵⁹ Moreover, it may be speculated, purely as a matter of conjecture – although this is not explored in sufficient depth in this paper –, that the principle of constitutional identity, recognized by the ECJ, and more recently articulated in Art 4(2) TEU, grants protection to fundamental constitutional structures. Concentrated constitutional review represents a core element of many Member States’ constitutional identities, protecting legality, legal certainty, and democratic legitimacy, especially in a crucial area such as criminal matter, given the systematic importance of the rights involved. See C Maes, ‘The

Acknowledging dual preliminaryity – by recognizing both disapplication and constitutional referral as legitimate remedies – can therefore lead to charting a middle path between rigid EU law supremacy and defensive constitutional nationalism.

This approach embodies constitutional pluralism: recognizing multiple, overlapping constitutional orders (national and European) that must coordinate and accommodate each other rather than maintaining strict hierarchical relationships. Constitutional pluralism accepts that constitutional conflicts may arise and that perfect harmony remains elusive, but insists on good-faith dialogue and mutual respect among constitutional actors in this multi-level framework.

Notion of Constitutional Identity and its Role in European Integration' (2024), available at www.europarl.europa.eu 21; P De Pasquale, 'Identità nazionale e primato del diritto dell'unione europea: incontro o scontro tra titani?' in G Stanco (ed), *Autodeterminazione e diritti dei popoli. Diritti umani e democrazia, interdipendenza planetaria e sovranità [dis]armata, credibilità della giustizia* (Giuffrè 2024) 97; B Guastaferrò, 'Sincere Cooperation and Respect for National Identities' in R Schütze and T Trimmas (eds), *Oxford Principles of European Union Law* (Oxford University Press 2018) 374.