Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 23 September 2021 [1]

Case C-205/20

NE
v
Bezirkshauptmannschaft Hartberg-Fürstenfeld,
joined parties:
Finanzpolizei Team 91

(Request for a preliminary ruling from the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria))

(Reference for a preliminary ruling – Free movement of services – Posting of workers – Article 20 of Directive 2014/67/EU – Penalties – Principle of proportionality – Direct effect – Powers of the national courts – Legislation of a Member State providing for the aggregation of administrative fines for each infringement committed and establishing minimum amounts without fixing maximum overall amounts)

I. Introduction

1. Is the requirement of proportionality of penalties directly effective? If it is, but equally so if it is not, what exactly does it require of a national court faced with a dispute in which it is to apply national rules on sanctions that were already declared to be disproportionate by the Court?

2. In a series of previous decisions, starting with *Maksimovic*, [2] the Court declared several elements of the Austrian sanctioning regime for the breach of essentially administrative record-keeping obligations relating to the posting of workers as being disproportionate. However, after the decisions of the Court, the national legislature remained inactive. The referring court is uncertain as to what it is supposed to do in such a scenario. It refers to the recent decision of this Court in *Link Logistik*, [3] where an almost identical EU law provision was found to lack direct effect, and where the possibility to interpret national law in conformity with EU law was considered to be excluded. The Court nonetheless went on to recall the obligation on the courts of the Member States to set aside the conflicting national law provisions.

1 Original language: English.

2 Judgment of 12 September 2019, *Maksimovic and Others* (C-64/18, C-140/18, C-146/18 and C-148/18, EU:C:2019:723; '*Maksimovic*'); orders of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108) and *EX and Others* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103).

3 Judgment of 4 October 2018, *Link Logistik N&N* (C-384/17, EU:C:2018:810; '*Link Logistik*').

3. In my view, the real issue in the present case is not so much what the national court should do, but rather what this Court should do. That statement in no way downplays the importance of the case in the main proceedings and the ultimate responsibility that the national court always carries in deciding an individual case. It is rather to acknowledge that the problems unearthed by the order for reference in the present case are largely attributable to unclear guidance issued by the Court itself.

II. Legal framework

A. EU law

4. Recital 44 of 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,[4] reads as follows: 'Notwithstanding the establishment of more uniform rules with respect to the cross-border enforcement of administrative penalties and/or fines and the need for more common criteria to make follow-up procedures more effective in the event of the non-payment, they should not affect the Member States' competences to determine their system of penalties, sanctions and fines or the recovery measures available under their national law. Therefore, the instrument permitting enforcement or execution of such penalties and/or fines may, if appropriate, and taking into account national law and/or practice in the requested Member State, be completed, or be accompanied or replaced by a title permitting its enforcement or execution in the requested Member State.'

5. Article 20 of Directive 2014/67, entitled 'Penalties', provides:

'Member States shall lay down rules on penalties applicable in the event of infringements of national provisions adopted pursuant to this Directive and shall take all the necessary measures to ensure that they are implemented and complied with. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 18 June 2016. They shall notify without delay any subsequent amendments to them.'

B. National law

6. Paragraph 16(1) and (2) of the Verwaltungsstrafgesetz (Law on administrative offences),[5] provides for the possibility to adopt custodial sentences as a substitution penalty in the case of non-payment of fines.

4 OJ 2014 L 159 p. 11.

5 BGBl. 52/1991.

7. Paragraph 52(1) and (2) of the Verwaltungsgerichtsverfahrensgesetz (Law on the rules of procedure for the administrative courts)[6] in the version applicable to the dispute in the main proceedings, is worded as follows:

'1. Every judgment delivered by an administrative court upholding an administrative decision imposing a penalty (*Straferkenntnis*) shall order the person penalised to pay a contribution to the costs.

2. That contribution, in administrative complaint proceedings, shall be 20% of the penalty imposed, but not less than EUR 10; if a custodial sentence has been imposed, one day of detention shall be equal to EUR 100 for the purpose of calculating the costs. …'

8. Paragraph 26(1) of the Lohn- und Sozialdumping-Bekämpfungsgesetz (Law to combat wage and social dumping) ('the LSD-BG'),[7] in the version applicable to the dispute in the main proceedings, states:

'Anyone who, in the capacity of employer or undertaking hiring out workers for the purposes of Paragraph 19(1):

1. fails to make the declaration, including subsequent changes to the data (declaration of change) in breach of Paragraph 19, or fails to do so in due time or in a comprehensive manner, or

…

3. does not have available the required documents in breach of Paragraph 21(1) or (2), or fails to make them available to the tax authorities on the spot … in electronic form,

commits an administrative offence and shall be penalised, for each worker concerned, by a fine imposed by the district administrative authority in the amount of EUR 1 000 to EUR 10 000, and, in the event of a repeat offence, EUR 2 000 to EUR 20 000.'

9. Paragraph 27(1) of the LSD-BG provides:

'Anyone who fails to transmit the required documents in breach of Paragraph 12(1)(3) commits an administrative offence and shall be penalised, for each worker concerned, by a fine imposed by the district administrative authority in the amount of EUR 500 to EUR 5 000, and, in the event of a repeat offence, EUR 1 000 to EUR 10 000. …'

10. Paragraph 28 of the LSD-BG is worded as follows:

'Anyone who, in the capacity of

1. employer, does not have available the documents relating to wages in breach of Paragraph 22(1) or (1a), …

6 BGB1. I, 33/2013.

7 BGBl. I, 44/2016.

commits an administrative offence and shall be penalised, for each worker concerned, by a fine imposed by the district administrative authority in the amount of EUR 1 000 to EUR 10 000, and, in the event of a repeat offence, EUR 2 000 to EUR 20 000; where more than three workers are concerned, that fine shall be in the amount, for each worker concerned, of EUR 2 000 to EUR 20 000 and, in the event of a repeat offence, of EUR 4 000 to EUR 50 000.'

III. Facts, national proceedings and the questions referred

11. CONVOI s.r.o. is a company established in Slovakia. It posted its employees to Niedec Global Appliance Austria GmbH ('Niedec'), a company established in Fürstenfeld (Austria). On 24 January 2018, the administrative authority of the district of Hartberg-Fürstenfeld (Austria) carried out an inspection with Niedec. By decision of 14 June 2018, that administrative authority ordered the applicant in the main proceedings, in his capacity as representative of CONVOI, to pay a fine in the total amount of EUR 54 000 for the failure to respect a number of obligations provided for by the LSD-BG, relating in particular to the availability of wage and social security records. [8]

12. By decision of 9 October 2018, the referring court sent a request for a preliminary ruling to the Court concerning the compliance of the penalties provided for by the national law in question with EU law and, in particular, with the principle of proportionality.

13. To that question, the Court replied by a reasoned order under Article 99 of the Rules of Procedure in *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (No I). [9] In doing so, it relied on its judgment issued shortly beforehand in *Maksimovic*, [10] where the Court was invited to rule on very similar questions on the basis of Article 56 TFEU.

14. By the order issued previously in the (same) main proceedings, the Court found that Article 20 of Directive 2014/67 must be interpreted as precluding national legislation which provides, in respect of non-compliance with labour law obligations in relation to the declaration of workers and the keeping of wage records, for fines to be imposed, which may not be lower than a predefined minimum amount, which apply cumulatively in respect of each worker concerned and without an upper limit, and to which is added a contribution to court costs of 20% of the amount of the fines if the appeal against the decision imposing those fines is dismissed. [11]

15. The Court arrived at the same conclusion (also under Article 99 of the Rules of Procedure) in the order in Joined Cases C-140/19, C-141/19 and C-492/19 to C-494/19, [12] originating in the same referring court, raised in the context of different cases, but indeed in rather similar factual circumstances. In those cases, the Court also relied on what it had already stated in *Maksimovic*.

16. In the present case, taking note of the Court's previous decision in *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (No I), the referring court nevertheless points out that the national legislature has not yet amended the national rules at issue in the main proceedings. The referring

8 As set out in the order of the Court of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108, paragraphs 10 and 11).

9 Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108).

10 That case concerned different national provisions (the Arbeitsvertragsrechts-Anpassungsgesetz (Law adapting employment contract law, BGBl. 459/1993; 'the AVRAG')). The latter nonetheless contained a very similar system and amounts of sanctions to those at issue in the present case.

11 Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108, paragraph 43).

12 Order of 19 December 2019, *EX and Others* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103).

court therefore harbours doubts as to the extent to which it can apply those rules. The referring court wonders, more precisely, whether the criminal provisions at issue, which remain in force, can still be applied, and, if so, to what extent.

17. The referring court explains that the Austrian higher courts have issued divergent case-law on that matter. On the one hand, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), has ruled that, in order to comply with EU law, it is obliged to set aside the words 'in respect of each worker'.[13] In doing so, that court has effectively lowered and capped the total amount of the penalties that may be imposed, while still allowing for penalties to be imposed.[14]

18. On the other hand, the Verfassungsgerichtshof (Constitutional Court, Austria) has (fully and entirely) annulled the penalties imposed on the basis of the national provisions at issue in several judgments.[15] The referring court explains that the rulings of the Verfassungsgerichtshof (Constitutional Court) have been interpreted by certain national courts as meaning that it is not allowed to continue applying the penalties at issue at all. That would then mean that no penalty can be imposed on the basis of the provisions having been declared disproportionate by the Court until new legislation is passed.

19. It would nonetheless appear that the majority of administrative courts have followed the position of the Verwaltungsgerichtshof (Supreme Administrative Court). However, they still seem to arrive at rather different results: some courts fix the amount of the penalty at the level of the minimum sanction. In other cases, the total amount of the penalty is fixed in a way that almost corresponds to the sum of the individual sanctions that would have been imposed for each infringement. Additionally, a number of administrative judges have adopted their own interpretation of *Maksimovic* and continue to apply cumulative sanctions.

20. It is in this context that the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67/EU and interpreted by the Court of Justice of the European Union in its orders [of 19 December 2019,] *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, [not published,] EU:C:2019:1108)[, and of 19 December 2019, *EX and Others*] (C-140/19, C-141/19 [and] C-492/19 [to] C-494/19, [not published,] EU:[C:]2019:1103) a directly applicable provision of the Directive?

(2) If Question 1 is answered in the negative:

Does the interpretation of national law in conformity with EU law permit and require the national court and administrative authority to supplement – in the absence of new legislation at national level – the domestic penal provisions applicable in the present proceedings with the criteria of the requirement of proportionality laid down in the orders of the Court of Justice of the European Union [of 19 December 2019,]

13 These terms were contained in Paragraph 7i(4) of the AVRAG, but correspond essentially to those contained in Paragraphs 26(1), 27(1) and 28 of the LSD-BG.

14 Judgment Ra 2019/11/0033 of 15 October 2019.

15 E 3530/2019 and others, E 2893/2019 and others, E 2047/2019 and others, E 3530/2019 and others, E 2893/2019 and others, of 27 November 2019.

Bezirkshauptmannschaft Hartberg-Fürstenfeld (C-645/18, [not published,] EU:C:2019:1108)[, and of 19 December 2019, *EX and Others*] (C-140/19, C-141/19 [and] C-492/19 [to] C-494/19, [not published,] EU:[C:]2019:1103)?'

21. Written observations have been submitted by the Czech, Austrian and Polish Governments, as well as the European Commission.

IV. Analysis

22. This Opinion is structured as follows. I shall start with the first question: is Article 20 of Directive 2014/67, or more specifically the requirement of proportionality of penalties contained therein, directly effective (A)? I shall then turn to the consequences of the direct effect (or lack thereof) of that requirement for the case at hand (B). In my view, the proportionality requirement contained in the provision mandating Member States to adopt rules on 'effective, proportionate and dissuasive' penalties is directly effective. However, since there is tension, to say the least, between that proposition and the findings of the Court in *Link Logistik*, I shall conclude with a suggestion on how to proceed (C).

A. Is the requirement of proportionality of penalties directly effective?

23. Article 20 of Directive 2014/67 requires Member States to 'lay down rules on penalties applicable in the event of infringements of national provisions adopted pursuant to [that] Directive' and to 'take all the necessary measures to ensure that they are implemented and complied with'. It requires that those penalties be 'effective, proportionate and dissuasive'.

24. In its order in *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (No I), the Court ruled, in relation to the main proceedings in the present case,[16] that Article 20 of Directive 2014/67 is infringed by the Austrian provisions at issue, particularly with regard to the proportionality requirement.[17]

25. The referring court is now asking for clarification of the practical consequences of that first ruling. It wonders, in particular, what exactly it should do in the main proceedings, bearing in mind that the national provisions at issue remain in force. The national court is well aware of the decision of the Court in *Link Logistik* and the fact that the Court, when faced with a question on the direct effect of the proportionality requirement set out in Article 9a of Directive 1999/62/EC,[18] a provision almost identical to that of Article 20 of Directive 2014/67, answered in the negative. However, in order to give a ruling in the case before it, the national court asks whether the same conclusion is also warranted as far as the direct effect of Article 20 of Directive 2014/67 is concerned.

16 Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108).

17 The Court arrived at the same conclusion in its order of 19 December 2019, *EX and Others* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103), originating from the same referring court in the context of different cases but in a rather similar factual context.

18 Directive of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ 1999 L 187, p. 42), as amended by Directive 2011/76/EU of the European Parliament and of the Council of 27 September 2011 (OJ 2011 L 269, p. 1).

26. In this section, I shall recall the main lines of the ruling of the Court in *Link Logistik* (1). I will then explain why I (still) consider the proportionality requirement in Article 20 of Directive 2014/67 to be directly effective, reiterating not only the arguments already made in my Opinion in *Link Logistik* [19] (2), but adding a few more considerations, in particular of systemic nature (3).

1. The Court's position in Link Logistik

27. The resemblance between *Link Logistik* and the present case is uncanny. First, in *Euro-Team and Spirál-Gép*, the Court found that the Hungarian legislation providing for the imposition of flat-rate fines for the lack of payment of tolls, regardless of the nature and gravity of the offence, infringed the proportionality requirement set out in Article 9a of Directive 1999/62. [20]

28. Next, faced with such a declaration of incompatibility, in *Link Logistik*, another Hungarian court referred specific questions to this Court concerning the practical effects of its ruling in *Euro-Team and Spirál-Gép*. How was that declaration of incompatibility to be taken into account by a national court and applied to individual cases? In particular, the question raised was whether Article 9a of Directive 1999/62, [21] a provision whose wording is very similar to that of Article 20 of Directive 2014/67, was directly effective, and what could or should judicial and administrative authorities do in that case.

29. The Court in *Link Logistik* found, in the first place, that Article 9a of Directive 1999/62 was *not* directly effective. The Court first declared that 'for the principle of proportionality to be implemented in connection with Directive 1999/62, the Member States are required to adopt the legal measures needed in accordance with their national law, since Article 9a of the directive lays down an obligation which by its nature necessitates the intervention of a measure of those Member States, which have a wide margin of discretion when fulfilling that obligation'. [22] The Court then ruled that 'the directive does not contain more precise rules with regard to the establishment of those national penalties and, in particular, that it does not establish any express criterion for the assessment of the proportionality of such penalties'. [23] As a consequence, the Court concluded that 'as it necessitates the intervention of the Member States and leaves them a wide margin of discretion, Article 9a of Directive 1999/62 cannot be regarded, so far as its subject matter is concerned, as unconditional and sufficiently precise, which rules out its having direct effect'. [24]

30. The Court added that 'a contrary interpretation would lead in practice to the removal of the discretionary power conferred on the national legislatures alone, for whom it is to design an appropriate system of penalties within the framework defined in Article 9a of Directive 1999/62'. [25] The Court then concluded, with regard to the issue of direct effect, that 'in

19 Opinion in *Link Logistik N&N* (C-384/17, EU:C:2018:494).

20 Judgment of 22 March 2017, *Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229).

21 That provision reads as follows: 'Member States shall establish appropriate controls and determine the system of penalties applicable to infringements of the national provisions adopted under this Directive. They shall take all measures necessary to ensure that they are implemented. *The penalties established shall be effective, proportionate and dissuasive*.' My emphasis.

22 *Link Logistik*, paragraph 51.

23 Ibid., paragraph 52, by reference to judgment of 22 March 2017, *Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229, paragraph 38).

24 Ibid., paragraph 53.

25 Ibid., paragraph 54.

circumstances such as those of the main proceedings, the requirement of proportionality of penalties in Article 9a of Directive 1999/62 cannot be interpreted as requiring the national court to take the place of the national legislature'. [26]

2. Why the proportionality requirement is directly effective

31. As far as the test of direct effect is concerned, and in accordance with the standard case-law of this Court that ought to be applied in such cases, I cannot but summarise the arguments already set out in my Opinion in *Link Logistik*. [27] I will also use this opportunity to clarify some of those arguments and to add several other considerations of a more systemic nature in the following section of this Opinion.

32. Direct effect is the ability of an EU law rule to be justiciable at national level, directly before the national judge, without the need for any further 'intermediary' of national law. It amounts to the effective fusion of two sets of norms that are to be applicable to a case: the national one and EU one. It is assessed with regard to an individual legal provision or a part thereof that is to be applied before the national authority. It is determined by reference to the nature, general scheme and wording of the provision in question. Is the provision at issue sufficiently clear, precise and unconditional to be relied on before the courts? [28]

33. According to the Commission, the proportionality requirement enshrined in Article 20 of Directive 2014/67 is directly effective. It is sufficiently clear, precise and unconditional. Conversely, relying on the position adopted by the Court in *Link Logistik*, the Austrian and Polish Governments submit that Article 20 of Directive 2014/67 does not fulfil the requirements of sufficient clarity and precision, since it requires the intervention of the Member States and leaves them a large margin of appreciation. The Czech Government considers that it is not necessary to address the unconditional and sufficiently precise character of Article 20 of Directive 2014/67 since, in any case, EU law precludes in an absolute manner the provisions of a directive that have been incorrectly transposed from being applied against individuals. That appears to be the case in the main proceedings since the provisions of Austrian law at issue have been declared incompatible with EU law by the Court.

34. I agree with the Commission. In my view, the requirement of proportionality of penalties enshrined in Article 20 of Directive 2014/67 is sufficiently clear, precise and unconditional. As regards that specific requirement, the conditions for direct effect are fulfilled.

35. First, the *clarity and precision* criteria are met.

26 Ibid., paragraph 55.

27 Opinion in *Link Logistik N&N* (C-384/17, EU:C:2018:494, points 63 to 69), as well as my Opinion in *Klohn* (C-167/17, EU:C:2018:387, points 38 to 46).

28 In the words of Advocate General Van Gerven, speaking about the eminently practical nature of the direct effect test: '… provided and in so far as a provision of [Union] law is sufficiently operational in itself to be applied by a court, it has direct effect. The clarity, precision, unconditional nature, completeness or perfection of the rule and its lack of dependence on discretionary implementing measures are in that respect merely aspects of one and the same characteristic feature which that rule must exhibit, namely it must be capable of being applied by a court to a specific case.' Opinion of Advocate General Van Gerven in *Banks* (C-128/92, EU:C:1993:860, point 27).

36. It is true that the proportionality requirement may appear vague at first sight. However, the case-law of the Court confirms that the 'clear and precise' character of a provision is a rather elastic concept: a provision can meet those requirements whilst containing undefined or even vague concepts or indeterminate legal notions. [29]

37. In the present case, the meaning and the exact consequences of the proportionality requirement in the context of sanctions are easily understandable: the penalties imposed shall not go beyond what is strictly necessary to attain the aim legitimately pursued. It is also quite clear in respect to what the penalties are supposed to be proportionate: they are supposed to be commensurate with the seriousness of the offence committed. [30] In short, in the field of penalties, the principle of proportionality 'requires, first, that the penalty imposed corresponds to the seriousness of the offence and, second, that the individual circumstances of the particular case are taken into account in determining the penalty and fixing the amount of the fine'. [31] More particularly, in the present case, that means that the assessment is supposed to take place within the specific context of Directive 2014/67, which sets out the aims and the framework for the application of the requirement of proportionality of penalties.

38. The case-law of the Court provides ample guidance as to the content of the test of proportionality. Indeed, the application of that test involves a degree of judicial/administrative appraisal and, therefore, a certain margin of appreciation. However, what needs to be stressed in this context is that the *clarity of a rule* should not be confused with the *clarity of the outcome* of the application of that rule in each individual case. [32] Proportionality of penalties is a prime example in that regard. Irrespective the number of guidelines or judgments there may be on the interpretation of that concept, some degree of indeterminacy in terms of its application will remain as a consequence of the specific circumstances of each individual case. [33] There will always be some degree of uncertainty as to the outcome, but that does not mean there will be uncertainty at a general level as to what the rule requires. [34]

39. Moreover, the requirement of proportionality also appears to be clear and precise from the point of view of the authorities called on to apply it on a regular basis – national courts and administrative bodies – which are indeed (or should be) familiar and well equipped to run the proportionality test, in the particular context of sanctions. Irrespective of their empowerment to carry out such a type of assessment under national law, it is also common that the Court leaves national courts the task of carrying out the assessment of the proportionality of a national measure, including the proportionality of penalties. [35]

29 Just to name a salient example, in its judgments of 5 February 1963, *van Gend & Loos* (26/62, EU:C:1963:1), and of 19 December 1968, *Salgoil* (13/68, EU:C:1968:54), the Court held that the provision of customs duties and quantitative restrictions and measures having equivalent effect were sufficiently clear and precise to be directly effective, and yet the Court has spent the last half-century interpreting the term 'measures having equivalent effect'.

30 *Maksimovic*, paragraph 39. See also, to that effect, judgments of 26 September 2018, *Van Gennip and Others* (C-137/17, EU:C:2018:771, paragraph 99), and of 9 February 2012, *Urbán* (C-210/10, EU:C:2012:64, paragraphs 41 and 44).

31 *Link Logistik*, paragraph 45.

32 See, for a practical example of this situation, judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraphs 88 to 97), where it became apparent that the prohibition of discrimination imposed was sufficiently precise and unconditional even if its applicability before the national judge could not lead to a specific result.

33 For example, it might be rather clear that, for a given type of offence, it is wholly disproportionate to impose penalties in the range of tens of thousands or hundreds of thousands of euros. Thus, in that regard and to that extent, there is no doubt as to the clarity and precision of what 'proportionality of penalties' means. That does not preclude, however, the *ex ante* natural indeterminacy as to where exactly, *in view of the circumstances* of the individual case, the specific penalty will ultimately be imposed within the proportionate range (will it be, in the particular case, EUR 1 000 or 5 000?).

34 See already my Opinion in *Klohn* (C-167/17, EU:C:2018:387, point 49), with regard to effectively another embodiment of the proportionality rule requiring that the costs of litigation in environmental matters not be prohibitively expensive.

35 For a recent example, judgment of 14 May 2020, *T-Systems Magyarország* (C-263/19, EU:C:2020:373, paragraphs 71 and 72).

40. Second, the proportionality requirement enshrined in Article 20 of Directive 2014/67 also meets the requirement of being *unconditional*.

41. That criterion implies that the EU provision does not require the adoption of any further measure to be applied. The Member States should not be left with any discretionary power in relation to the implementation of that provision. However, the case-law demonstrates that, notwithstanding the existence of discretionary power on the part of Member States, the conditions of direct effect may still be met if the question of whether the national authorities *exceeded their discretion* can be judicially reviewed.[36] That will be the case as well where a minimum degree of guarantee or protection can be ascertained,[37] and it can be established through judicial review whether that minimum level has been respected.[38]

42. With those considerations in mind, it is to be noted with regard to the *unconditional* nature of the requirement of proportionality of penalties that the applicability of that requirement is not subject to any preconditions. The role of the proportionality requirement in the field of sanctions, as a specific manifestation of the principle of proportionality as a limit in the action of administrative authorities, clearly points to a 'minimum' content or protection. As the Commission rightly points out, even if the proportionality requirement of Article 20 of Directive 2014/67 leaves the Member States a margin of appreciation, it imposes upon them a sufficiently clear limit: penalties cannot go beyond what is necessary.

43. *Link Logistik* excluded the direct effect of the proportionality requirement laid down in Article 9a of Directive 1999/62 on the basis of a very strict notion of clarity, precision and unconditionality. The fact, pointed out in paragraph 51 of *Link Logistik*, that a provision of a directive needs transposition through the adoption of national rules[39] cannot per se preclude the direct effect of a provision included in such a directive. If that were to be the case, then directives would always be prevented from deploying direct effect in cases of their delayed, lacking or even incorrect transposition by the national legislature.

44. It is true that the provisions on sanctions included both in Article 9a of Directive 1999/62 and in Article 20 of Directive 2014/67, at issue in the present case, do not contain precise rules on the establishment of penalties, as noted in paragraph 52 of *Link Logistik*. Nonetheless, this does not preclude the clarity, precision and unconditional character of the proportionality requirement, nor the corresponding prohibition to adopt disproportionate penalties. In other words, the need

36 Judgment of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraphs 7 and 13). See also judgments of 24 October 1996, *Kraaijeveld and Others* (C-72/95, EU:C:1996:404, paragraph 59); of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 64); and of 21 March 2013, *Salzburger Flughafen* (C-244/12, EU:C:2013:203, paragraphs 29 and 31). See, for a more recent application, judgment of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519, paragraph 25 and the case-law cited), where the Court found that even where the wording of an EU law provision 'is not sufficiently precise to enable an applicant … to rely directly on that provision in order to invoke criteria which should in his view be applied when assessing his application, the fact remains that such an applicant is entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by that directive'.

37 See, for example, judgments of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 19); of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 17); and of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 35).

38 See, in that regard, judgment of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468, paragraph 37): 'this discretion, which a Member State may exercise when transposing that provision into national law, *does not preclude judicial review* of the question whether it has been exceeded by the national authorities' (my emphasis).

39 It might be added, as a side note, that such a statement does not even appear to be factually accurate in a situation such as the one in *Link Logistik*, or in fact in the present case. In those cases, the national legislature has already exercised its transposition choice. It has done so, however, in a clearly excessive and thus incorrect manner, bringing about an incorrect implementation of EU law at the national level. Intriguingly, what is required under the requirement of proportionality of penalties was clear and unconditional enough for this Court to declare, on the basis of the individual example, the national rules incompatible with that rule, but then it is not clear and unconditional enough to be applied directly by the national judge in the same individual case?

for intervention of the Member States and their margin of discretion affects generally the establishment of a complete system of sanctions,[40] but not the material content of the proportionality requirement and the obligations that it encompasses.

45. In summary, I naturally agree with the Court that the initial choice as to the nature, type, and range of the penalties is and should be for the national legislature to make when duly transposing the EU law at issue, such as Article 9a of Directive 1999/62, or Article 20 of Directive 2014/67 for that matter. However, for all the reasons outlined in this section, that certainly does not preclude that, within the bulk of EU law provisions that the national legislature is supposed to transpose, some of them, such as the requirement of proportionality of penalties, are already in themselves directly effective and thus justiciable, if the case and need arise, before national courts.

3. Further elements justifying the direct effect of the proportionality requirement

46. There are a number of additional considerations that ought to be taken into account when adopting a position on the proportionality requirement enshrined in Article 20 of Directive 2014/67. Indeed, from a broader, systemic point of view, it is a truism to suggest that the embodiment of the proportionality requirement within that specific provision is far from a lonely, isolated provision, both in its vertical dimension (its relation to the Charter of Fundamental Rights of the European Union ('the Charter'), the Treaties, and general principles of law) as well in the horizontal one (with a myriad of almost identically worded provisions spread over a number of other secondary law instruments). As the present case and the issues raised therein clearly demonstrate, the choice exercised in *Link Logistik* has repercussions and is causing ripple effects across the water level of EU law.

47. First, denying the direct effect of the provision at issue in this case, containing the proportionality requirement vis-à-vis penalties in one specific field, is likely also to lead to the rejection of the directly effective character of Article 49(3) of the Charter and the prohibition of disproportionate penalties.

48. Admittedly, the Court has not yet taken an express position on that specific right of the Charter. However, in view of the overall direction of the most recent case-law regarding the direct effect of the provisions of the Charter, to deny direct effect of Article 49(3) of the Charter would be a rather surprising outcome. Indeed, similarly (or even more) vague provisions or principles, such as the right to effective judicial protection,[41] the principle of non-discrimination on the basis of religion or belief,[42] the principle *ne bis in idem*,[43] or the right to paid holidays,[44]

40 See paragraph 54 of *Link Logistik*, emphasising that it is for the national legislature alone to design an appropriate system of penalties.

41 See, for example, judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 78); of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626, paragraph 56); of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 162); of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 145); or of 15 April 2021, *Braathens Regional Aviation* (C-30/19, EU:C:2021:269, paragraph 57).

42 See judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 76); of 11 September 2018, *IR* (C-68/17, EU:C:2018:696, paragraph 69); and of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraph 76).

43 See, for example, judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraph 66).

44 Judgments of 6 November 2018, *Bauer and Willmeroth* (C-569/16 and C-570/16, EU:C:2018:871, paragraph 85), and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 74).

have been declared directly effective in recent times.[45] Having due regard for the precision, clarity and unconditional character of the rule at issue, the prohibition of disproportionate penalties emerges, in my view, as a far more qualified candidate for direct effect.

49. Second, a proportionality element is embedded in the content of all fundamental freedoms. Even if it is perhaps not always expressly mentioned in a Treaty provision covering a fundamental freedom as such, it tends to be inserted by way of case-law and applied within the test of the analysis of the justifications of restrictions or to indirectly discriminatory rules or practices.[46]

50. This is, in particular, visible, in relation to the legal framework applicable to the present case. In *Maksimovic*, the Court examined national provisions with almost identical content through the prism of free-movement rules. The Court declared that the national provisions at issue were contrary to Article 56 TFEU because they were disproportionate.[47] Yet there is no doubt that Article 56 TFEU is directly effective.[48]

51. In such circumstances, it would be paradoxical, to say the least, to consider that the national provisions regarding sanctions shall be set aside because they are contrary to the *general* prohibition to introduce disproportionate obstacles to free movement under the directly effective Article 56 TFEU, but to conclude that the more *specific* provision regarding the proportionality of penalties within the more specific directive on the issue of the posting of workers is not directly effective.

52. Moreover, the content of the proportionality requirement apparently remains the same, irrespective of whether it is examined as part of Article 20 of Directive 2014/67 or as part of the more general provision of Article 56 TFEU. The two subsequent orders relating to the interpretation of Directive 2014/67[49] repeat almost verbatim, when interpreting the requirement of proportionality of Article 20 of the abovementioned directive, the reasoning laid out by the Court in *Maksimovic* with regard to the proportionality requirement enshrined in Article 56 TFEU. It was the similarity with *Maksimovic* that contributed to the adoption of reasoned orders on the basis of Article 99 of the Rules of Procedure.

53. Third, the Court has impliedly declared that the provision of the TFEU according to which Member States must adopt effective sanctions in order to protect the financial interests of the Union, namely Article 325 TFEU, is directly effective. The Court has also expressly recognised

45 For that matter, so has Article 19 TEU – see judgment of 18 May 2021, *Asociația "Forumul Judecătorilor din România" and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraphs 250 to 252).

46 For example, judgments of 19 April 2007, *Stamatelaki* (C-444/05, EU:C:2007:231); of 13 November 2018, *Čepelnik* (C-33/17, EU:C:2018:896, paragraphs 46 to 50); or of 3 March 2020, *Google Ireland* (C-482/18, EU:C:2020:141, paragraphs 44 to 54).

47 *Maksimovic*, paragraphs 46 to 50. That case was decided exclusively on the basis of Article 56 TFEU. Directive 2014/67 did not temporarily apply to the facts in the main proceedings.

48 See, for example, judgments of 3 December 1974, *van Binsbergen* (33/74, EU:C:1974:131, paragraph 26); of 17 December 1981, *Webb* (279/80, EU:C:1981:314, paragraphs 13 and 14); of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212, paragraph 27); of 18 December 2007, *Laval un Partneri* (C-341/05, EU:C:2007:809, paragraph 97); or of 13 April 2010, *Wall* (C-91/08, EU:C:2010:182, paragraph 68).

49 See orders of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108, paragraphs 32 to 41), and *EX and Others* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103, paragraphs 34 to 43).

the duty of the Member States to set aside national law provisions that are contrary to that requirement.[50] In the line of case-law emerging under that provision, the focus has been, however, not on the proportionality, but on the *effectiveness* requirement.

54. However, it is hard to claim that the effectiveness requirement contained in that provision is in fact sufficiently clear, precise and unconditional, but that the proportionality requirement is not. Apart from the hardly justifiable incoherence of such a proposition, there is also the rather morally questionable outcome of such a potential distinction. Only the effectiveness requirement, leading to the disapplication of national rules that make the sanctions less effective, and therefore a situation which is in the end more onerous to the individuals, can be directly effective. The disapplication of national rules that breach the requirement of proportionality, which would then function in favour of the interests of the sanctioned individuals, cannot be directly effective.

55. Fourth and finally, as the present case demonstrates, a decision of the Court on the issue of the direct effect of the requirement of proportionality of penalties is likely to have horizontal repercussions in a number of other secondary law regimes beyond Directive 2014/67, or Directive 1999/62 for that matter. There are a great number of directives in various areas of EU law containing an almost identical, standard provision on sanctions, stating that sanctions or penalties to be provided for by the Member State shall be 'effective, proportionate and dissuasive'.

56. Certainly, each individual directive regulates different elements, issues, or areas of law. However, I am not sure how that fact could help differentiate the precision, clarity, or conditionality of the requirement of proportionality of penalties that remains worded in virtually identical terms in all those instruments. Certainly, in view of the regulatory subject matter and the type of offences that need to be punished, the specific range of proportionate penalties is likely to vary. Logically, the failure to pay a highway toll is, in terms of its nature, gravity, and thus the penalties that could reasonably be imposed, likely to differ from, for instance, the failure to satisfy the obligation to submit a mandatory public takeover bid after having acquired majority share in a company, on the one hand, or dumping tonnes of toxic waste into a river, on the other.

57. However, in my view, in all those situations, the nature and the content of the (directly effective) requirement of proportionality of penalties remains the same, irrespective of the regulatory field. The area of law and the type of offences that are to be punished are simply a factual element that is to be taken into account and factored into the otherwise identical equation of proportionality between the aims and means.[51]

58. All those considerations point, in my view, to the conclusion that, unlike what was declared in *Link Logistik*, the requirement of proportionality of penalties under Article 20 of Directive 2014/67 is directly effective.

[50] Judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555, paragraph 52), stating that 'the provisions of Article 325(1) and (2) TFEU … have the effect, in accordance with the principle of the precedence of EU law, in their relationship with the domestic law of the Member States, of rendering automatically inapplicable, merely by their entering into force, any conflicting provision of national law'. See also judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraph 39).

[51] As already set out above in point 37 of this Opinion. For the same logic applied to the nature and scope of remedies in general, see my Opinion in *An tAire Talmhaíochta Bia agus Mara, Éire agus an tArd-Aighne* (C-64/20, EU:C:2021:14, in particular points 54 to 62).

B. The specific consequences of the direct effect of the proportionality requirement

59. By its second question, the referring court seeks to ascertain whether, in the absence of action on the part of the legislature, the principle of interpretation in conformity with EU law permits (or even requires) national courts to *supplement* Austrian legislation before the legislature amends it, in order to uphold the proportionality requirement laid down in Article 20 of Directive 2014/67.

60. Two clarifications must be made with regard to the assumptions on which that question apparently rests. Those clarifications ultimately lead to its reformulation.

61. First, the explanations offered by the referring court, motivating its second question, and, in particular, the doubts it has concerning the judgment of the Verwaltungsgerichtshof (Supreme Administrative Court), make apparent the confusion that arose from the judgment of the Court in *Link Logistik*. Indeed, relying on that decision, the referring court takes as the foundation of its second question the possibility that national legal provisions may be disapplied in a case where a provision was declared to be deprived of direct effect.

62. However, in view of what will be set out in this section of the present Opinion, the Court recently confirmed that the setting aside of national rules is only possible in cases where the EU law rule invoked is endowed with direct effect. The referring court's second question thus refers, in reality, to the possibility of a partial disapplication of national provisions or even of 'supplementation' thereof with the relevant rules of EU law, rather than to an instance of interpretation in conformity with EU law. By 'supplementation',[52] I cannot but understand that to mean the direct application of the proportionality requirement in order to complement national provisions and, in particular, to fill the vacuum of the elements of national law that have been set aside.

63. Second, the referring court has raised its second question only in the event that the first question should be replied in the negative, that is to say, if the Court were to declare that Article 20 of Directive 2014/67 is not directly effective. However, I have proposed that the first question be replied in the affirmative, that is, acknowledging the direct effect of Article 20 of Directive 2014/67. That said, the referring court's second question remains very much relevant also, or rather in particular, in the circumstances where the EU law provision at issue has direct effect. Indeed, it would actually be in the reversed circumstances, where the requirement of proportionality of penalties were not to be directly effective, that the second question would become moot.[53]

64. The second question must therefore be reformulated as follows: Does the requirement of proportionality of penalties enshrined in Article 20 of Directive 2014/67 permit and/or require the national court and administrative authority to supplement – in the absence of new legislation at national level – the domestic penal provisions applicable in the present proceedings?

52 Put as 'ergänzen' in the German original.

53 Alternatively, the second question would then have to be rephrased as enquiring as to the limits of conform interpretation in such cases, and bound to be answered in the negative. Removing parts of national provisions that are incompatible with EU law and then (or simultaneously) supplementing national law with EU law provision not previously put there by the national legislature, and thereby clearly altering the content of national rules, could hardly be seen as an instance of conform interpretation, at least in my view. See, for example, judgments of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 39); of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 40); or of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 76 et seq.).

65. In order to provide an answer to that question, I shall first recall the stance taken by the Court in *Link Logistik* with regard to the disapplication of national law conflicting with non-directly effective EU law provisions (1) as well as the subsequent clarification provided in this regard by the Grand Chamber of the Court in *Popławski II* (2).[54] I shall then briefly set out the different positions taken by Austrian higher courts (the Verwaltungsgerichtshof (Supreme Administrative Court) and the Verfassungsgerichtshof (Constitutional Court)) as a result of *Maksimovic* (3). Next, I shall turn to the implications of the direct effect of the requirement of proportionality of penalties and the potential limitations that exist in the specific field of sanctions (4). I shall conclude with a final, more general observation about terminology and the rather intuitive need for proportionality when it comes to the setting aside of a provision in the name of the principle of proportionality (5).

1. The Court's position in Link Logistik

66. As already outlined above, in *Link Logistik*, the Court concluded that Article 9a of Directive 1999/62 does not have direct effect.[55]

67. The Court then continued by recalling the obligation of the Member States to achieve the result envisaged by the directive as well as the principle of interpretation in conformity with EU law and its limits. However, the Court went on to acknowledge that interpretation in conformity with EU law was not possible in the case at hand.[56]

68. However, even after having excluded both direct effect as well as an interpretation of national law in conformity with EU law, the Court concluded that 'the national court must fully apply EU law and protect the rights which EU law confers on individuals, disapplying if necessary any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to EU law'.[57]

69. That statement is repeated in the operative part of the judgment, stating that 'the requirement of proportionality in Article 9a of Directive 1999/62 … *cannot be regarded as having direct effect*' and that 'the national court must, by virtue of its duty to take all appropriate measures, whether general or particular, to ensure the implementation of that provision, interpret national law in conformity with that provision or, if such an interpretation is not possible, *disapply any national provision in so far as its application would, in the circumstances of the case, lead to a result contrary to EU law*'.[58]

2. Subsequent clarification in Popławski II

70. Shortly after the ruling in *Link Logistik*, the Court, sitting as the Grand Chamber, delivered its judgment in *Popławski II*. That case concerned the possibility of setting aside national rules contrary to a provision of Framework Decision 2008/909/JHA,[59] an instrument that, by mandate

54 Judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, '*Popławski II*').

55 *Link Logistik*, paragraph 56. See also above, points 28 to 30 of this Opinion.

56 Ibid., paragraph 60.

57 Ibid., paragraph 61.

58 Ibid., paragraph 62 and the operative part of that judgment. My emphasis.

59 Article 28(2) of Council Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

of the Treaty, is deprived of direct effect.[60] As such, the specific issue which arose was whether, on the mere basis of the principle of primacy, a national court could set aside national rules contrary to non-directly effective EU law provisions.

71. The Court ruled that 'a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it'.[61] It further clarified that, 'a national court's obligation to disapply a provision of its national law which is contrary to a provision of EU law, if it stems from the primacy afforded to the latter provision, is nevertheless dependent on the direct effect of that provision in the dispute pending before that court. Therefore, a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect'.[62]

72. The central element of that ruling has been confirmed several times thereafter with regard to a number of other EU law provisions, not contained in framework decisions.[63]

73. Thus, *Popławski II* and the subsequent case-law, with a number of those latter judgments also delivered in the Grand Chamber of the Court, have *authoritatively settled* the issue of whether the setting aside of national law may be only the consequence of primacy, or of primacy of EU law in conjunction with the direct effect of the EU law provision that is to be applied.

74. Certainly, there is no disguising the fact that that very issue had already been discussed for some time,[64] with varying options and visions on the table.[65] However, in view of the repetitive authoritative statements from the enlarged formation of the Court settling that issue, I consider that discussion now to be over, certainly in the judicial forum.

3. Implications for the present case: the competing visions at national level

75. At national level, different courts hold divergent visions on the practical meaning for ongoing cases of the rulings of incompatibility delivered by the Court with regard to several elements of the system of penalties at issue. The second question raised by the referring court is framed by those competing visions.

60 (Former) Article 34(2)(b) TEU. *Popławski II*, paragraphs 69 to 71.

61 *Popławski II*, paragraph 62.

62 Ibid., paragraph 68.

63 See, for example, judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 161); of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114, paragraph 42); of 14 May 2020, *Staatsanwaltschaft Offenburg* (C-615/18, EU:C:2020:376, paragraph 69); of 30 September 2020, *CPAS Liège* (C-233/19, EU:C:2020:757, paragraph 54); of 15 April 2021, *Braathens Regional Aviation* (C-30/19, EU:C:2021:269, paragraph 58); and of 18 May 2021, *Asociația "Forumul Judecătorilor din România" and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 248).

64 In the scholarly arena, see, for example, for different positions in this debate: Lenaerts, K. and Corthaut, T., 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', *European Law Review*, vol. 31, 2006, pp. 287-315, at pp. 301-311; Prechal, S., 'Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union', in Barnard, C. (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*, Oxford University Press, 2007, pp. 35-69; Muir, E., 'Of Ages in – and Edges of – EU Law', *Common Market Law Review*, vol. 48, 2011, pp. 39-62; or Dougan, M., 'Primacy and the Remedy of Disapplication', *Common Market Law Review*, vol. 56, 2019, pp. 1459-1508.

65 In fact, the Opinion of Advocate General Campos Sánchez-Bordona, which sustained the opposite conclusion, pleaded in favour of the possibility to apply the remedy of disapplication to rules which were not directly effective on the basis of *Link Logistik*: see his Opinion in *Popławski* (C-573/17, EU:C:2018:957, point 117). See also my Opinion in *Cresco Investigation* (C-193/17, EU:C:2018:614, points 114 to 149), where I suggested, in essence, a similar approach with regard to setting aside national law that is incompatible (only) with provisions of the Charter.

76. On the one hand, there is the approach taken in the judgment of the Verwaltungsgerichtshof (Supreme Administrative Court).[66] In the framework of a similar case and after *Maksimovic* was handed down, that court found that, in order to comply with EU law, only some elements of the national provision at issue should be set aside. As a result of that judgment, it is still possible to impose penalties that are, according to that court, in accordance with the requirements of proportionality.

77. First, the Verwaltungsgerichtshof (Supreme Administrative Court) ruled that, in order to comply with EU law, the words 'for each worker concerned' should be set aside. Those terms were contained in Paragraph 7i(4) of the AVRAG, but correspond essentially to the terms of Paragraph 26(1) and Paragraph 28 of the LSD-BG, relevant to the present case.[67]

78. If I understand correctly, by disapplying the expression 'for each worker concerned', the limits imposed by the national provisions with regard to each worker become applicable in general, as regards the entirety of the workers concerned. Setting aside the words 'for each worker concerned' is therefore tantamount not only to considerably lowering the potential amount of fines, and the introduction of a clear range of the permissible amounts, but also to the introduction of an overall cap, which was missing in the legislation and which was one of the factors that motivated this Court to find that the relevant provisions of Austrian law were disproportionate.[68]

79. Second, the Verwaltungsgerichtshof (Supreme Administrative Court) also ruled that the minimum fines provided for by law should cease to apply. Third, it declared that custodial sentences in the event of non-payment should cease to be handed down in accordance with Paragraph 16 of the Law on administrative offences. The existence of minimum fines, as well as the possibility to apply custodial sentences, were also elements which motivated this Court to find that the sanctions at issue were disproportionate in *Maksimovic*.[69] Fourth, the Verwaltungsgerichtshof (Supreme Administrative Court) considered that it was not necessary to set aside the provision relating to the contribution to court costs.[70]

80. Thus, as a consequence of the approach embraced by the Verwaltungsgerichtshof (Supreme Administrative Court), even though considerably reduced, it still remains possible for administrative authorities to impose a penalty which should now nonetheless be in conformity with EU law.

81. Taking as its point of departure the reply of the Court in *Link Logistik*, the referring court considers the judgment of the Verwaltungsgerichtshof (Supreme Administrative Court) to be an instance of interpretation in conformity with EU law, and has correctly observed that, if that

66 Ra 2019/11/0033 of 15 October 2019.

67 As the Austrian Government noted in its submissions, the Verwaltungsgerichtshof (Supreme Administrative Court) has applied its reasoning related to Paragraph 7i of the AVRAG to Paragraphs 26 and 28 of the LSD-BG (judgments of 25 February 2020, 2018/11/0110; of 26 February 2020, 2020/11/0004; and of 27 April 2020, 2019/11/0171).

68 *Maksimovic*, paragraph 42; orders of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108, paragraph 36); and *EX and Others* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103, paragraph 38).

69 Paragraphs 43 and 45; orders of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108, paragraph 37); and *EX and Others* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103, paragraphs 39). However, the element of custodial sentences was not considered in the two orders.

70 In conjunction with the other elements, the Court had already found that that element was one of the factors that rendered the system disproportionate. *Maksimovic*, paragraph 44; orders of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108, paragraph 38); and *EX and Others* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103, paragraph 40).

were the case, the solution it purports constitutes an interpretation *contra legem*.[71] In those circumstances, it wishes to know whether the solution proposed by the Verwaltungsgerichtshof (Supreme Administrative Court) complies with EU law. More specifically, the referring court asks whether it is entitled to apply the solution devised by the Verwaltungsgerichtshof (Supreme Administrative Court) or whether, in view of the operative part of *Link Logistik*, the only possibility available to it is to proceed to the complete disapplication of the conflicting national provisions.

82. On the other hand, the referring court has also pointed out that the Verfassungsgerichtshof (Constitutional Court) seems to have taken a different stance. Deciding on a constitutional complaint against a ruling of a lower administrative court concerning the penalties imposed on the basis of the national provisions at issue, the Verfassungsgerichtshof (Constitutional Court) took into account the findings of the Court in *Maksimovic*, in order to declare that the right to property had been infringed.[72] After having evoked the case-law of the Court according to which national courts must fully apply EU law, disapplying if necessary any contrary provision of national law, the constitutional ruling annulled the penalties imposed. In reaching that conclusion, the Verfassungsgerichtshof (Constitutional Court) stated that applying national penalties which are incompatible with directly effective EU rules amounts to imposing sanctions without any proper legal basis.[73]

83. The referring court explains that those constitutional rulings have been interpreted by some national courts as meaning that it is not allowed to continue applying the penalties at issue at all. No sanction can be imposed whatsoever until new legislation is passed. The referring court therefore presents the positions of the Verfassungsgerichtshof (Constitutional Court) and of the Verwaltungsgerichtshof (Supreme Administrative Court) as being opposed.

84. The Austrian Government has pointed out that there is no contradiction between the case-law of the Verfassungsgerichtshof (Constitutional Court) and that of the Verwaltungsgerichtshof (Supreme Administrative Court).

85. It is certainly not for this Court to take any position on national law, a fortiori to arbitrate between national courts on matters of national law. However, to the extent that it concerns consequences flowing from EU law, the doubts of the referring court are illustrative of a well-known dilemma: in the face of a national provision contrary to a directly effective EU law provision, is the disapplication of the entirety of the provision of national law the only remedy available, or is it possible to proceed by way of a partial or selective disapplication or even supplementation of national law? Whereas the solution adopted by the Verfassungsgerichtshof (Constitutional Court) seems to have followed the first path, the case-law of the Verwaltungsgerichtshof (Supreme Administrative Court) provides an example of the second. Put simply, what exactly does it mean to 'disapply'?

71 See already above, footnote 53 of this Opinion.

72 Judgment of the Verfassungsgerichtshof (Constitutional Court) of 27 November 2019, E 2047 – 2049/2019.

73 According to the referring court, the Verfassungsgerichtshof (Constitutional Court) has annulled the penalties in several other cases, inter alia E 3530/2019 and others, E 2893/2019 and others, E 3530/2019 and others, and E 2893/2019 and others.

4. The specific implications of direct effect of the proportionality requirement

86. The interested parties that submitted observations have taken different positions with regard to the consequences of the direct effect of the proportionality requirement enshrined in Article 20 of Directive 2014/67.

87. The Commission submits that that provision can be the basis for the judge to adjust the penalties in conformity with the proportionality principle. This is because, first, Article 20 of that directive requires that the Member States impose penalties on the obligations covered by the directive: not providing any penalties would also be contrary to the directive. Second, as the Court has declared in its orders, national rules providing for penalties in the case of infringement of the obligations of labour law at issue is appropriate to the attainment of the legitimate objectives pursued by the directive.[74] Third, conflict between EU law and national law does not imply necessarily that the latter must be completely set aside: EU law supplements national law only to the extent which is sufficient to allow the adoption of a penalty that is in conformity with the proportionality requirement. In this connection, the Commission considers that Austrian courts should even continue to apply cumulated sanctions, inasmuch as such cumulative sanctions are not per se disproportionate, according to the case-law of the Court.[75]

88. Similarly, the Austrian Government submits that the complete disapplication of the national provisions would lead to a situation of infringement of EU law. The partial disapplication of the national provisions at issue could, by itself, ensure that the penalties foreseen by national law could be applied by national authorities and courts in conformity with the requirements of EU law.[76]

89. Conversely, the Polish Government considers that setting criminal sanctions independently from the wording of national legal provisions could infringe the principle of legality; this means that the only possible solution is the complete disapplication of the national provisions. In a similar vein, the Czech Government submits that an approach according to which the amount of the penalty is fixed not on the basis of criteria established by law, which can be known in advance by the addressees of the regulation, but on the basis of criteria established *ex post* by jurisdictions or administrative authorities, would infringe the principle of legal certainty.

90. I agree with the Commission that the direct effect of the proportionality principle should not necessarily lead to the *complete* disapplication of the national provisions on penalties. In my view, the key element in this regard is the fact that the Court has declared certain excessive elements of the national sanctioning regime to be incompatible with EU law. The Court has not declared incompatible penalties per se, nor, a fortiori, stated that the illegal behaviour giving rise to those penalties cannot be sanctioned. Put differently, the requirement of *proportionality of penalties* can hardly be equated with the requirement of there being *no penalties*. That proposition appears to be, certainly in the abstract, somewhat disproportionate.

74 Orders of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108, paragraph 32), and *EX and Others* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103, paragraph 34).

75 *Maksimovic*, paragraph 41; see also orders of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-645/18, not published, EU:C:2019:1108, paragraph 35), and *EX and Others* (C-140/19, C-141/19 and C-492/19 to C-494/19, not published, EU:C:2019:1103, paragraph 37).

76 The position of the Austrian Government on this point is somewhat puzzling, especially given that that government has proposed a response to the first question that would reject the direct effect of the proportionality requirement, and has not limited its reply to the second question in the form of a reply only in the alternative, but rather frames the partial disapplication as conform interpretation. However, similarly to the referring court, it may be assumed that, in that regard, the Austrian Government takes the problematic holding of the Court in *Link Logistik* as its point of departure.

91. However, I do recognise the concerns raised by the referring court in the particular context of sanctions of a criminal nature, leading to concerns in terms of the principles of legality, legal certainty and equality before the law, to which I now turn.

(a) Legality, legal certainty and equality before the law in the imposition of penalties

92. The referring court considers that the solution following from the judgment of the Verwaltungsgerichtshof (Supreme Administrative Court) may be problematic for reasons linked to the principle of legality. That principle is interpreted very strictly by the Verfassungsgerichtshof (Constitutional Court), in particular in the field of criminal law. Moreover, as the referring court has pointed out, various administrative courts in Austria have interpreted differently the judgment of the highest Austrian courts. Faced with the divergent positions adopted by administrative courts, the referring court summarises the current situation as being beset by inconsistent case-law and legal uncertainty. Furthermore, that court considers that the inconsistencies in the current adjudication practice create cause for concern from the point of view of the principle of equality. The application of penalties on a case-by-case system is unfamiliar to the Austrian legal system in general and to the criminal justice system in particular.

93. The Czech Government has pointed out that, in any event, Article 20 of Directive 2014/67 cannot be considered as directly effective in order to be invoked against a private party. The Court's case-law excludes the possibility for a Member State to rely on the direct effect of a directive in order to apply penalties on the basis of the provisions of a directive. That government also posits that, if each court or administrative authority were able to modulate national rules in a creative manner, this would inevitably lead to differences in the amount of sanctions imposed, without objective motivation.

94. In the same vein, the Polish Government considers that leaving it to each court or authority to adapt the sanctions deviating from the legal provisions would contravene the requirements of the principle legality. The Polish Government has even submitted that the different interpretations arrived at by the various courts show that Article 20 is not directly effective.

95. I am unconvinced by those arguments for the following reasons.

96. The *legality* principle requires that legislation must clearly define offences and penalties that apply at the moment when the punishable act or omission was committed. That requirement is satisfied once individuals are able to ascertain which acts or omissions will make them criminally liable, on the basis of the wording of the relevant provision and, if need be, with the interpretative assistance of case-law.[77] Those requirements do not, however, prohibit the gradual clarification of rules of criminal liability by means of judicial interpretation, provided that those interpretations are reasonably foreseeable.[78] Additionally, the *lex mitior* part of Article 49 of the Charter precludes heavier penalties than the one which was applicable at the time the criminal offence was committed from being imposed.

[77] See, for example, judgments of 3 May 2007, *Advocaten voor de Wereld* (C-303/05, EU:C:2007:261, paragraph 50); of 31 March 2011, *Aurubis Balgaria* (C-546/09, EU:C:2011:199, paragraph 42); and of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 162).

[78] See judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 167 and the case-law cited).

97. In my view, the possibility to disapply in part national provisions to the extent that they infringe EU law, and to complement or supplement them through the direct application of the proportionality principle, does not infringe the principle of legality as enshrined in Article 49 of the Charter.

98. First, the offences and penalties were defined at the moment when the punishable act was committed. As such, individuals were able to ascertain the consequences of their conduct. The direct effect of the proportionality principle does not lead to the imposition of penalties on the basis of an incorrectly transposed directive. The penalties are clearly based on national law, as validly promulgated and made available to its addressees, not on the directive. For that reason, the case-law of the Court on the impossibility directly to apply directives determining or aggravating the criminal liability of individuals [79] is simply not relevant in the present case.

99. Second, the proportionality requirement enshrined in Article 20 of Directive 2014/67 is the basis for *mitigating* and correcting the national provisions, through the direct effect of the requirement of proportionality. In other words, the proportionality requirement is not the basis on which sanctions are imposed or aggravated, but the basis on which legally imposed penalties are *reduced* in order to be rendered compliant with EU law.

100. Third and again, the judgment declaring the disproportionality of penalties in *Maksimovic* and the two subsequent orders of the Court do not affect the validity of the national applicable provisions defining the offences. Thus, the criminalisation and punishment of those offences clearly remain lawful. What the decisions of the Court affect are only certain specific elements of the national sanctioning regime that were declared incompatible because they were disproportionate.

101. Next, there are the concerns voiced by the referring court relating to the existence of divergent case-law in administrative courts and the negative consequences that it may entail from the point of view of the *principles of equality* and *legal certainty*. While I fully share those concerns, it is difficult to suggest that the direct effect of the requirement of proportionality of penalties would be their sole or even main cause.

102. Some degree of temporal uncertainty concerning the correct application of national rules following the declaration of their incompatibility with EU law is indeed inherent in the operation of the diffuse and decentralised EU judicial system. In contrast to, for instance, a number of national legal systems, where a declaration of unconstitutionality by (one) national constitutional court leads to an annulment of the national rules with effect *erga omnes*, the setting aside by (any) national court for incompatibility with EU law may be, for a certain period of time, subject to the normal procedural rules and instances available in national law. Therefore, provided that the matter is not authoritatively settled by this Court as the ultimate interpreter of EU law, there might, before being unified at national level by the respective apex court, even be competing views on the same issue by the various national courts.

103. However, it cannot be overlooked that the legal uncertainty and diversity in the application at national level in the present case is largely due to two factors which find their origin in the national context. First, the national legislature, as the referring court has repeatedly emphasised, remained inactive. However, one would naturally assume that, if any uncertainty regarding the

[79] For example, judgments of 11 June 1987, *Pretore di Salò* (14/86, EU:C:1987:275, paragraph 20); of 8 October 1987, *Kolpinghuis Nijmegen* (80/86, EU:C:1987:431, paragraph 13); of 3 May 2005, *Berlusconi and Others* (C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraph 74); or of 20 December 2017, *Vaditrans* (C-102/16, EU:C:2017:1012, paragraph 56).

scope of application of nationally imposed sanctions is to be clarified, it would be for the national legislature to carry out that exercise in order to minimise the temporal uncertainty following a declaration of incompatibility.

104. Second, even if the national legislature did not step in, achieving uniformity in the application of national law should ultimately be secured within the typically hierarchically organised national judicial system, certainly within the civil legal tradition. It is commonly the role of apex courts to unify the case-law within their respective branches of jurisdiction. However, within that dimension, it would appear that the national rules on jurisdiction allow, in essence, for a choice of whether to challenge a decision of a lower administrative court before the Verwaltungsgerichtshof (Supreme Administrative Court) or before the Verfassungsgerichtshof (Constitutional Court). [80]

105. I wish to emphasise clearly that this is, as a matter of EU law, possible. Indeed, how national judicial institutions and procedures are structured remains within the realm of the initial choice of the Member State. [81] However, it would be a little more problematic if one were to take the consequences generated by such national choices (inaction of the legislature and the effective lack of a judicial authority able to unify the case-law) and present them as consequences of the potential direct effect of the EU law-based requirement of proportionality of penalties.

106. Finally, beyond the structural level, there still remains the issue of potential uncertainty in terms of the exact amount of the fine in each individual case. In the context of imposing a penalty, even if one were to embrace the approach chosen by the Verwaltungsgerichtshof (Supreme Administrative Court) as a starting point, there still remains the range of, for instance, a penalty having to be set anywhere between EUR 1 000 and EUR 10 000, or, if the minimum were to be removed, then effectively EUR 0 and EUR 10 000. It is therefore conceivable that, in one case, one offender would receive a penalty in the total amount of EUR 100, while another may receive a penality amounting to EUR 5 000. That could indeed, in turn, raise the issue of equality before the law.

107. However, a problem of equality could then arise only if the two offenders were in an identical situation. There would therefore be no distinguishing elements. That said, life tends to be infinitely variable. That is why both administrative and criminal law, when setting out penalties or sanctions in general, at least in modern law, [82] normally do not proceed by a 'one size fits all' approach, but by setting a permissible range, within which administrative or judicial discretion is exercised.

80 As the experience of a number of European systems seeking to bring about the distinction between matters of constitutionality, on the one hand, and (mere or simple) legality, on the other, for the purposes of attribution of jurisdiction shows, that borderline is very elusive and impossible to draw in practice. The present case offers a vivid example in this regard. The same legal problem can transit freely between the two and can be phrased as a matter of constitutionality (right to property infringed upon by a penalty) or legality (compatibility of the national decision imposing the penalty with national and EU law). For a comparative discussion with examples from Germany, Spain, the Czech Republic, Slovakia, or Slovenia, see the volume edited by the Ústavní soud (Constitutional Court, Czech Republic) entitled *The Limits of the Constitutional Review of the Ordinary Courts' Decisions in the Proceedings on the Constitutional Complaint*, Linde, Prague, 2005. See also, for instance, Bundesministerium der Justiz, *Entlastung des Bundesverfassungsgerichts: Bericht der Kommission*, Moser, Bonn, 1998, pp. 62-66.

81 See, to that effect, judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 52), and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 115).

82 As opposed to past instances of 'tied-sentencing', known for the sheer disproportionality between the act and the punishment, brought about by specific offences being tied to just one possible sanction without any possibility of adapting or modulating that sanction in view of the individual circumstances – see, for example, my Opinion in *An tAire Talmhaíochta Bia agus Mara, Éire agus an tArd-Aighne* (C-64/20, EU:C:2021:14, point 56).

108. Again, as already noted with regard to the unconditional core of the requirement of proportionality of penalties, 'clear, precise and unconditional' does not imply that every aspect is expressly set out in advance in legislation. Such a scenario is simply not realistic. However, what is left undecided must at the very least be justiciable. [83]

109. In summary, I see no issues brought about in the present case, either by the principle of legality of sanctions under Article 49 of the Charter, or by the imperative of legal certainty and equality before the law, as a matter of EU law.

110. That said, it is nonetheless true that the enactment of penalties in the field covered by Directive 2014/67 has not been completely harmonised by EU law. Thus, the sanctions applicable in this area remain within the discretion of the Member States. Their existence is indeed in general mandated by EU law (there must be some sanctions), but the particular problematic elements concerning their (disproportionate) scope and imposition are for the Member States to set.

111. Therefore, recalling the approach adopted by the Court in *M.A.S. and M.B.*, [84] in this situation, national authorities and courts should remain in principle free to apply different (higher) standards for the protection of fundamental rights. That might potentially include stricter visions of the principle of legality of sanctions, if such a requirement indeed exists in national law and is being applied against sanctions enacted by national law that are not fully determined by EU law. [85]

(b) Proportionality in setting aside disproportionate national rules?

112. The findings of the Court in *Maksimovic* and in the subsequent orders declaring the disproportionate character of the penalties provided for by the Austrian legislation were based on a combination of factors: (i) the high amount of the fines; (ii) the unlimited accumulation of those fines; (iii) the fact that there was a minimum threshold below which fines could not fall, even where it is not established that an offence is particularly serious; (iv) the fact that, where an appeal is dismissed, the person has to pay an amount equivalent to 20% of the fine by way of contribution to court costs; and (v) the fact that failure to pay a fine could lead to a custodial sentence. [86]

113. Against that background, in my view, the solution arrived at by the Verwaltungsgerichtshof (Supreme Administrative Court) is pragmatic and at the same time very elegant. By one stroke of the pen, that court set aside a number of elements contained in the national applicable provisions. It introduced a maximum cap while allowing a permissible range for penalties. It furthermore dropped the lower limit and eliminated the possibility to apply the substitution penalty of custodial sentences in the case of non-payment. By doing so, the Verwaltungsgerichtshof (Supreme Administrative Court) set aside different elements of the Austrian system of fines, while preserving the possibility for sanctions to continue to be applied until the legislature proceeds by amending the relevant legislation.

83 See above, points 41 to 42 of this Opinion.

84 See judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 47 to 62).

85 Further on the limits of that possibility, and the interpretation of the proviso carved out by the case-law related to the 'primacy, unity and effectiveness of EU law', see my recent Opinion in Joined Cases *Ministerul Public – Parchetul de pe lângă Înalta Curte de Casație și Justiție – Direcția Națională Anticorupție and Others* (C-357/19 and C-547/19, EU:C:2021:170, points 145 to 156).

86 *Maksimovic*, paragraphs 42 to 45.

114. I cannot but again emphasise that EU law does not exclude the imposition of penalties for the offences at issue, but rather the contrary. Article 20 of Directive 2014/67 imposes the obligation to adopt such penalties, which must be, granted, proportionate, but also dissuasive and effective.Moreover, from the point of view of Article 20 of that directive, the possibility of supplementing national law complies with the objectives of the directive since it would make it possible to strike a reasonable balance between the requirement of proportionality and that of effectiveness and dissuasiveness of penalties.

115. In this connection, the requirement of the proportionality of penalties, which is also enshrined in Article 49(3) of the Charter, can hardly be equated with impunity, where there is a reasonable manner to adjust the national legal order in line with the principle of proportionality. Relying solely on the proportionality principle so as to set aside the possibility to apply any kind of penalties would completely disregard the need to safeguard the objective, declared in Article 1(1) of Directive 2014/67, of guaranteeing respect for an appropriate level of protection of the rights of posted workers.

116. In summary, therefore, it would be somewhat paradoxical, at least from the point of view of EU law, to arrive, in the name of the principle of proportionality, at the disproportionate setting aside of all the concerned provisions on penalties of national law, including those that were in fact never questioned. That statement again does not preclude that those other provisions of national law may become the collateral damage of stricter national visions of the principle of legality, or that in other cases they will simply fall by association since they could no longer be applied independently.

117. What is simply being suggested is that the direct effect of the requirement of proportionality does not require the disproportionate setting aside of any and all national rules. Metaphorically put, the operation to be carried out in the name of EU law ought to resemble a surgical incision rather than carpet-bombing.

5. A coda on direct effect dichotomies: exclusion, substitution … or simple plugging in?

118. Throughout the years, much academic ink has been spilled over hair-splitting distinctions and taxonomies of the various types of direct effect that the Court introduced in one case or may have intended in another. In particular, the distinction between the exclusionary and substitutive effects of EU law provisions [87] with regard to the national rules which are contrary to them remains the subject of heated discussions. [88] Moreover, even if *Popławski II* resolved the upstream question (setting aside because of primacy only, or just primacy and direct effect), the downstream question as to the exact type and number of configurations that may ensue is still very much open.

119. I have no intention of making a contribution to that discussion here. I will, however, simply use this case as an opportunity to underline the limited practical relevance of such taxonomic boxes. As the present case demonstrates, the dividing line between, for example, the exclusionary

[87] See, originally on the distinction, Galmot, Y. and Bonichot, J.-C., 'La Cour de justice des Communautés européennes et la transposition des directives en droit national' 4(1), *Revue française de droit administratif*, 1988, pp. 1-23.

[88] See, for example, Opinion of Advocate General Saggio in Joined Cases *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:1999:620), and Opinion of Advocate General Léger in *Linster* (C-287/98, EU:C:2000:3). See also, inter alia, Dougan, M., 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy', *Common Market Law Review*, 2007, vol. 44, pp. 931-963; Wathelet, M., 'Du concept de l'effet direct à celui de l'invocabilité au regard de la jurisprudence récente de la Cour de Justice' in Hoskins, M. and Robinson, W. (eds), *A True European: Essays for Judge David Edward*, Hart Publishing, Oxford, 2004, pp. 367-389.

and substitutive consequences of direct effect remains rather blurry in a number of cases. It will be heavily case-dependent and more a matter of 'self-declaration' by the relevant court than a clear-cut divide.

120. The approach chosen by the Verwaltungsgerichtshof (Supreme Administrative Court), as summarised in the previous section, is particularly revealing in this regard. The fact that the legal technique used is that of 'disapplication' is dependent upon the wording and structure of the national legal provisions, rather than being an inescapable consequence emanating from the 'essence' of the EU law provision containing the proportionality requirement itself.

121. In fact, similar results could be arrived at by way of 'plugging in' the positive content of the principle of proportionality in order to reach a legal solution through substitution rather than through exclusion. That was, in fact, my proposal in *Link Logistik*, where the design of the national rule (the fixed amount of a fine, irrespective of any individual circumstance of the case) would not have enabled a national court to arrive at a solution that is compliant with the proportionality principle simply by setting aside parts of the national legislation. It was therefore necessary to introduce normative elements stemming from the test and intrinsic to the proportionality principle.[89]

122. This contrast shows that the type of direct effect of the same provision of EU law will thus be logically dependent on the national legal landscape. While in some instances a directly effective provision would completely substitute the 'displaced' contrary national provision, in other instances, only complete disapplication will be possible. In a large number of in-between cases, compliance with EU law may entail only partial disapplication, or disapplication of the elements of the national rule, only to the extent that they conflict with EU law provisions. Eventually, complete or partial disapplication would also need to be combined with the interpretation of the 'remaining' applicable provisions or elements thereof in conformity with EU law.

123. In short, the taxonomic box of direct effect in which a case will find itself will be determined by national law, the structure of the individual case, and the level of abstraction chosen. Often, the same result might be achieved either by excluding a more general rule higher up, or by substituting or inserting a more specific rule into the national legal order.

124. That is why, in my view, whether exactly what is to be done on the basis of a potentially directly effective provision of EU law amounts to exclusion, or substitution, or something else, might be of pedagogical or scholarly interest. That said, such taxonomies should not control the decision of whether direct effect of a specific EU law provision is possible or not. Instead, after having ascertained whether the EU rule at issue is simply justiciable, the focus should turn to the potential consequences of direct effect in the individual case and the protection of individual rights therein.

C. Overruling Link Logistik

125. If the Court were to agree with the considerations made in sections A and B of the present Opinion, then it is bound to revisit its findings in *Link Logistik*.

89 See my Opinion in *Link Logistik N&N* (C-384/17, EU:C:2018:494, point 84 et seq.).

126. As explained in section B of this Opinion, *Popławski II* impliedly and partially overruled the position of the Court in *Link Logistik*. Only national provisions that contravene directly effective provisions of EU law may be set aside by national courts and other bodies.

127. What about the position of the Court in *Link Logistik* with regard to the direct effect of the proportionality requirement? As explained in detail in section A of this Opinion, a number of reasons advocate for a finding that the proportionality requirement in Article 20 of Directive 2014/67 is directly effective.

128. Furthermore, the very important correction brought about by *Popławski II* with regard to the disapplication of national law contrary to EU law also affects the balance underlying the entire reasoning of the Court in *Link Logistik*. That correction also affects the Court's findings with regard to the direct effect of the proportionality requirement. In *Link Logistik*, the Court rejected the direct effect of the requirement of proportionality in Article 9a of Directive 1999/62. However, part of the reasoning leading to that conclusion was based perhaps on the incorrect premiss that the disapplication of national law contrary to EU law was possible for non-directly effective rules. The Court in fact asked the referring court to do exactly that. [90]

129. Against that background, how should one proceed in the present case? In my view, *Link Logistik* should be expressly and openly overruled by the Grand Chamber of the Court.

130. The Court has never proclaimed that it is formally bound by the doctrine of *stare decisis*. It does, nonetheless, adhere to that doctrine in practice. [91] The need to refer coherently to its own precedent and to assure the authoritative character of its case-law means that the Court only rarely proceeds to express overruling. More often, the Court operates by distinguishing the case, or by retrospectively explaining its own case-law so that the different pieces of the jigsaw 'fit together' and are 'clarified'. [92]

131. The past practice of the Court in revisiting its previous decisions is varied. [93] The cases of express overruling remain rare. Even on those seldom occasions, the explanations of the Court in terms of the reasons underlying the adoption of a different position are relatively scarce. In some instances, the Court limits itself to acknowledging the divergent precedent and to signalling that it adopts a different interpretation. [94] In other cases, it becomes apparent that the Court has changed its mind in view of the circumstances and arguments submitted in a subsequent case, [95] or it clarifies its previous position in the light of those newly adduced considerations. [96]

90 *Link Logistik*, paragraph 62 and the operative part of that judgment.

91 See already Slynn, G., 'The Court of Justice of the European Communities', *International and Comparative Law Quarterly*, vol. 33, 1984, p. 409, at p. 423.

92 To name a famous example, judgment of 8 October 1996, *Dillenkofer and Others* (C-178/94, C-179/94 and C-188/94 to C-190/94, EU:C:1996:375, paragraph 20 et seq.), rationalising the previous case-law on state liability for loss and damage caused to individuals as a result of breaches of EU law.

93 On the early debates, see, in particular, Opinion of Advocate General Roemer in *Netherlands* v *High Authority* (9/61, not published, EU:C:1962:20, p. 242); Opinion of Advocate General Lagrange in Joined Cases *Da Costa and Others* (28/62 to 30/62, not published, EU:C:1963:2); or Opinion of Advocate General La Pergola in *Sürül* (C-262/96, EU:C:1998:610).

94 See, for example, judgments of 3 April 1968, *Molkerei-Zentrale Westfalen* v *Lippe* (28/67, EU:C:1968:17), with regard to judgment of 16 June 1966, *Lütticke* (57/65, EU:C:1966:34); and of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449), with regard to judgment of 23 September 2003, *Akrich* (C-109/01, EU:C:2003:491).

95 See, for example, judgment of 22 May 1990, *Parliament* v *Council – Chernobyl* (C-70/88, EU:C:1990:217, paragraph 16), with respect to judgment of 27 September 1988, *Parliament* v *Council – Comitology* (302/87, EU:C:1988:461); or judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905), with respect to judgment of 20 February 1979, *Rewe-Zentral (Cassis de Dijon)* (120/78, EU:C:1979:42).

96 See, for example, judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 28), with regard to judgment of 8 September 2015, *Taricco and Others* (C-105/14, EU:C:2015:555).

132. The Court departs more openly from its previous case-law in the light of constitutional developments or modifications of the Treaty.[97] Yet there are a number of cases in which the Court continues to cite as 'good law' previous judgments even though the new ruling arrives at a different conclusion.[98] It is only on very rare occasions that the Court expressly reconsiders its previous interpretation, engages with its previous precedent, and explains the reasons for a different outcome.[99]

133. In my view, the present case should be one of those rare occasions. The Court should take the opportunity offered by the present case *expressly* to reconsider the value of its finding in *Link Logistik*, in particular for the following reasons.

134. First, it is simply not possible to distinguish, at least for this Advocate General, the present case from *Link Logistik* for the purposes of a coherent interpretation of the proportionality requirement both in Article 9a of Directive 1999/62 and in Article 20 of Directive 2014/67.

135. The referring court has made an effort to highlight the differences between the present case and *Link Logistik*. However, the wording, purpose and context of both Article 9a of Directive 1999/62 and Article 20 of Directive 2014/67 make it impossible, in my view, to establish significant differences that would enable the Court to arrive at a different conclusion with regard to the latter provision and yet leave the ruling in *Link Logistik* untouched.[100] Similarly, a retrospective 'clarification' of what the Court really wanted to say in *Link Logistik* would risk giving rise to further confusion, given the important departure from that precedent already brought about in *Popławski II*.

136. Second, any such further 'clarification' of the position taken in *Link Logistik* risks creating confusion in a particularly sensitive and complex area of law, touching upon some of the most fundamental elements of the EU legal order, such as the principles of direct effect and primacy, the remedy of disapplication, and the specific legal effects of the proportionality principle. The contradiction between *Link Logistik* and the Grand Chamber pronouncement in *Popławski II* makes it even more necessary to proceed to an express reversal in the present case, all the more where the divergence of pronouncements concerns the interpretation of the essential principles that govern the relationship between the national and the EU legal orders. In such a situation, where there is a clear contradiction with a previous ruling, the Court should openly engage with its own case-law and clearly indicate if and to what extent it is revisiting its previous legal position.

137. Third, the fact that the precedent to be overruled is relatively recent might be regrettable, but it should ultimately play no role. The correct interpretation of EU law overrides such concerns. In fact, some of the most prominent examples of overruling by this Court took place relatively shortly after the overruled precedent was delivered.[101] This is understandable, bearing in mind the fact that a judgment by the Court often stirs up a debate that results in national courts formulating follow-up questions, providing additional information or arguments to the Court. In some of these more recent situations, the Court has allocated the cases to the Grand

97 See, for example, judgment of 15 March 2005, *Bidar* (C-209/03, EU:C:2005:169), with regard to judgments of 21 June 1988, *Lair* (39/86, EU:C:1988:322), and of 21 June 1988, *Brown* (197/86, EU:C:1988:323).

98 See, for example, judgments of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390), and *Montero Mateos* (C-677/16, EU:C:2018:393), with regard to judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683).

99 See judgment of 17 October 1990, *HAG GF* (C-10/89, EU:C:1990:359, paragraph 10 et seq.), and in particular, Opinion of Advocate General Jacobs in that case (EU:C:1990:112), with regard to judgment of 3 July 1974, *Van Zuylen (HAG I)* (192/73, EU:C:1974:72).

100 See also above, points 55 to 57 of this Opinion.

101 See, for example, judgment of 22 May 1990, *Parliament* v *Council – Chernobyl* (C-70/88, EU:C:1990:217), with respect to judgment of 27 September 1988, *Parliament* v *Council – Comitology* (302/87, EU:C:1988:461), only 20 months apart.

Chamber when it was expressly invited to reconsider the position of the Court.[102] Indeed, where the precedent to be overruled is many years or even decades old, a judicial departure is not so problematic. It can be rationalised by using the argument of the evolution of the EU legal order.[103]

138. Fourth and finally, in the current structure of the Court, who should be called to overrule? Again, it is true that there is no formal rule of *stare decisis*. Thus, the different chambers of the Court remain free to reconsider previous precedent. Moreover, the delicate line between constructive reconsideration of previous judgments, the evolution of case-law, and a silent departure, make any formalised rule vis-à-vis the allocation of any case entailing a case-law revision to the Grand Chamber rather difficult to craft and bring about.

139. However, in the current institutional structure of the Court, where the Grand Chamber enjoys a special, constitutional status within the Court, and the corresponding enhanced authority within and outside the Court, the *intentional* overruling of precedents should be one of its prerogatives and functions. That should be in particular true in situations like the present one, where there is simply no rational space for 'distinguishing' or 'clarifying' the case.

140. Indeed, given the need to preserve the authority of the case-law of the Court, it would be advisable that once a problematic ruling has been identified from which departure should be considered, the Grand Chamber of the Court should be preferably seised of the case.[104] That naturally does not preclude the ongoing and parallel intellectual experimentations taking place in other compositions of the Court. Indeed, larger, solemn judicial formations are rarely good at finding new directions. They tend to be, however, quite good at authoritatively choosing from a range of options.

141. Finally, should an intentional overruling be *expressly* made? In my view, it certainly should. That said, I shall not embark on a lengthy discussion of all the possible arguments relating to the virtues of open legal discourse and the imperative of proper justification for a judicial decision. Instead, I would simply close by observing that, indeed, all highest courts care about their reputation and *gravitas*. These elements are vital to their role and overall standing. An apex court is thus by definition unlikely to rejoice in being wrong, if indeed that situation can in fact ever arise.[105] However, to find, in a system that defines itself as being based on judicial dialogue, a dialogue partner that is never wrong may perhaps be rather surprising and occasionally frustrating. In any case, and in that regard, the inability to admit that one was wrong is neither a sign of dialogue, nor genuine self-confidence and authority, for that matter.

[102] See, for example, judgments of 5 June 2018, *Grupo Norte Facility* (C-574/16, EU:C:2018:390), and *Montero Mateos* (C-677/16, EU:C:2018:393), with regard to judgment of 14 September 2016, *de Diego Porras* (C-596/14, EU:C:2016:683).

[103] For example, recently, judgment of 18 November 2020, *Syndicat CFTC* (C-463/19, EU:C:2020:932), with regard to (plenary) judgment of 12 July 1984, *Hofmann* (184/83, EU:C:1984:273).

[104] Pointing to the need to refer a case to the Grand Chamber in case of a reversal, Opinion of Advocate General Sharpston in *Puffer* (C-460/07, EU:C:2008:714, point 56). For a practical recent example, see judgment of 9 July 2020, *Santen* (C-673/18, EU:C:2020:531), with regard to judgment of 19 July 2012, *Neurim Pharmaceuticals (1991)* (C-130/11, EU:C:2012:489).

[105] Since, as wryly captured some time ago by Mr Justice Jackson in his concurring opinion in *Brown v. Allen*, 344 U.S. 443 (1953), at 540: 'We are not final because we are infallible, but we are infallible only because we are final.'

V. Conclusion

142. I propose that the Court answer the questions referred for a preliminary ruling by the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria) as follows:

(1) The requirement of proportionality of penalties laid down in Article 20 of 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 is directly effective.

(2) On the basis of the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67, national courts and administrative authorities must, by virtue of their duty to take all appropriate measures to ensure the implementation of that provision, disapply any national provision in so far as its application would lead to a result contrary to EU law, and if necessary, supplement the applicable domestic provisions with the criteria of the requirement of proportionality laid down in the case-law of the Court.