



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
KOKOTT  
delivered on 15 December 2011<sup>1</sup>

**Case C-489/10**

**Łukasz Marcin Bonda**

(Reference for a preliminary ruling from the Sąd Najwyższy (Poland))

((Agriculture — Regulation (EC) No 1973/2004 — Exclusion and reduction of aid in the event of incorrect declaration of area — Criminal nature of an administrative penalty — Prohibition of double penalties — *Ne bis in idem* principle))

### **I – Introduction**

1. As a result of incorrect declarations in an application for European Union agricultural aid, the national administration imposed on a farmer the reductions provided for in a European Union Regulation in the aid applied for. Subsequently, on the basis of the same false declarations, the farmer was charged with subsidy fraud in proceedings before a criminal court. Consequently, the main issue in the present case is the question whether the administrative proceedings were of a criminal nature, with the consequence that criminal proceedings may not also be brought against the recipient of aid, as a result of the prohibition of double penalties (*ne bis in idem* principle).

### **II – Legal context**

2. Article 50 of the Charter of Fundamental Rights of the European Union<sup>2</sup> provides:

‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.’

<sup>1</sup> — Original language: German.

<sup>2</sup> — The Charter of Fundamental Rights of the European Union was solemnly proclaimed initially in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and then for a second time in Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1, and OJ 2010 C 83, p. 389).

3. Article 138(1) of Regulation (EC) No 1973/2004,<sup>3</sup> in the version in force at the time the aid application at issue was lodged (16 May 2005) and at the time of the administrative decision (25 June 2006)<sup>4</sup>, stated as follows:

‘Except in cases of *force majeure* or exceptional circumstances as defined in Article 72 of Regulation (EC) No 796/2004, where, as a result of an administrative or on-the-spot check, it is found that the established difference between the area declared and the area determined, within the meaning of point (22) of Article 2 of Regulation (EC) No 796/2004, is more than 3% but no more than 30% of the area determined, the amount to be granted under the single area payment scheme shall be reduced, for the year in question, by twice the difference found.

If the difference is more than 30% of the area determined, no aid shall be granted for the year in question.

If the difference is more than 50%, the farmer shall be excluded once again from receiving aid up to an amount which corresponds to the difference between the area declared and the area determined. That amount shall be off-set against aid payments to which the farmer is entitled in the context of applications he lodges in the course of the three calendar years following the calendar year of the finding.’

### III – Facts and main proceedings

4. According to the reference for a preliminary ruling, on 16 May 2005 Mr Łukasz Marcin Bonda lodged an application for the grant of European Union agricultural aid<sup>5</sup> in respect of 2005 with the District Office of the Agricultural Restructuring and Modernisation Agency (‘the District Office’). In that application, he made incorrect declarations concerning the area used by him for agriculture and the crops grown on that land.<sup>6</sup>

5. As a result of those incorrect declarations, according to the reference for a preliminary ruling the District Office, based on Article 138 of Regulation No 1973/2004, refused payment of the aid in respect of 2005 and, in addition, stated that the entitlement to agricultural aid would be forfeited in the three following years.

6. On 14 July 2009, as a result of the above incorrect declarations in his aid application, Mr Bonda was convicted by the Sąd Rejonowy w Goleniowie<sup>7</sup> of the offence of subsidy fraud under Article 297(1) of the Polish Criminal Code and sentenced to a term of imprisonment of eight months suspended for two years and a fine of 80 daily rates of PLN 20 each.

3 — Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials, OJ 2004 L 345, p. 1 (‘Regulation No 1973/2004’ or ‘the Regulation’).

4 — Later minor amendments to this article are not relevant to the case at issue. The deletion of Article 138 by means of Regulation (EC) No 316/2009 (OJ 2009 L 100, p. 3) only applies to aid applications from the year 2009. In the meantime, the whole of Regulation No 1973/2004 has been repealed by Regulation (EC) No 1121/2009 (OJ 2009 L 316, p. 27). However, pursuant to Article 96(1) of that regulation, Regulation No 1973/2004 continues to apply to aid applications relating to the 2009 and previous premium years. A provision comparable to Article 138(1) may be found in Article 58 of Regulation (EC) No 1122/2009 (OJ 2009 L 316, p. 65).

5 — The order for reference speaks of an application for ‘direct payment’, but since the question refers to the interpretation of Article 138 of Regulation No 1973/2004, it would more probably have concerned a ‘single area payment’ application.

6 — In a check following the application, it was found that instead of the area declared of 212.78 ha, the actual area used for agriculture merely amounted to 113.49 ha.

7 — Goleniów District Court.

7. Mr Bonda appealed against the above judgment to the Sąd Okręgowy w Szczecinie<sup>8</sup>. That court allowed the appeal and discontinued the criminal proceedings against Mr Bonda. It held that as a result of the fact that a penalty had already been imposed on Mr Bonda pursuant to Article 138 of Regulation No 1973/2004 for the same conduct, the criminal proceedings against him were not admissible. As a result of the appeal on a point of law lodged by the Prokurator Generalny,<sup>9</sup> the proceedings are now pending before the Sąd Najwyższy,<sup>10</sup> the referring court.

#### IV – Reference for a preliminary ruling and the procedure before the Court

8. By order of 27 September 2010, received at the Court on 12 October 2010, the Sąd Najwyższy referred the following question to the Court for a preliminary ruling:

What is the legal nature of the penalty provided for in Article 138 of Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials (OJ 2004 L 345, p. 1) which consists in refusing a farmer direct payments in the years following the year in which he submitted an incorrect statement as to the size of the area forming the basis for direct payments?

9. In the proceedings before the Court, written submissions were made by Mr Bonda, Austria, Poland and the European Commission. Poland and the Commission took part in the hearing on 4 October 2011.

#### V – Assessment

##### A – Preliminary remarks

10. In order to give the national court a useful answer the question referred must be supplemented and made more precise.<sup>11</sup>

##### 1. Scope of review: European Union law prohibition of double penalties

11. The referring court poses its question with regard to the application of the prohibition of double penalties under Polish law. The Polish Government and the Commission also submitted at the hearing that the Polish prohibition of double penalties was the assessment criterion. However, I will explain below that in the case at issue the *European Union law* prohibition of double penalties applies.<sup>12</sup>

12. It also appears doubtful to me whether in the event of the national prohibition of double penalties applying the Court would actually be competent to express its opinion in relation to the criminal nature of the administrative penalties at issue: the issue of their criminal nature would also then have to be judged according to the criterion of national law. In this respect it would be conceivable — though not the situation in the present case — that the national court explains the criteria under which the

8 — Szczecin Regional Court.

9 — Principal Public Prosecutor.

10 — The Polish Supreme Court.

11 — According to settled case-law, where the questions referred are couched in imprecise terms it is for the Court, having regard to the subject-matter of the dispute, to extract the elements of European Union law that need to be interpreted (see Case 251/83 *Haug-Adrion* [1984] ECR 4277, paragraph 9) and to provide all useful guidance to assist the national court in resolving the dispute in the main proceedings (see only Case C-12/10 *Lecson Elektromobile* [2010] ECR I-14173, paragraph 15).

12 — See also in relation to this the pending proceedings in Case C-617/10 *Åkerberg Fransson* (OJ 2011 C 72, p. 14).

prohibition of double penalties applies pursuant to its assessment criteria and the Court then expresses its opinion on whether a particular European Union law administrative penalty fulfils those criteria; this could, for example, involve the question of whether a particular European Union law penalty pursues a punitive purpose, if such a purpose were a requirement, under national law, for the criminal nature of a provision.

a) Applicability of the European Union law prohibition of double penalties

13. The prohibition of double penalties and of double prosecution (*ne bis in idem* principle) is recognised as a general principle of law at European Union level<sup>13</sup> and now enjoys the status of a fundamental right of the European Union under Article 50 of the Charter of Fundamental Rights.

14. Article 51(1) of the Charter of Fundamental Rights states that the Charter applies ‘to the Member States only when they are implementing Union law’.<sup>14</sup> The interpretation of this provision is not uncontroversial. Thus the question arises as to whether the scope of the Charter of Fundamental Rights must be defined differently from that of the general principles of law, as it has been developed in the case-law.<sup>15</sup> Pursuant to that case-law, those principles apply if a national measure is covered by European Union law. Proponents of a narrower understanding of Article 51(1) of the Charter primarily raise the issue of the application of the fundamental rights of the European Union to measures of the Member States which restrict fundamental freedoms and to measures which are not directly intended to implement a provision of a directive but which are merely included in the area regulated by the directive.

15. Up to now, the Court had not yet expressed a definitive opinion on the application of the Charter *ratione materiae*.<sup>16</sup> In two orders it has interpreted Article 51(1) as meaning that the Charter applies if the facts of the case demonstrate a connection with European Union law.<sup>17</sup> In its judgment in the *Dereci* case, the Court has now established that the Charter applies if the facts of the case are covered by European Union law and has accordingly adopted the wording it uses in relation to the application of the general principles of law.<sup>18</sup>

16. This certainly does not answer all of the questions though. However, even on the basis of a narrower understanding of Article 51(1), in my view the case at issue is within the scope of the Charter.

17. As far as the administrative penalty against Mr Bonda is concerned, this was imposed in direct implementation of Article 138(1) of Regulation No 1973/2004. Whilst the second penalty, which the national court imposed as a result of the commission of the offence of subsidy fraud, is based on a provision of national criminal law, European Union law also gave rise to that provision: in the specific case the provision of Polish criminal law is intended to impose a penalty in respect of an infringement of the provisions of the agricultural law of the European Union. It is therefore intended to implement the primary law obligation of the Member States to impose effective and appropriate penalties in respect of infringements affecting the financial interests of the Union.

13 — Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission (LVM)* [2002] ECR I-8375, paragraph 59, and Case C-289/04 P *Showa Denko v Commission (Showa Denko)* [2006] ECR I-5859, paragraph 50.

14 — See in relation to the other language versions of this provision, J. Kokott/Ch. Sobotta, ‘Die Charta der Grundrechte der Europäischen Union nach dem Inkrafttreten des Vertrags von Lissabon’, *Europäische Grundrechte Zeitschrift* (2010), pp. 265-271.

15 — See also in relation to this the Opinions of Advocate General Bot delivered on 5 April 2011 in Case C-108/10 *Scattolon* [2011] ECR I-7491, points 116 to 119, and of Advocate General Trstenjak delivered on 22 September 2011 in Case C-411/10 and C-493/10 *M. E. and Others*, pending before the Court, points 71 to 81.

16 — See for the first suggestions, Case C-400/10 PPU *McB* [2010] ECR I-8965, paragraph 52, and Joined Cases C-483/09 and C-1/10 *Gueye* [2011] ECR I-8263, paragraph 55.

17 — See the orders of the Court of 12 November 2010 in Case C-339/10 *Asparuhov Estov and Others* [2011] ECR I-11465, paragraph 14, and of 1 March 2011 in Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 25.

18 — Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 72, in which the Court chooses the wording ‘is covered by European Union law’. However, in a surprising manner, it left the decision on the question of whether the facts of the case at issue there were covered by European Union law to the referring court.

18. Article 325(1) TFEU obliges the Member States to counter any illegal activities affecting the financial interests of the Union through measures which act as a deterrent and which are effective. If it is necessary for the purpose of implementing European Union law, this could also include criminal penalties.<sup>19</sup> Article 325(2) provides that Member States are to take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests. According to the case-law of the Court, where the Member States act for the purposes of fulfilling this European Union law obligation to impose penalties in respect of irregularities, they are obliged to comply with Community law and its general principles, which include the fundamental rights of the European Union and the principle of proportionality.<sup>20</sup>

19. If the obligation can thus arise from European Union law for the Member States to provide for criminal penalties in respect of risks to the financial interests of the Union in connection with agricultural aid, then conversely the possible limits to this obligation must also arise from European Union law and in particular from the fundamental rights of the European Union. The European Union law obligation to impose criminal penalties for infringements of European Union law can only exist to the extent that the fundamental rights of the persons concerned, which are guaranteed at European Union level, are not affected. Furthermore, it is only in this way that it can be ensured that obligations resulting from European Union law to protect the financial interests of the Union can be subject to uniform limits within the entire European Union.

20. In my opinion, for the purposes of the obligation to comply with the fundamental rights of the European Union when imposing penalties in respect of infringements of European Union law, it cannot make a difference whether the Member State's measure imposing a penalty was adopted explicitly when implementing European Union law or whether it already existed. In both cases it serves to implement European Union law. The application of the fundamental rights of the European Union cannot ultimately depend on the chance circumstances of whether a penal provision already existed or was only adopted when implementing the European Union law obligation.

#### b) Protocol No 30 to the Lisbon Treaty

21. The applicability of the Charter of Fundamental Rights in the case at issue is not called into question either by the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom.<sup>21</sup> That protocol was annexed to the Treaties by means of the Lisbon Treaty. Pursuant to Article 51 TEU, it forms an integral part of the Treaties and has the same legal effects as the Treaties.

22. Article 1(1) of that protocol states that the Charter does not extend the ability of the Court of Justice, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

23. This provision does not distinguish itself by great clarity. However, Protocol No 30 does not signify an opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland.<sup>22</sup> On the contrary, recitals 8 and 9 in the preamble to the protocol point in favour of the protocol not containing any derogation from the Charter for the two countries cited but having merely

19 — Case 68/88 *Commission v Greece* [1989] ECR 2965, paragraph 23 et seq.

20 — See, in relation to the case-law with regard to the general obligation of the Member States to impose penalties in respect of infringements of European Union law which arises from Article 4(2) TEU, Case C-262/99 *Louloudakis* [2001] ECR I-5547, paragraph 67, and Case C-430/05 *Ntíonik and Pikoulas* [2007] ECR I-5835, paragraph 53.

21 — Protocol of 17 December 2007, OJ 2007 C 306, p. 157.

22 — See also the Opinion of Advocate General Trstenjak in *M. E. and Others* (cited in footnote 15 above, point 167).

a clarifying function, serving as a guide to interpretation.<sup>23</sup> Article 51(2) of the Charter itself establishes that it does not extend the field of application of European Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Since the prohibition of double penalties laid down in Article 50 of the Charter had however already been recognised as a general European Union law principle, and according to the previous case-law such a principle would also have been applicable to the case at issue, and since even on a narrower understanding of Article 51 of the Charter, the Charter is applicable, as explained above, an extension of the ability of the Court of Justice within the meaning of the protocol cannot come into question.

c) Interim conclusion

24. The question whether penalties under Article 138 of Regulation 1973/2004 preclude subsequent criminal proceedings for subsidy fraud must therefore be determined by reference to the European Union law principle *ne bis in idem*. The question must be reformulated accordingly.

2. Modification of the question referred to make it more precise — subject of examination

25. In its question, the Sąd Najwyższy did not refer to a specific paragraph of Article 138 of Regulation No 1973/2004. In contrast to the first paragraph, the second paragraph regulates the special case of intentional false statements. However, without being contradicted, in its written observations the Republic of Poland referred more precisely to the fact that the director of the District Office based his decision on the first paragraph of Article 138 of Regulation No 1973/2004. The subject of interpretation is accordingly Article 138(1) of the Regulation.

26. In addition, the referring court does not mention in its question that, apart from the reductions in aid pursuant to the third subparagraph of Article 138(1) for the years 2006 to 2008, pursuant to the second subparagraph of Article 138(1) Mr Bonda also forfeited the entitlement to aid for 2005 — the year in which he lodged the incorrect application. In order to give the national court a useful answer, the assessment of the nature of the penalty provided for in Article 138(1) should include the measures to be imposed pursuant to it in their entirety. Therefore it is necessary to include in the evaluation not only the reduction of aid which took effect in the years 2006 to 2008, but also the exclusion of aid in the claim year.

27. In addition, the answer to the question referred should also be based more narrowly on the wording of the measures imposed under Article 138(1). This is also advisable for the following further reason.

28. The present wording of the question referred in fact raises a further question itself. Namely, according to the question referred and the information in the order for reference, Mr Bonda was wholly denied aid payments in the three years following the false declaration. In the third subparagraph of Article 138(1) of the Regulation, it states however that, after the exclusion of aid in the claim year, the beneficiary of the aid is to be excluded 'once again' from receiving aid up to an amount which corresponds to the difference between the area declared and the area determined and that amount is to be off-set against aid payments in the three following years.

29. It is not unequivocally apparent from the wording of the provision whether the amount of the difference is deducted from the aid payments *once* in the following years or *in each of the three following years* (as stated in the order for reference). In my view, in particular the English and the French language versions of the provision<sup>24</sup> point in favour of the amount of the difference only being

23 — The fact that the protocol merely constitutes a clarifying guide to interpretation was also emphasised by the British Government. See on this point House of Lords, *Tenth Report of the European Union Select Committee* of 26 February 2008, paragraph 5.86, at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/62.pdf>.

24 — '... est exclu une nouvelle fois du bénéfice d'une aide à hauteur d'un montant correspondant à la différence entre la superficie déclarée et la superficie déterminée. Le montant correspondant est prélevé sur les paiements d'aides ...' and '... shall be excluded once again from receiving aid up to an amount which corresponds to the difference between the area declared and the area determined. That amount shall be off-set against aid payments to which the farmer is entitled in the context of applications ...'.

deducted once and not three times, but with it being possible for this one-off amount to be off-set against aid entitlements for three years.<sup>25</sup> Inquiries made of the parties at the hearing led to self-contradictory statements. Since the referring court did not make this question of the understanding of Article 138 of the Regulation the subject of its reference and the parties did not express their opinions on this in their pleadings either, the proceedings at issue are not suitable to clarify conclusively the interpretation of this provision. For the purposes of the further review, the specific configuration of the reductions of aid is not relevant.<sup>26</sup>

30. Finally, the Commission and Poland also suggested including the interpretation of Article 51(2) of Regulation (EC) No 796/2004<sup>27</sup> in the answer to the question referred, since the District Office also imposed an administrative penalty on the basis of that provision. However, since the order for reference only asks about Article 138 of Regulation No 1973/2004, I will restrict myself to reviewing that provision.

### 3. Reformulation of the question referred

31. The question must therefore be reformulated as follows.

Does the imposition of the penalties provided for in Article 138(1) of Regulation No 1973/2004, which consisted in not paying the farmer any aid in the year in which he submitted an incorrect declaration as to the size of the area forming the basis of his aid application and deducting the amount which corresponds to the difference between the area declared and the area determined from the total of the aid payments to which the farmer is entitled in the three following years, constitute criminal proceedings within the meaning of the European Union law principle *ne bis in idem* as laid down in Article 50 of the Charter of Fundamental Rights of the European Union?

B – *The European Union law prohibition of double penalties: when are there proceedings of a criminal law nature or of a nature similar to criminal law proceedings?*

32. The *ne bis in idem* principle, as codified by Article 50 of the Charter of Fundamental Rights of the European Union, states that no one may be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the European Union in accordance with the law.

33. Up to now the *ne bis in idem* principle has been treated as a general principle of European Union law in particular in competition law.<sup>28</sup> In addition, the Court has on a number of occasions been concerned with the interpretation of this principle in connection with the Convention implementing the Schengen Agreement.<sup>29</sup> However, essentially, the subject-matter of all these proceedings was the aspect of '*idem*', namely the question of whether a penalty was imposed more than once in respect of the *same offence*.<sup>30</sup> In contrast, the main issue in the present case is whether the false declaration made by Mr Bonda has been penalised twice by *criminal proceedings*, infringing the *ne bis in idem* principle.

25 — It may only come to a complete exclusion of aid for three years on the basis of this understanding in cases where the amount of the difference is so high that it uses up the aid payments for three years. In the light of the areas and the amounts concerned in the main proceedings, on the basis of my understanding of the provision it is not comprehensible that a complete exclusion was imposed on Mr Bonda for three years.

26 — However, it would have relevance for the question of the proportionality of the penalty.

27 — Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (OJ 2004 L 141, p. 18). This contains a comparable provision to that in Article 138 of Regulation No 1973/2004.

28 — See the judgments in *LVM* (cited in footnote 13, paragraph 59) and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraphs 338 to 340.

29 — Convention implementing the Schengen Agreement ('the CISA'), signed at Schengen on 19 June 1990 (OJ 2000 L 239, p. 19).

30 — See, most recently, in relation to this my Opinion of 8 September 2011 in Case C-17/10 *Toshiba and Others*.

Therefore it concerns determining the ‘bis’. In relation to the question of the circumstances in which there are proceedings of a criminal nature or which are similar to criminal proceedings in character, which leads to the application of the *ne bis in idem* principle, the Court has not yet expressed its views in any detail.<sup>31</sup>

34. Even if the Court has not yet expressed its opinion in relation to the classification of proceedings such as those under Article 138(1) of Regulation No 1973/2004 as of a criminal law nature or as similar to criminal proceedings in character within the meaning of the *ne bis in idem* principle, it has however expressed its opinion in relation to the applicability of other criminal law principles to comparable proceedings.

1. Case-law of the Court of Justice in relation to the criminal nature of penalties in the agricultural sector

35. Against the background of an action for annulment brought against a provision in agricultural law which provided for a complete exclusion for a year in the event of irregularities by the applicant, the Court already decided in *Germany v Commission* that the temporary exclusion of an operator from an aid scheme does not constitute a penal sanction.<sup>32</sup>

36. Once again, in *Käserei Champignon Hofmeister*<sup>33</sup> the Court was concerned with the question of whether a penalty in agricultural law should be regarded as of a criminal nature. The subject of that case was a provision which provided for the payment of a sum of money as a penalty for false declarations in an application for an export refund. The question arose as to whether that penalty had to be judged in the light of the principle *nulla poena sine culpa*. The Court answered that question in the negative with the argument that the penalty at issue was an integral part of the export refund scheme and was not of a criminal nature.<sup>34</sup>

37. The Court assessed the criminal nature of the penalty on the basis of two criteria.

38. On the one hand, it based its decision on the *nature of the breaches complained of*. It held that the rules breached were aimed solely at economic operators who had freely chosen to take advantage of an agricultural aid scheme. In such a case proceedings were not of a criminal nature.<sup>35</sup>

39. On the other hand, it examined the *objective of the penalty imposed*. During this review, it emphasised that temporary exclusion from the aid scheme is intended to combat the numerous irregularities which are committed in the context of agricultural aid and which, because they weigh heavily on the Community budget, are of such a nature that they might compromise the action undertaken by the European Union institutions in the agricultural sector to stabilize markets, to support the standard of living of farmers and to ensure that supplies reach consumers at reasonable prices.<sup>36</sup> Since in the context of a European Union aid scheme, the granting of the aid is subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness, the penalty imposed in the event of non-compliance with those requirements constitutes a specific administrative instrument forming an integral part of the aid scheme and intended to ensure the sound financial management of European Union public funds.

31 — However, see the Opinion of Advocate General Sharpston of 10 February 2011 in Case C-272/09 P *KME* [2011] ECR I-12789, paragraph 61 et seq. and the Opinions of Advocate General Bot of 26 October 2010 in Case C-352/09 P *ThyssenKrupp Nirosta* (previously *ThyssenKrupp Stainless*) v *Commission* [2010] ECR I-2359, paragraphs 48 et seq., and of 26 October 2010 in Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg v Commission* [2010] ECR I-2239, paragraph 40 et seq., in which the Advocates General draw on the criteria of the European Court of Human Rights in order to establish the similarity of European Union anti-trust proceedings to proceedings at criminal law. See also in relation to the criminal law nature of anti-trust proceedings, the judgment of the European Court of Human Rights of 27 September 2011 in *Menarini v. Italy*, no. 43509/08.

32 — Case C-240/90 *Germany v Commission* [1992] ECR I-5383, paragraph 25.

33 — Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453.

34 — *Käserei Champignon Hofmeister* (cited in footnote 33, paragraph 44).

35 — *Käserei Champignon Hofmeister* (cited in footnote 33, paragraph 41), with reference to Case 137/85 *Maizena and Others* [1987] ECR 4587, paragraph 13, and *Germany v Commission* (cited in footnote 32, paragraph 26).

36 — *Germany v Commission* (cited in footnote 32, paragraph 19) and *Käserei Champignon Hofmeister* (cited in footnote 33, paragraph 38).

40. Those criteria of the Court must equally apply to the assessment of the criminal nature of proceedings with regard to the criminal law principle *ne bis in idem*. Pursuant to those criteria, in the case at issue neither the exclusion for the current year pursuant to the second subparagraph of Article 138(1) of the Regulation, nor the reduction in the three following years pursuant to the third subparagraph of Article 138(1) of the Regulation would be of a criminal nature. Consequently, the *ne bis in idem* principle would not apply: just like the penalty concerned in the *Käserei Champignon Hofmeister* case, the aid rules breached in the present case are aimed solely at economic operators who have freely chosen to take advantage of an aid scheme. In addition, pursuant to Article 138(1) of the Regulation, the penalties at issue in the present case also constitute a specific administrative instrument forming an integral part of an aid scheme which is not open to all and are intended to ensure the sound financial management of Community public funds.

41. By way of interim conclusion, it must therefore be stated that the case-law of the Court to date in relation to the criminal nature of comparable administrative penalties in the field of agricultural law points against a criminal nature of the penalties provided for in Article 138(1) of Regulation No 1973/2004.

2. Taking into account the case-law of the ECtHR in determining criminal law nature

42. I shall examine below whether other criteria arise from the case-law of the European Court of Human Rights (ECtHR) in relation to the parallel *ne bis in idem* provision in the ECHR,<sup>37</sup> which must be taken into account in assessing the criminal nature and whether such criteria lead to a classification of penalties such as those in the present case which deviates from the case-law of the Court to date.

43. For the purpose of interpreting the European Union law principle *ne bis in idem*, the case-law of the ECtHR must be taken into account.<sup>38</sup> This follows from the requirement of homogeneity,<sup>39</sup> under which the rights contained in the Charter are to have the same meaning and scope as the corresponding rights guaranteed by the ECHR as interpreted by the case-law of the ECtHR.<sup>40</sup>

44. The prohibition of double penalties in European Union law is based on Article 4(1) of Protocol No 7 to the ECHR, although that protocol has not yet been ratified by all the EU Member States.<sup>41</sup> That close proximity to the ECHR is indicated not only by the Explanations on Article 50 of the Charter but also by the previous case-law of the Court of Justice concerning the general principle of European Union law of *ne bis in idem*.<sup>42</sup>

a) Case-law of the ECtHR

45. The ECtHR interprets the notion of ‘penal procedure’ in Article 4(1) of Protocol No 7 in the light of the general principles which it has developed concerning the corresponding terms ‘criminal charge’ and ‘penalty’ in Articles 6 and 7 of the ECHR respectively.<sup>43</sup>

46. In the context of Article 6, the ECHR draws upon the three ‘*Engel* criteria’, named after the judgment in which it first formulated them.<sup>44</sup>

37 — European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’, signed in Rome on 4 November 1950).

38 — In relation to this, see also my Opinion in *Toshiba and Others* (cited in footnote 30, point 120).

39 — The third subparagraph of Article 6(1) TEU and the first sentence of Article 52(3) of the Charter of Fundamental Rights.

40 — See *McB.* (cited in footnote 16, paragraph 53), *Dereci* (cited in footnote 18, paragraph 70), and my Opinion in *Toshiba and Others* (cited in footnote 30, point 120). It may be noted that the second sentence of Article 52(3) of the Charter of Fundamental Rights makes it possible to exceed the standard of the ECHR.

41 — Four Member States of the European Union (Belgium, Germany, the Netherlands and the United Kingdom) have not yet ratified Protocol No 7 to the ECHR.

42 — *LVM* (cited in footnote 13, paragraph 59) and *Showa Denko* (cited in footnote 13, paragraph 50).

43 — ECtHR, *Maresti v. Croatia*, no. 55759/07, § 56, 25 June 2009, and the case-law cited there.

44 — ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22.

47. The *first Engel criterion* concerns whether the provision belongs to criminal law according to national law. However, the ECtHR does not regard this as decisive, but as merely providing a starting point for the consideration of the issue.<sup>45</sup>

48. In the context of the *second Engel criterion*, the ECtHR first of all examines the group of persons addressed by a rule which penalises conduct of a certain kind. If a rule is directed not towards a given group possessing a special status — in the manner, for example, of disciplinary law — but towards the general public, this points in favour of the criminal nature of the penalty.<sup>46</sup> In addition, the ECtHR has regard to the objective of the penalty which is liable to be imposed in the penalty provision. A criminal nature is not found to exist if the penalty is only intended as pecuniary compensation for damage to property.<sup>47</sup> In contrast, if it is aimed at repression and prevention, a criminal penalty exists.<sup>48</sup> Furthermore, in its more recent case-law, the ECtHR takes into account whether the imposition of penalties for the offence is intended to protect legal interests which normally fall within the sphere of protection of criminal law.<sup>49</sup> These elements must be assessed together.<sup>50</sup>

49. The *third Engel criterion* concerns the nature and the severity of the penalty which is liable to be imposed.<sup>51</sup> In relation to deprivations of liberty, there is a general presumption as to the criminal nature of the penalty, which may only be rebutted exceptionally.<sup>52</sup> Even fines liable to be converted into imprisonment on default<sup>53</sup> or which are entered in the criminal record usually point towards the existence of criminal proceedings.<sup>54</sup>

50. The ECtHR understands the second and third criteria as being alternative. However, it also considers them on a cumulative basis where separate analysis of each criterion does not lead to a clear conclusion.<sup>55</sup>

b) Application of the *Engel* criteria to the case at issue: conflict with the previous case-law of the Court of Justice in the field of agricultural law?

i) Application of the first *Engel* criterion

51. In the case at issue, the first *Engel* criterion would affect the autonomous European Union classification of the proceedings under Article 138(1) of Regulation No 1973/2004, which the Court carried out in its judgment in *Käserei Champignon Hofmeister* without explicitly reviewing the *Engel* criteria.

ii) Application of the second *Engel* criterion

52. For the purposes of the second *Engel* criterion, the ECtHR essentially reviews the same elements which the Court of Justice also applied in its judgment in *Käserei Champignon Hofmeister*.

45 — ECtHR, *Engel and Others v. the Netherlands* (cited in footnote 44, § 82).

46 — ECtHR, *Öztürk v. Germany*, 21 February 1984, § 53, Series A no. 73, and *Lauko v. Slovakia*, 2 September 1998, § 58, *Reports of Judgments and Decisions* 1998-VI.

47 — ECtHR, *Jussila v. Finland* [GC], no. 73053/01, § 38, ECHR 2006-XIII.

48 — See only ECtHR, *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §55, 10 February 2009, with reference to *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 102 and 105, ECHR 2003-X, and *Maresti v. Croatia* (cited in footnote 43, § 59).

49 — ECtHR, *Sergey Zolotukhin v. Russia* (cited in footnote 48, § 55) and *Maresti* (cited in footnote 43, § 59).

50 — ECtHR, *Ezeh and Connors v. the United Kingdom* (cited in footnote 48, § 103) and *Bendenoun v. France*, 24 February 1994, § 47, Series A no. 284.

51 — ECtHR, *Sergey Zolotukhin v. Russia* (cited in footnote 48, § 56).

52 — ECtHR, *Engel and Others v. the Netherlands* (cited in footnote 44, § 82) and *Ezeh and Connors v. the United Kingdom* (cited in footnote 48, § 126).

53 — ECtHR, *Žugić v. Croatia*, 31 May 2011, no. 3699/08, § 68.

54 — ECtHR, *Žugić v. Croatia* (cited in footnote 53, § 68).

55 — ECtHR, *Sergey Zolotukhin v. Russia* (cited in footnote 48, § 53).

– Group of persons addressed

53. The penalties provided for in Article 138(1) of the Regulation are not directed towards the general public, but on the contrary are intended to ensure that the members of a specific group, namely the beneficiaries of the relevant agricultural subsidies, comply with the rules directed at them.<sup>56</sup> Thus in its judgment in *Käserei Champignon Hofmeister*, the Court of Justice also emphasised that the rules breached were aimed solely at economic operators who had freely chosen to take advantage of an agricultural aid scheme.<sup>57</sup>

54. Nothing different follows from the judgment of the ECtHR in *Jussila* either.<sup>58</sup> That case concerned tax surcharges due to unpaid VAT. The ECtHR regarded the fact that the person concerned opted for VAT registration as irrelevant and did not find that a limited group of persons was addressed by the rule. In my view, that conclusion cannot be transposed to the case at issue: unlike VAT, which everyone could potentially be subject to, the agricultural aid scheme, as the Court of Justice has already established, is a self-contained scheme and its beneficiaries must fulfil a series of requirements in order to participate in it.

55. Accordingly, the particular definition of the group of persons addressed points against the criminal nature of the conduct upon which Article 138(1) of Regulation No 1973/2004 imposes a penalty.

– Legal interest typically protected by criminal penalties

56. The legal interest protected in the case at issue, the financial interests of the European Union, may be protected both by criminal law and by administrative law, so that this element of the second *Engel* criterion does not assist further in characterising the penalty.

– Objective and purpose of the penalty

57. The question as to what purposes are characteristic of a criminal penalty is the subject-matter of a long-standing discussion. However, that question will not be considered here. Only this much is said: the modern teaching on the purpose of penalties mostly emphasises the pursuit of a dual purpose of punishment and prevention,<sup>59</sup> though in some of these mixed or ‘unified theories’ punishment does not have any independent significance.<sup>60</sup>

58. However, I infer from the case-law of the ECtHR that the latter regards a punitive objective as a constituent element of a criminal penalty, though even in this respect it remains doubtful what should be understood by punishment. Generally speaking it is understood to mean the infliction of an inconvenience which is intended to make amends for the culpable wrong which has been committed, as differentiated from restitution, which is intended to restore the situation which existed before the infliction of damage.<sup>61</sup> In his Opinion in *Germany v Commission*, Advocate General Jacobs had also emphasised that the purpose of a penal sanction exceeds that of simple deterrence or prevention and includes a judgment of impropriety.<sup>62</sup>

56 — See, to this effect, ECtHR, *Weber v. Switzerland*, 22 May 1990, § 33, Series A no. 177.

57 — *Käserei Champignon Hofmeister* (cited in footnote 33, paragraph 41).

58 — ECtHR, *Jussila v. Finland* (cited in footnote 47, § 38).

59 — See, for example, B. Bouloc, *Droit pénal général*, 19<sup>th</sup> edition (2005), pp. 22 and 23, and A. Ashworth, *Principles of Criminal Law*, 6<sup>th</sup> edition (2009), pp. 16 to 18.

60 — See the preventative unified theory advocated by Claus Roxin, which takes as its starting point the fact that ‘the purpose of the penalty can only be preventative in nature’; C. Roxin, *Strafrecht Allgemeiner Teil*, Volume I, 4<sup>th</sup> edition (2006), pp. 85 to 96.

61 — As was said in ECtHR, *Jussila v. Finland* (cited in footnote 47, § 38), focussing on whether a financial burden was intended as pecuniary compensation for damage inflicted or as a punishment to deter re-offending.

62 — Opinion of 3 June 1992 (cited in footnote 32, point 11).

59. The penalties at issue are not only intended to make amends for damage which has occurred. Therefore it is necessary to examine their preventative and punitive nature.

60. It is clear that no criminal law objective is pursued by a provision which merely does not grant the applicant the amount for which he wrongfully applied, but nevertheless grants him the aid which is evidenced by correct information.

61. It proves to be more difficult to establish whether the penalty has a punitive nature with regard to the reductions provided for in Article 138(1) of the Regulation in the claim year (in the case at issue pursuant to subparagraph 2: the exclusion in the claim year) and in the following years.

62. In its judgment in *Käserei Champignon Hofmeister*, in analysing the objective of an administrative penalty in the agricultural sector, the Court of Justice has already established that a comparable penalty is intended to combat the numerous irregularities in the scheme and the burden on the European Union budget which those irregularities cause.<sup>63</sup> In so doing, the Court relied upon the ninth recital in the preamble to the Regulation on the protection of the European Communities' financial interests,<sup>64</sup> pursuant to which Community measures and penalties laid down in pursuance of the objectives of the common agricultural policy form an integral part of the aid scheme and pursue their own ends. As the Commission also states, this indicates that the provision has a purely preventative nature.

63. Due to capacities in the administration, checks to prevent irregularities are necessarily limited. A beneficiary of aid, who has on one occasion made a false declaration in his application, offers a lesser guarantee of trustworthiness, probity and care. Consequently, the best possible protection for the budget would be the complete exclusion of such a beneficiary from the aid scheme. This would not be intended as punishment, but would be intended to protect the budget from possible further false applications. It may be argued that a correctly made application, at least where marginal errors in the application are not concerned, is just as much a condition of payment of the aid as, for example, submitting the application within the deadline or any other condition connected with the payment of the aid.

64. However, if, because of the consequences for the individual applicant, having regard to the principle of proportionality the legislature decides to only carry out a partial exclusion of aid in the form of reductions instead of a complete exclusion, that does not change the nature of the penalty. The legislature is not then concerned with subsequent disapproval of the conduct of the applicant. The risk to the budget arising from an untrustworthy beneficiary is also minimised by means of the reduction, with the consequence that the relevant provisions are of a preventative nature.

65. It also points against a punitive nature that the reduction only comes to bear if the beneficiary of aid lodges an application in the following three years. If the beneficiary does not lodge an application in the following years — because he shuts down his business, sells it or does not fulfil the other conditions for the aid — the penalty has no effect. If, in the following years, the beneficiary of aid is entitled to lower aid entitlements and these do not suffice to off-set the amount of the reduction, the penalty is also ineffective in this respect. If it was concerned with punishment, that is, the imposition of a judgment of impropriety and making up for being at fault, the penalty would be imposed irrespective of any action on the part of the beneficiary of aid, in this case the lodging of a new application, and the amount could not lapse either.

66. In this way, the penalty in the case at issue also differs from tax surcharges, which have been the subject of the case-law of the ECtHR in which it adjudged them to be of a criminal nature, since they were not intended as pecuniary compensation for damage but as a penalty to deter repetition.<sup>65</sup>

63 — *Käserei Champignon Hofmeister* (cited in footnote 33, paragraph 38).

64 — Council Regulation (EEC, Euratom) No 2988/95 of 18 December 1995 (OJ 1995 L 312, p. 1).

65 — ECtHR, *Jussila v. Finland* (cited in footnote 47, § 38), in which it also dealt with divergences in its case-law on the characterisation of surcharges in the field of taxation. See also ECtHR, *Ruotsalainen v. Finland*, no. 13079/03, § 46, 16 June 2009, with regard to a fuel fee debit due to the use of the wrong fuel.

– Interim conclusion

67. The application of the second *Engel* criterion to the penalties at issue shows that the result of the interpretation essentially corresponds to the conclusion reached by the Court in its previous case-law on the criminal nature of penalties in the agricultural sector. Accordingly, the second *Engel* criterion does not lead to a finding that proceedings under Article 138(1) of the Regulation are of a criminal nature.

iii) The application of the third *Engel* criterion

68. In contrast, the Court of Justice has not to date explicitly reviewed the severity of the penalty when assessing comparable penalties in the agricultural sector.<sup>66</sup> Having regard to the requirement of homogeneity with the ECtHR,<sup>67</sup> the case at issue therefore provides the opportunity to include this element in the review as well.

69. If one considers the nature and the severity of the penalties imposed in the case at issue, it is conspicuous first of all that they are not associated with detention replacing the penalty. With regard to the criterion of the severity of the penalty, the ECtHR has regard to the amount of the penalty which is liable to be imposed in the abstract, not to the specific penalty imposed. In transferring this premiss to the case at issue, first of all one is confronted with practical difficulties: the ECtHR proceeds for these purposes on the basis of rules which provide for a penalty framework and accordingly a maximum penalty. Since the penalty at issue in the present case is based on variable criteria, namely on the difference between the eligible area applied for and that determined to be eligible, it is not possible to determine an abstract upper limit of the penalty. Accordingly, in the case at issue one may only take as a basis the amount of the specific penalty to be calculated.

70. If one solely considers the financial consequences of the exclusion from the aid or of the aid reductions and takes as a starting point that the ECtHR understands the second and third *Engel* criteria to be alternative, one could come to the conclusion that the aid reduction under Article 138(1) of the Regulation is of a criminal nature: the farmer is in a better position financially if he receives the aid than if it is refused and the amounts by which the aid entitlements can be reduced in the case at issue are not insignificant.

71. However, in my view, in assessing the severity of the penalty which is liable to be imposed, the assessment may not be based on whether, at face value, a measure ultimately has a financially disadvantageous effect. On the contrary, an evaluatory consideration is advisable, which should include whether the penalty adversely affects interests of the person concerned which are worthy of protection. If this must be answered in the negative, there is no severe penalty within the meaning of the third *Engel* criterion. In making this examination it is conspicuous in connection with the case at issue that the penalty does not adversely affect the current property of the person concerned, as would be the case with a fine. Neither is there any interference with legitimate expectations. By means of the reduction, the person concerned is merely faced with the loss of the prospect of aid. However, with regard to this prospect of aid, there is no legitimate expectation of aid where a beneficiary of aid has knowingly made false declarations: he knew from the start that he would not get any aid which was not reduced if he made false declarations.<sup>68</sup>

66 — See, however, in the field of competition law with regard to the application of the principle of the presumption of innocence, Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 150.

67 — See point 43 of this Opinion.

68 — The Court of Justice also based its decision in its judgment in *Käserei Champignon Hofmeister* precisely on these ideas, in that it regarded the criterion of voluntary participation in the aid scheme as being decisive.

### 3. Consequences if a different decision were made

72. Finally, a look is proffered at the practical consequences which would result if one were to apply the *ne bis in idem* principle in circumstances such as in the present case. I would mention at this point that the specific effects may not of course determine the interpretation of the *ne bis in idem* principle, nevertheless a consideration of them is not devoid of interest and underlines the understanding of the overall agricultural aid scheme. They show that the legislature did not proceed on the basis that comparable administrative penalties in the agricultural sector are a *bis* within the meaning of the *ne bis in idem* principle.

73. First of all, in this respect, it is of interest that there are regulations which explicitly direct that the administrative penalties provided for in European Union law are to apply without prejudice to additional penalties laid down at national level.<sup>69</sup>

74. Article 6 of Regulation No 2988/95 on the protection of the European Communities' financial interests<sup>70</sup> does not indicate either that the legislature proceeded on the basis that the concurrence of administrative penalties and national criminal penalties should be judged according to the *ne bis in idem* principle: Article 6(1) of that provision states that proceedings relating to administrative penalties merely *may* be suspended if criminal proceedings have been initiated against the same person in the Member States and may basically be resumed later.<sup>71</sup> While Article 6(3) of Regulation No 2988/95 makes resuming the administrative proceedings subject to general principles of law, if *ne bis in idem* were to apply then the administrative proceedings could never be resumed.

75. Pursuant to the tenth recital in the preamble to Regulation No 2988/95, whilst the overlapping of penalties without allowing credit is to be prevented, the conduct of a second set of proceedings is not barred: although the term *ne bis in idem* is also mentioned there, at the same time the ninth recital states that the European Union law sanctions pursue their own ends which do not affect the assessment of the conduct of the economic operators concerned by the Member States from the point of view of criminal law.

76. Finally, it is necessary to come back to the obligation of the Member States, referred to at the outset, to punish fraudulent conduct injuring the European Union's financial interests by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty.<sup>72</sup>

77. If the *ne bis in idem* principle were to be applied in the case at issue, it would generally exclude the imposition of a penalty in the form of deprivation of liberty even in cases of the most serious and recurring fraud, since under the Regulation it is mandatory to impose the administrative penalty and that would be a bar to a criminal prosecution.

69 — See Article 48(9) of Commission Regulation (EC) No 612/2009 of 7 July 2009 on laying down common detailed rules for the application of the system of export refunds on agricultural products, OJ 2009 L 186, p. 1, and recital 98 in the preamble to Regulation No 1122/2009 (cited in footnote 4).

70 — Cited in footnote 64.

71 — In relation to this, see also the ninth recital in the preamble to the Regulation.

72 — Point 18 et seq. of this Opinion; in relation to this, see also Article 2(1) of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, OJ 1995 C 316, p. 49.

#### 4. Credit for the penalty

78. However, the non-application of the *ne bis in idem* principle must not lead to the person concerned being disproportionately burdened with regard to the severity of the national criminal penalty.<sup>73</sup> It follows from the principle of proportionality that the administrative penalty must be taken into account in assessing the criminal penalty to be imposed.<sup>74</sup> The tenth recital in the preamble to Regulation No 2988/95,<sup>75</sup> referred to above, according to which any overlap of European Union financial penalties and national criminal penalties must be prevented, also points in this direction.

#### 5. Review of the remaining criteria of the *ne bis in idem* principle

79. Finally, I would also like to deal with arguments in relation to the further review of the *ne bis in idem* principle, which were mentioned, in the alternative, by the Republic of Poland and by the Commission. Both indicated that the application of this principle in the case at issue also fails due to the lack of the *idem* requirement: the administrative penalty under Article 138(1) of Regulation No 1973/2004 and the national penalty do not protect the same legal interest.

80. However, in its case-law on the prohibition of double penalties in Protocol No 7 to the ECHR, the ECtHR now has regard only to whether or not the facts are identical and not to whether or not the legal interest protected is identical.<sup>76</sup> As I explained in my Opinion in *Toshiba and Others*, for the purposes of the European Union law prohibition of double penalties, the notion of *idem* should be guided by the case-law of the ECtHR, pursuant to which whether or not the facts are identical is decisive.<sup>77</sup> Pursuant to that case-law, the legal interest protected by Article 138(1) of Regulation No 1973/2004 would be irrelevant to the review of *idem*.

### VI – Conclusion

81. Against the background of the above considerations, I propose that the Court answer the reference for a preliminary ruling as follows:

The proceedings pursuant to Article 138(1) of Regulation No 1973/2004 which lead to a penalty which consists in not paying the farmer any aid in the year in which he submitted an incorrect declaration as to the size of the area forming the basis of his aid application and excluding him once again from receiving aid up to an amount which corresponds to the difference between the area declared and the area determined and off-setting that amount against aid payments to which he is entitled in the context of applications he lodges in the course of the three calendar years following the calendar year of the finding do not constitute criminal proceedings within the meaning of the European Union law *ne bis in idem* principle.

73 — See, to this effect, the judgment in *Käserei Champignon Hofmeister* (cited in footnote 33, paragraph 52), in which the Court emphasised that despite the fact that the principle '*nulla poena sine culpa*' is not applicable, the person concerned is not left without legal protection.

74 — See point 18 of this Opinion in relation to the applicability of the principle of proportionality to the national criminal penalty.

75 — Cited in footnote 64.

76 — ECtHR, *Sergey Zolotuhkin v. Russia* (cited in footnote 48, § 82).

77 — Cited in footnote 30, points 111 to 124.