Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 26 June 2018 [1]

Case C-384/17

Dooel Uvoz-Izvoz Skopje Link Logistik N&N
v
Budapest Rendőrfőkapitánya

(Request for a preliminary ruling from the Szombathelyi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szombathely, Hungary))

(Reference for a preliminary ruling — Transportation by road — Charging of heavy goods vehicles for the use of certain infrastructures —Directive 1999/62/EC — Article 9a —Requirement of proportionality of sanctions — Conform interpretation — Direct effect — Consequences for national courts and administrative authorities — Power to impose a milder sanction pending legislative intervention)

I. Introduction

1. Dooel Uvoz-Izvoz Skopje Link Logistik N&N ('the Applicant') is an undertaking that operates heavy goods vehicles. In October 2015, it failed to ensure payment by the driver of a toll for one of its vehicles prior to that vehicle entering the road subject to the toll. The Applicant, as the vehicle operator, was fined. The Applicant has challenged the amount of the fine before the Hungarian courts. It argues that the fine is disproportionate and that the national legislation in question is incompatible with EU law.

2. In the judgment in *Euro-Team and Spirál-Gép*,[2] the Court has already held that the system of penalties provided for by the Hungarian legislation did not comply with the requirement of proportionality laid down in Article 9a of Directive 1999/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures.[3] The Court's analysis and findings in that judgment were general in the sense that they resulted in a declaration of incompatibility of a system of penalties (such as that at issue in the main proceedings) with the requirement of proportionality.

3. In the present case, the Court is asked by a different Hungarian court to provide more specific guidance: what are the specific consequences of such an incompatibility? On whom is the burden to ensure the required proportionality of sanctions, and how? In particular how are these questions to be answered as regards the transitional period before the national legislature provides for a new

1 Original language: English.

2 Judgment of 22 March 2017 (C-497/15 and C-498/15, EU:C:2017:229).

3 Directive of the European Parliament and of the Council of 17 June 1999 (OJ 1999 L 187, p. 42).

framework? To that end, the Court is being asked whether Article 9a of Directive 1999/62 has direct effect and/or whether national law must be interpreted in conformity with that provision. Furthermore, the referring court raises a connected issue: upon which body, judicial or administrative, any such duty falls, and how exactly it should be carried out.

II. Legal framework

A. EU law

1. Directive 1999/62

4. Recital 14 of Directive 1999/62 is worded as follows: 'Tolls and user charges should not be discriminatory nor entail excessive formalities or create obstacles at internal borders; therefore, adequate measures should be taken to permit the payment of tolls and user charges at any time and with different means of payment.'

5. Recital 15 reads as follows: 'The rates of user charges should be based on the duration of the use made of the infrastructure in question and be differentiated in relation to the costs caused by the road vehicles.'

6. Recital 21 states that: 'In accordance with the principle of proportionality, this Directive limits itself to the minimum required for the attainment of the objectives under the third paragraph of Article 5 of the Treaty.'

7. Article 2(b) of Directive 1999/62 defines a 'toll' as 'a specified amount payable for a vehicle based on the distance travelled on a given infrastructure and on the type of the vehicle comprising an infrastructure charge and/or an external-cost charge'.

8. Article 2(c) defines a 'user charge' as 'a specified amount payment of which confers the right for a vehicle to use for a given period the infrastructures referred to in Article 7(1)'.

9. Chapter III of the directive is devoted to tolls and user charges.

10. Article 7(1) provides that: 'Without prejudice to Article 9 paragraph 1a, Member States may maintain or introduce tolls and/or user charges on the trans-European road network or on certain sections of that network, and on any other additional sections of their network of motorways which are not part of the trans-European road network under the conditions laid down in paragraphs 2, 3, 4 and 5 of this Article and in Articles 7a to 7k. This shall be without prejudice to the right of Member States, in compliance with the Treaty on the Functioning of the European Union, to apply tolls and/or user charges on other roads, provided that the imposition of tolls and/or user charges on such other roads does not discriminate against international traffic and does not result in the distortion of competition between operators.'

11. Under Article 7a(1), 'user charges shall be proportionate to the duration of the use made of the infrastructure, not exceeding the values stipulated in Annex II, and shall be valid for a day, a week, a month or a year ...'.

12. Article 9a provides that: '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 necessary measures to ensure that they are implemented. The penalties established shall be effective, proportionate and dissuasive.'

B. Hungarian law

1. The Road Traffic Law

13. Paragraph 20(1) of the közúti közlekedésről szóló 1988. évi I. törvény (Law No I of 1988 on road traffic) ('the Road Traffic Law') provides:

'A fine may be imposed on anyone who infringes the present law, specific legislation, or acts of Community law, relating to:

…

(m) distance-based tolls payable for the use of a toll section of road.

…'

14. Paragraph 21 of the Road Traffic Law states:

'(1) The person who operates the vehicle or, in the situation referred to in Paragraph 21/A(2), the person who has been entrusted with the use of the vehicle, shall be responsible for ensuring compliance, when operating or using the vehicle, with the provisions laid down in the specific laws, concerning

…

(h) distance-based tolls payable for the use of a toll section of road.

…

(2) In the event of an offence under subparagraph (1), the person who operates the vehicle or, in the situation referred to in Paragraph 21/A(2), the person who has been entrusted with the use of the vehicle, shall be ordered to pay an administrative fine of 10 000 [Hungarian forints (HUF)] to HUF 300 000 (approximately EUR 32 to EUR 974). The amount of the fines applicable for offences under the different provisions shall be set by Governmental regulation. Where a single act constitutes an infringement of a number of rules and is examined in a single set of proceedings, the penalty shall be a fine the amount of which corresponds to the sum of the amounts of the fines laid down for each of those infringements.

…

(5) The Government — taking account of subparagraph (1) — shall establish by regulation the list of offences in respect of which an administrative fine may be imposed … on the person operating the vehicle.'

2. The Law on Tolled Roads

15. Paragraph 3(1) and (6) of the az autópályák, autóutak és főutak használatáért fizetendő, megtett úttal arányos díjról szóló 2013. évi LXVII. törvény (Law No LXVII of 2013 on distance-based tolls payable for the use of motorways, expressways and main roads) ('the Law on Tolled Roads') provides:

'(1) The use of tolled sections of road with tolled motor vehicles requires road use authorisation as specified in this Law.

…

(6) The operator of the motor vehicle shall be responsible for ensuring compliance with the requirements in subparagraph (1) in respect of the motor vehicle that he operates.'

16. Article 14 of the Law on Tolled Roads reads as follows:

'… road use shall be deemed unauthorised if:

(a) prior to using a section of tolled road, the person liable to pay the toll fails to purchase a route ticket for the section of tolled road that they use, and they do not have a valid agreement with the toll service provider for the submission of toll declarations under this Law to the body responsible for collecting the toll and for toll payment;

(b) the person liable to pay the toll uses a section of tolled road under a toll or environment protection declaration for a lower toll or environment protection category than that which is applicable; or

(c) with respect to the motor vehicle concerned, the person liable to pay the toll holds a valid agreement to use a section of tolled road with the toll service provider for the submission of toll declarations to the body responsible for collecting the toll and for toll payment under this Law; however, during the use of those sections of the tolled road, at least one of the conditions for the proper operation of the on-board unit, set out in the Decree adopted pursuant to the powers conferred by this Law, is not satisfied, and prior to using a section of tolled road, the person liable to pay the toll failed to purchase a route ticket for the section of tolled road that they use.'

17. Article 15 of that law provides:

'(1) The amount of the fine shall be set in such a way as to encourage persons liable to pay the toll actually to pay the toll required.'

3. Governmental Decree No 410/2007

18. Paragraph 1(1) of the közigazgatási bírsággal sújtandó közlekedési szabályszegések köréről, az e tevékenységekre vonatkozó rendelkezések megsértése esetén kiszabható bírságok összegéről, felhasználásának rendjéről és az ellenőrzésben történő közreműködés feltételeiről szóló 410/2007. (XII. 29.) Korm. rendelet (Governmental Decree No 410/2007 on road traffic offences subject to an administrative fine, the amounts of the fines due in respect of road traffic offences, the use of fines and the conditions for cooperation in roadside checks) of 29 December 2007 ('Governmental Decree No 410/2007') provides:

'In accordance with Paragraph 21(1) of the Road Traffic Law, in the event of an offence under the provisions in Paragraphs 2 and 8a, an administrative fine shall be imposed on the person responsible for operating the vehicle … in the amount laid down in this Law.'

19. Paragraph 8/A of Governmental Decree No 410/2007 states:

'(1) In relation to Paragraph 21(1)(h) of [the Road Traffic Law], in the event of an infringement of the provisions contained in Annex 9, the person responsible for operating the vehicle shall be required to pay a fine, the amount of which shall be determined according to the category of the vehicle.

…'

20. Annex 9 to that decree contains the following table:

A	B		
	B1	B2	B3
1. Offence provided for in Law No LXVII of 2013	Amount of the fine, according to the category of the vehicle		
	J2	J3	J4
2. Paragraph 14(a) of Law No LXVII of 2013	140 000	150 000	165 000
3. Paragraph 14(b) of Law No LXVII of 2013	80 000	90 000	110 000
4. Paragraph 14(c) of Law No LXVII of 2013	140 000	150 000	165 000

III. Facts, proceedings and the questions referred

21. On 29 October 2015, at 19.34 hours, a J4 class heavy goods vehicle operated by Link Logistik N&N, was travelling at kilometre point 3.670 of the toll section of main road 14 (heading towards the starting point of the road). The vehicle drove into the toll section of the road without the prior payment of the required distance-based toll having been made.

22. Eighteen minutes later, on his own initiative, the driver purchased a route ticket for the entirety of the planned journey on the toll road. That ticket, which cost HUF 19 573, covered the part of the journey that had already been completed and the part that the driver would go on to complete.

23. On 15 January 2016, the Vas Megye Rendőrfőkapitánya (Commander-in-Chief of Police, Province of Vas, Hungary), the first-tier administrative authority, found that on the date of the check, at the place and in the direction indicated above, the vehicle operated by Link Logistik was using the road without having paid the toll, contrary to Paragraph 14(a) of the Law on Tolled Roads. The Commander-in-Chief of Police therefore imposed an administrative fine of HUF 165 000 on Link Logistik, in accordance with Paragraphs 21 to 21/B of the Road Traffic Law, as amended on several occasions, and Paragraph 1(1) and Paragraph 8/A of Governmental Decree No 410/2007.

24. The appellate administrative authority, the Budapest Rendőrfőkapitánya (the Commander-in-Chief of Police, Budapest, Hungary) confirmed the first-tier decision. It stated that the applicable national legislation does not confer on the competent authority the power to conduct a balancing of interests in the assessment of the amount of the fine. The Budapest Commander-in-Chief of Police observed that national law only permits account to be taken of the circumstances provided for in the statute. That does not include the specific circumstances relied on by Link Logistik, notably the a posteriori purchase of the route ticket, for the whole toll route, after a short period of time had elapsed, and the existence of obstacles preventing the purchase of the route ticket prior to entering the section of the road subject to the toll.

25. Link Logistik challenged the decision of the Commander-in-Chief of Police ('the Defendant') before the referring court. In its appeal, the Applicant claimed that the Hungarian legislation is not compatible with EU law. It pointed to the excessive nature of the amount, as it is equivalent to the fine imposed on those who do not buy a route ticket at all.

26. It is within this factual and legal context that the Szombathelyi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szombathely, Hungary) decided to stay the proceedings and to refer the following questions to the Court:

'(1) Is the requirement of proportionality laid down in Article 9a of [Directive 1999/62] and interpreted by the Court of Justice of the European Union in its judgment of 22 March 2017 in [*Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229)], a directly applicable provision of the directive?

(2) If the requirement of proportionality laid down in Article 9a of [Directive 1999/62] and interpreted by the Court of Justice of the European Union in its judgment of 22 March 2017 in [*Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229)], is not a directly applicable provision of the directive:

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 legislative action at national level — the relevant Hungarian legislation in the present proceedings with the substantive criteria of the requirement of proportionality, laid down in the judgment of the Court of Justice of the European Union of 22 March 2017 in [*Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229)]?'

27. Written submissions were lodged by the Hungarian Government and the European Commission.

IV. Assessment

28. This Opinion is structured as follows. I will start by discussing why sanctions should be proportionate in EU law, whether in general, or specifically under Article 9a of Directive 1999/62 (A). I will then provide an answer to the referring court's two explicit questions as to whether the proportionality requirement, set out in Article 9a of Directive 1999/62, is directly effective or whether it can give rise to the duty of conform interpretation (B). Finally, I will turn to the issue touched upon by the referring court in its second question concerning the institutional and procedural implications of the answer provided: whether it is the national courts or administrative authorities that shall ensure compliance with the requirements stemming from EU law in the absence of legislative intervention at national level, and how they should do so? (C).

A. Why should sanctions be proportionate

29. In recent years, several cases [4] have been brought before this Court concerning the compatibility of various aspects of the Hungarian system of penalties with the proportionality requirement as laid down either in Directive 1999/62 or in Regulation (EC) No 561/2006. [5]

30. By virtue of Article 9a of Directive 1999/62, Member States shall determine the system of penalties applicable to infringements of the national provisions adopted under that directive. Those penalties shall be effective, *proportionate* and dissuasive.

4 See judgments of 9 February 2012, *Urbán* (C-210/10, EU:C:2012:64); of 9 June 2016, *Eurospeed* (C-287/14, EU:C:2016:420); of 19 October 2016, *EL-EM-2001* (C-501/14, EU:C:2016:777); and of 22 March 2017, *Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229).

5 Regulation of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJ 2006 L 102, p. 1).

31. That provision has recently been interpreted by the Court in the judgment in *Euro-Team*.[6] That judgment joined two cases with similar factual backgrounds: the applicants in those cases had missed the correct motorway exit, one because of an error in the navigation system of the vehicle, the other due to a failure to pay attention. They were fined for using a section of motorway without paying the required toll for that section in advance. The fines were, respectively, 500 and 87 times higher than the amount due for the toll. In those cases, the authorities could not take into consideration the individual and particular situation of the vehicle operator, nor investigate whether or not the offence was actually attributable to that operator. The applicants claimed that the amount of the penalty was disproportionate and thus ran counter to EU law.[7]

32. Within such a factual context, the Court recalled that, in the absence of EU harmonisation in the field of penalties, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with EU law and its general principles, including the principle of proportionality. That entails that the severity of penalties must be commensurate with the seriousness of the infringements. Furthermore, Member States are required to comply with the principle of proportionality not only as regards the determination of factors constituting an infringement and the determination of the rules concerning the severity of fines, but also with regard to the assessment of the factors which may be taken into account in the fixing of a fine.[8]

33. Accordingly, the Court held that the requirement of proportionality of the penalties set out in Article 9a of Directive 1999/62 precluded a system of penalties, which provides for the imposition of a flat-rate fine for all offences, whatever their nature and gravity, under the rules on the obligation to make prior payment of the toll for use of a road infrastructure. The fact that national authorities responsible for penalising infringements could not take account of the actual circumstances of the individual case or, if appropriate, reduce the amount of that fine, was incompatible with EU law.[9]

34. The Court has also reached the same conclusion in the context of Regulation No 561/2006. That regulation contains a similar provision to Article 9a of Directive 1999/62.[10] In particular, in the judgment in *Urbán*, the Court held that the requirement of proportionality laid down in Article 19(1) and (4) of Regulation No 561/2006 must be interpreted as precluding a system of penalties which provides for the imposition of a flat-rate fine for all breaches, no matter how serious, of the rules on the use of record sheets.[11]

35. It is therefore clear from the case-law that, whether under Directive 1999/62 or under Regulation No 561/2006, penalties imposed for infringements of those acts must be proportionate. However, that requirement is in no way limited to those two secondary law acts.

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

7 Judgment of 22 March 2017, *Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229, paragraphs 29 to 30).

8 Judgment of 22 March 2017, *Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229, paragraphs 39 to 43). See also, again in the context of the Hungarian system of penalties for road offences, judgments of 9 February 2012, *Urbán* (C-210/10, EU:C:2012:64, paragraphs 53 to 54), and of 19 October 2016, *EL-EM-2001* (C-501/14, EU:C:2016:777, paragraphs 40 to 41).

9 Judgment of 22 March 2017, *Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229, paragraphs 50 and 60).

10 Article 19(1) of Regulation No 561/2006 provides that: 'Member States shall lay down rules on penalties applicable to infringements of this Regulation and Regulation (EEC) No 3821/85 and shall take all measures necessary to ensure that they are implemented. Those penalties shall be effective, proportionate, dissuasive and non-discriminatory.' Article 19(4) further states that: 'Member States shall ensure that a system of proportionate penalties, which may include financial penalties, is in force for infringements of this Regulation …'

11 Judgment of 9 February 2012, *Urbán* (C-210/10, EU:C:2012:64, paragraph 44). See also judgments of 9 June 2016, *Eurospeed* (C-287/14, EU:C:2016:420), and of 19 October 2016, *EL-EM-2001* (C-501/14, EU:C:2016:777). See also, with regard to the predecessor of Regulation No 561/2006, judgment of 10 July 1990, *Hansen* (C-326/88, EU:C:1990:291).

36. First, on the most abstract level, the principle of proportionality is a general principle of EU law. It must be observed by any national legislation which falls within the scope of EU law or which implements that law. It requires Member States to adopt measures that are suitable for achieving the objectives pursued and do not go beyond what is necessary to attain them. [12]

37. Second, that principle, when applied specifically to sanctions, is certainly not confined to the area of road transport. It applies cross-sectionally to various fields of EU law, such as for instance customs, [13] competition law, [14] the protection of the financial interests of the EU, [15] free movement of workers, [16] or illegal immigration. [17]

38. Third, the principle of proportionality of sanctions is also guaranteed at the constitutional level by Article 49(3) of the Charter of Fundamental Rights of the European Union ('the Charter'). That provision requires that the severity of the penalties must not be disproportionate to the criminal offence. That includes that the sum of all the criminal penalties imposed must correspond with the seriousness of the offence concerned. [18]

39. Of course, Article 49(3) refers to *criminal* offences. Thus, its argumentative force with regard to, certainly at first sight, an administrative infraction, could be called into question. However, in line with the case-law of the European Court of Human Rights ('ECtHR'), [19] the Court has retained a broad, substantive understanding of the notion of 'criminal offence'. [20] This means that, depending on whether the criteria defined by the ECtHR and taken up by this Court are met, a formally administrative offence can also be classified as criminal and, thus, be subject to Article 49(3) of the Charter. Without in any way prejudging this aspect in the present case, I simply note that what is 'criminal' and what 'administrative' is far from clear-cut. Moreover, whatever it is in terms of classification, the reference made here remains simply on the level of principle.

40. Fourth and finally, the requirement of proportionality of sanctions is also present in the case-law of the ECtHR. In particular, Article 1 of the First Additional Protocol to the European Convention on Human Rights ('ECHR') provides that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions'. In order to determine whether there is an infringement of that right, the ECtHR assesses whether sanctions of pecuniary nature, both criminal but also (or in particular)

12 Most recently see, for instance, judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 68). Or see judgment of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraph 34 and the case-law cited).

13 See judgments of 16 December 1992, *Commission* v *Greece* (C-210/91, EU:C:1992:525, paragraph 20), and of 12 July 2001, *Louloudakis* (C-262/99, EU:C:2001:407, paragraph 67).

14 See Article 7(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), as regards the fines imposed by the Commission. In general see, for example, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 279 to 281) (taking into account the size of the undertaking through its total turnover when setting the amount of the fine).

15 See Article 7(1) and Article 9 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (OJ 2017 L 198, p. 29).

16 Judgment of 14 July 1977, *Sagulo and Others* (8/77, EU:C:1977:131, paragraph 13), where the Court held that the penalties imposed on a person that has failed to provide himself with an identity document under Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485) must not be disproportionate to the nature of the offence committed.

17 Article 5(1) and Articles 10 and 12 of Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ 2009 L 168, p. 24) require Member States to take the necessary measures to ensure that infringements of certain provisions of that directive are subject to effective, proportionate and dissuasive sanctions against the employer.

18 See, for instance, judgment of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraph 56), where the Court noted that that requirement resulted from both Article 49(3) and Article 52(1) of the Charter (requirement of *proportionate* limitations on the exercise of the rights and freedoms recognised by the Charter). See also judgment of 28 July 2016, *JZ* (C-294/16 PPU, EU:C:2016:610, paragraphs 42 to 45).

19 See, inter alia, judgments of the ECtHR of 8 June 1976, *Engel and Others v. the Netherlands* (CE:ECHR:1976:0608JUD000510071, paragraphs 80 to 82), and of 10 February 2009, *Sergey Zolotukhin v. Russia* (CE:ECHR:2009:0210JUD001493903, paragraphs 52 to 53).

20 See, for instance, judgments of 5 June 2012, *Bonda* (C-489/10, EU:C:2012:319, paragraph 37); of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105, paragraph 35); and of 20 March 2018, *Garlsson Real Estate and Others* (C-537/16, EU:C:2018:193, paragraph 28).

administrative, are proportionate, that is whether they do not entail an excessive burden or deprivation of property for the person on whom the penalty is imposed.[21] In so doing, the ECtHR takes into account the individual circumstances of each case in order to determine whether the sanction is proportionate.[22]

41. Under Article 52(3) of the Charter, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Thus, at the end of the day, irrespective of the issue of applicability of Article 49(3) of the Charter, the requirements of the ECtHR outlined above regarding the proportionality of sanctions are applicable to a case such as the one in the main proceedings by the joint operation of Article 17(1), Article 52(1), Article 51(1), and Article 52(3) of the Charter.

42. What follows rather clearly from the foregoing is that proportionality of sanctions entails two levels: first, the penalty imposed must be proportionate to the gravity of the infringement. Second, in setting that penalty, such as the amount of a fine, account ought to be taken of the individual circumstances of each case.

43. I wish to add two closing caveats. First, the requirement of proportionality as outlined above certainly cannot be read as excluding the legislative setting of penalties. Quite to the contrary, it is the inherent prerogative of the legislature not only to determine what is illegal, but also to set, in general, the penalty for any such illegality. Second, in my view, the duty to take individual circumstances into account should not be pushed so far as to exclude, per se, the possibility of having flat-rate penalties for certain types of infringement. There are certain types of infringement for which such penalties are suitable and appropriate: examples that come to mind are minor traffic violations or parking tickets.

44. However, the key to what system, within the two caveats, will or will not be appropriate again lies in the proportionality of any such system. That only demonstrates how deeply proportionality driven analysis is embedded in the current understanding of the law. The role of a judge is no longer that of a 'subsumption machine'[23] that is simply asked to identify the relevant transgression for which one uniform sanction must follow. The role of the judge might indeed be circumscribed in some cases, but on the condition that the legislatively instituted system of penalties is in itself already proportionate. In a way, the (general) *legislative* proportionality and the (individual) proportionality *in adjudication* are joint vessels. The more there is of the former, perhaps the less need there is of the latter, and vice versa. In any case, the default rule for the operation of a system as a whole is one of direct proportionality: the greater the interference with individual rights, for example, the more draconian the penalties, the greater the need to take into account the individual circumstances of each case and the power to modify the sanction, if appropriate.

21 Finding a violation of Article 1 of Protocol No 1 on grounds of the lack of proportionality of sanctions, see, for example, judgments of the ECtHR of 11 January 2007, *Mamidakis v. Greece* (CE:ECHR:2007:0111JUD003553304, paragraphs 47 to 48); of 6 November 2008, *Ismayilov v. Russia* (CE:ECHR:2008:1106JUD003035203, paragraph 38); and of 26 February 2009, *Grifhorst v. France* (CE:ECHR:2009:0226JUD002833602, paragraphs 94 to 106). For examples of finding no violation of Article 1 of Protocol No 1 after having assessed the proportionality of the sanctions imposed, see for example judgments of the ECtHR of 7 July 1989, *Tre Traktörer Aktiebolag v. Sweden* (CE:ECHR:1989:0707JUD001087384, paragraph 62); of 18 June 2013, *S.C. Complex Herta Import Export S.R.L. Lipova v Romania* (CE:ECHR:2013:0618JUD001711804, paragraph 38); and of 4 March 2014, *Grande Stevens v. Italy* (CE:ECHR:2014:0304JUD001864010, paragraph 199).

22 It may be added that the gravity of the sanction, for instance a large sum of money, can also hint at the criminal nature of the sanction for the purposes of Article 6(1) of the Convention (see, for instance, judgment of the ECtHR of 11 January 2007, *Mamidakis v. Greece* (CE:ECHR:2007:0111JUD003553304, paragraphs 20 to 21).

23 Ogorek, R., *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert*, Frankfurt am Main, V. Klostermann, 1986. Whether that picture was, as a matter of fact, correct even in the 19th century is another debate. See, for example, Gläser, M., *Lehre und Rechtsprechung im französischen Zivilrecht des 19. Jahrhunderts*, Frankfurt am Main, V. Klostermann, 1996.

B. The proportionality requirement set out in Article 9a of Directive 1999/62: direct effect or conform interpretation

45. The two questions posed by the referring court are presented in the alternative: is the proportionality requirement laid down in Article 9a of Directive 1999/62 directly effective? If it is not directly effective, can national law be interpreted in conformity with that requirement?

46. Before addressing those questions, two remarks ought to be made at the outset.

47. First, as suggested above, the present case follows the judgment of the Court in *Euro-Team*[24] and, to a certain extent, also in *Urbán*.[25] Taking the matter a step further, the referring court now essentially enquires as to what precisely national courts and/or administrative authorities are entitled or even obliged to do in individual pending cases, *as a matter of EU law*, during the transitional stage between the finding of incompatibility and the adoption of a new legislative framework by the Member States' competent authorities.[26] Thus, in a way, the Court is called on to take position on two interrelated issues: *how* does the principle of proportionality of sanctions, laid down in Article 9a of Directive 1999/62, extend into the national legal systems? Once that is ascertained, the connected question is *who* is supposed to apply it and in what way?

48. Second, the present request for a preliminary ruling was submitted only a few months after the delivery of the judgment in *Euro-Team*.[27] That decision concerned the same provisions of the Hungarian legislation that are also applicable in the main proceedings of this case. In this context, phrasing the argument as a ground of inadmissibility, the Hungarian Government has claimed that it is not for the Court to interpret national law in conformity with the directive.

49. The Hungarian Government is correct. It is undoubtedly not for this Court to interpret national law and determine whether it can — or it cannot — be interpreted in compatibility with EU law. Nonetheless, this Court is entitled to provide guidance as to the consequences that follow from the judgment in *Euro-Team*, notably as to the powers and obligations of national courts and/or administrative authorities in effectively safeguarding EU law based rights at national level.

50. In its order for reference, the referring court explains that there are divergent opinions at national level on whether, in addition to annulling the disproportionate sanction, it is also possible or even necessary to order new procedures to take place before the administrative authorities. Hence, the referring court seeks to ascertain whether, in the absence of action on the part of the Hungarian legislature, conform interpretation of national law *or* direct effect permits or even requires national courts and/or administrative authorities to supplement the Hungarian legislation before the latter has been effectively amended to meet the requirement of proportionality laid down in Article 9a of Directive 1999/62.

24 Judgment of 22 March 2017 (C-497/15 and C-498/15, EU:C:2017:229).

25 Judgment of 9 February 2012, *Urbán* (C-210/10, EU:C:2012:64).

26 It has been indeed stated by the Hungarian Government that the national system of sanctions has been reformed after the judgment in *Euro-Team* was handed down. The new provisions define the scale of fines according to the period of time that has lapsed between the first and the last finding of the irregular use of the road subject to a toll. It would appear that in a situation such as the one in issue in the main proceedings, the amount of the fine would now be HUF 40 000 (approx. EUR 127). In its written submissions, the Hungarian Government indicated that these new provisions entered into force on 12 November 2017. They are not therefore applicable to the present case.

27 Judgment of 22 March 2017 (C-497/15 and C-498/15, EU:C:2017:229).

51. Those questions, and whether or not the requirement of proportionality laid down in Article 9a of Directive 1999/62 is directly effective, are significant matters of interpretation of EU law. This concern about the effects of EU law during the transitional period between the finding of incompatibility and the adoption by the legislature of new measures, has already been dwelt on by the Court in the past.[28] Accordingly, to this extent, these matters ought to be addressed by the Court.

1. Conform interpretation or direct effect

52. Before examining whether the proportionality requirement contained in Article 9a of Directive 1999/62 has direct effect or can give rise to conform interpretation, one general remark should be made at the outset concerning direct effect and conform interpretation. Both notions are presented in the referring court's questions as two separate matters.

53. Such presentation indeed reflects the evolution in the case-law of both categories as two distinct mechanisms. They are subject to different conditions. Each of them extends into the national legal orders differently, and they have different procedural consequences, depending in particular on their limits, and the type of legal relationships in question.

54. At the same time, however, what is being required in terms of the practical result in the individual cases within each of these categories may not be that different, in particular in cases where a Member State is being sued by an individual. The reality seems closer to a continuum between these two remedies: it will often be debatable at what stage 'mere' conform interpretation ends and when direct effect begins. The blurring of that border between direct effect and conform interpretation will be even greater in cases concerning requirements such as proportionality, which may be found in a number of legal acts of varying legal weight at European as well as national levels.

55. With that caveat in mind, I shall first turn to the issue of conform interpretation. It is true that the referring court first enquires about direct effect. To my knowledge, the Court has never made any explicit statement concerning any order or hierarchy between direct effect and conform interpretation.[29] However, in an Opinion concerned with the importance of the principle of proportionality (but perhaps not limited to that), the same principle could also be taken into account in order to limit the degree of interference with the expressed national legislative choice to what is strictly necessary. Put differently, if conform interpretation is indeed able, without an unnatural twisting and bending of national rules and in view of the type of relationship in question in the main proceedings, to bring about the aim or objective required by EU law, then perhaps it ought to be preferred, because it is also likely to minimise the impact on the integrity of the national legal order.[30]

(a) Conform interpretation

56. As regards the referring court's second question, the statements made by the former in its order for reference together with the submissions of the Hungarian Government and the Commission largely follow the same direction. In particular, the referring court points out that legal interpretation is not unfettered and may not constitute veiled legislative activity, or assumption of the powers of the national legislature by national courts, thereby exceeding their jurisdiction.

28 See, to that effect, judgments of 19 November 2009, *Filipiak* (C-314/08, EU:C:2009:719, paragraphs 44 to 45), and of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraphs 40 to 41).

29 For an example of variations in the order of assessment, compare judgments of 27 February 2014, *OSA* (C-351/12, EU:C:2014:110, paragraphs 43 to 44), and of 25 June 2015, *Indėlių ir investicijų draudimas and Nemaniūnas* (C-671/13, EU:C:2015:418, paragraphs 56 to 57).

30 See my Opinion in *Pöpperl* (C-187/15, EU:C:2016:194, point 62) or Opinion of Advocate General Sharpston in *OSA* (C-351/12, EU:C:2013:749, point 45); see also, in general, Prechal, S., *Directives in EC Law*, 2nd ed., Oxford University Press, Oxford, 2005, pp. 314 and 315.

57. The referring court is certainly correct. There are limits to what may be achieved by conform interpretation, as clearly confirmed by the case-law.[31] On the one hand, the obligation to interpret national law in conformity with EU law is 'inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law'.[32] On the other hand, one of the limits to conform interpretation is that it cannot be used to achieve a result '*contra legem*'.[33]

58. This limit is not, however, that easy to assess. It is quite clear that conform interpretation cannot lead to situations in which national rules could be completely negated. A rule to 'be A' cannot suddenly become 'be non-A'.[34] However, beyond such clear-cut cases, what is '*intra*', what is '*praeter*', and what is already '*contra legem*' inevitably depends on a judge's subjective, interpretative assessment of whether a particular result is achievable based on a global assessment of national law.

59. This is even more the case because the duty of conform interpretation is not limited to the specific legal instrument that was adopted to transpose an obligation of EU law. It is also well established that conform interpretation involves looking at national law *as a whole*,[35] at any rule in the national body of law that could, on a proper and permissible construction of national law, secure its interpretative conformity with EU law.[36] Metaphorically speaking, conform interpretation is not limited to the examination of a specific branch or twig of national law, which happens to bear the same name as the EU measure to be implemented, but involves the entire tree of national law, including its constitutional or general administrative trunk and roots. However, whether there is anything elsewhere on the national legislative tree that would shed a different interpretative light on the one specific branch called 'proportionality of administrative sanctions' is indeed an issue for the national court(s) to ascertain.

60. In the present case, it is being suggested that conform interpretation is not possible. If indeed the problem is framed as including a conflict of, on the one hand, the specific, sectorial Hungarian legislation on road traffic offences providing for tables and specific figures or amounts, that does not allow for the possibility of any moderation of sanctions, and, on the other hand, the absence of any other provision of Hungarian law of any rank requiring that sanctions ought to be proportionate, then indeed one must agree that it is not possible to interpret what is clearly amount X being a different amount, Y. But again, those issues are for the national court to ascertain, bearing in mind the general guidance provided in the preceding paragraphs.

(b) Direct effect

61. If the national court establishes that conform interpretation is not an option in the case at hand, the main issue becomes whether Article 9a of Directive 1999/62, which contains the requirement of proportionality of penalties, is directly effective.

31 Judgments of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 26), and of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraphs 111 to 119). See also judgments of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 109), and of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 25).

32 Judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 114).

33 See, for example, judgment of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 110); of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 100); and of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 32).

34 For discussion of a specific example, see, for instance, Opinion of Advocate General Sharpston in *Unibet* (C-432/05, EU:C:2006:755, point 55).

35 'The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that EU law is fully effective and to achieving an outcome consistent with the objective pursued by it' (see, for a more recent restatement, for instance, judgment of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550, paragraph 43 and the case-law cited)).

36 Attesting to a broad approach to the duty of conform interpretation by including posterior national law within the scope of that duty, see for instance, judgments of 16 December 1993, *Wagner Miret* (C-334/92, EU:C:1993:945, paragraph 20), and of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 32).

62. By its wording and its nature, that question is circumscribed to the issue of direct effect of the requirement that penalties be proportionate contained in Article 9a of Directive 1999/62. That means a twofold limitation: first, even if, as outlined in the previous section, the principle of proportionality is applied in a number of areas of EU law, the assessment to be carried out in relation to the national court's first question strictly relates to one specific provision of a certain directive. This means that any such potential pronouncement is limited to the material scope of the directive in question. Second, the same assessment naturally concerns only the requirement of proportionality of penalties contained in that article, but not the other potential requirements contained in that same article.

(1) The conditions

63. Direct effect refers to the ability of an EU law rule to be justiciable at national level. Whether or not a provision has direct effect must be examined having regard to the nature, general scheme and wording of the provision in question.[37] A provision will be directly effective whenever, as far as its subject matter is concerned, it is sufficiently clear, precise and unconditional to be relied on in so far as the provisions define rights which individuals are able to assert against the State.[38]

64. Four general observations based on the case-law are called for, before turning to the present case.[39]

65. First, it is obvious from the case-law that 'clear and precise' is a rather elastic term. A provision can be 'clear and precise' whilst containing undefined — or even vague — concepts or indeterminate legal notions.

66. Second, the Court appears to be more prone to conclude that a provision, notwithstanding its use of vague or indeterminate notions, is directly effective where the provision contains a *prohibition*. Where the provision is being relied on as the source of a standalone right, the contours of which must be defined, recourse to vague concepts is generally more problematic. However, in several instances, a prohibition can be turned into a positive requirement and vice versa.

67. Third, in determining whether a provision is directly effective in a given case, the Court does not seek to establish that entire provisions are directly effective and applicable verbatim. Instead, it proceeds by extraction, that is, it seeks to determine whether a specific, applicable rule of behaviour can be extracted from the (perhaps longer and more complex) EU law provision.

68. Fourth, the 'unconditional' criterion of direct effect implies that the EU provision does not require the adoption of any further measure(s) on the part of either the EU institutions or the Member States. Member States should not be left with any discretionary power[40] in relation to their implementation or be allowed to rely on a failure to use that discretion.[41] However, notwithstanding the existence of some discretionary power on the part of the Member States, the conditions of direct effect may still be met.

37 See, for example, judgment of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 12).

38 Judgments of 19 January 1982, *Becker* (C-8/81, EU:C:1982:7, paragraph 25), and of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraphs 56 and 57).

39 For a more detailed argument together with further examples and references for each of the general propositions see my recent Opinion in Klohn (C-167/17, EU:C:2018:387, points 38 to 46).

40 Judgment of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 6).

41 Judgment of 19 January 1982, *Becker* (8/81, EU:C:1982:7, paragraphs 28 to 30).

That will be the case in particular if the question of whether the national authorities exceeded their discretion *can be judicially reviewed*.[42] That will, in principle, be so if a 'minimum guarantee', 'minimum rights', or 'minimum protection'[43] can be ascertained, and judicial review can establish whether that minimum level has been respected by the Member States.[44]

69. In a nutshell, when determining whether a provision imposing a prohibition or a command has direct effect, the basic question is whether the rule contained therein is justiciable. To that end, the requirements of 'sufficient clarity, precision and unconditionality' must be interpreted with regard to the actual ability of national authorities to understand and apply that provision themselves. If those authorities retain discretion or a margin of discretion in applying it, such discretion must be constrained by the structure of the provision itself.

(2) Application to the present case

70. The referring court takes the view that the requirement of proportionality laid down in Article 9a of Directive 1999/62 is not a directly applicable provision. It would not be possible to infer from the directive what the penalty must be proportionate to. It is for the national legislature to establish the criteria relating to proportionality on the basis of the Court's definition.

71. According to the Hungarian Government, the content of Article 9a of Directive 1999/62 is not precise and specific enough to be applied directly. It considers that that provision does not create rights for the benefit of the Applicant but rather defines limits allowing, within the application of sanctions, a balance to be struck between the objective protection of the law and individual rights.

72. The Commission claims for its part that Article 9a of Directive 1999/62 is clear, precise and unconditional inasmuch as the sanctions taken by the Member States must always respect the proportionality requirement. Thus, individuals can rely on that requirement laid down in the directive against the State before a court of law.

73. I agree with the Commission. The requirement of proportionality of penalties enshrined in Article 9a of Directive 1999/62 is sufficiently clear, precise and unconditional as to be directly effective.

74. That requirement is *clear and precise*. First, 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 achieve the aim pursued. The actual wording of the proposition extracted from Article 9a of the directive makes little difference to whether the requirement will be drafted as requiring positive action ('penalties shall be proportionate'), or as a prohibition ('penalties shall not be disproportionate').

75. Second, it is also quite clear in respect of what the penalties are supposed to be proportionate: they are supposed to be commensurate with the gravity of the offence committed while taking into account, if appropriate, the individual circumstances of each case. That entire assessment is supposed to take place within the specific context of Directive 1999/62, which sets out the aims and the framework of the applicability of the requirement of proportionality of penalties.

42 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).

43 See respectively, judgments of 19 November 1991, *Francovich and Others* (C-6/90, 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).

44 See in that sense, for example, judgment of 19 September 2000, *Linster* (C-287/98, EU:C:2000:468, paragraph 37).

76. Third, in terms of clarity and precision, 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. The test of direct effect of a provision of EU law is clearly of the former nature: is the general or normative rule or requirement sufficiently clear, precise, and unconditional as to be justiciable? In other words, is the adjudicating body, be it a court or an administrative authority, able to use and directly apply the rule to a dispute pending before it, without further clarification of that rule? This does not (and by the very nature of the law cannot) necessarily mean that the rule will *ex ante* provide a clear answer to any legal case falling under its material scope. As a general point, regardless of how many guidelines, tables, or judgments can be rendered to interpret the meaning of 'proportionate penalty', the discretion inherent in the application of that rule to individual cases would never be taken away.

77. Fourth, the requirement of proportionality also appears to be clear and precise if one considers it from the point of view of those authorities that are called on to apply it on a regular, if not daily, basis — namely national courts and administrative bodies. These authorities should indeed be familiar and well equipped with running the proportionality test, in particular in the context of sanctions.[45]

78. As for the *unconditional* nature of the requirement of proportionality of penalties, it is also clear that the applicability of that principle is not subject to any preconditions.

79. First, it is undoubtedly primarily for the national legislature to implement that provision through more specific means and to shape proportionality in a certain way by setting exact yardsticks and figures. However, that cannot be pushed so far as to suggest that by the same token, other actors, such as judicial or administrative authorities, could not ever consider proportionality, especially in cases in which the national legislature remains inactive or implemented the rule in question incorrectly.

80. That is even more the case if, second, the case at hand clearly falls within what could be labelled a 'minimum guarantee' or a 'minimum protection' of the proportionality requirement. In this sense, some degree of conditionality of a rule could perhaps be invoked if the application of that rule *remained within* the scope of discretion that could have been reasonably considered as being reserved to the Member States. However, by setting up a system of penalties that, as the Court held, imposes sanctions in the realm of multiples of hundreds of the sum due,[46] while making it impossible to take into account the individual circumstances of each case and to moderate the fine, a Member State is clearly going beyond what could reasonably be perceived as falling within the bounds of its discretion and thus covered by any transposition conditionality. Put differently, other than what could have been reasonably covered by Member States' discretion, there is no conditionality.

(3) Interim conclusion

81. It follows from the foregoing that Article 9a of Directive 1999/62, inasmuch as it requires that penalties are to be proportionate, is directly effective.

45 Again, for an illustration of some of the other areas in which the requirement of proportionality of sanctions is applied, see above, points 29 to 42.

46 Above, point 31 of this Opinion.

C. The institutional dimension

82. Once it is established that the requirement of proportionality contained in Article 9a of Directive 1999/62 has direct effect,[47] the connected issue becomes: *who* shall do *what*, as a matter of EU law, in a context where it would appear that national courts and administrative authorities cannot, under national law, take account of the actual circumstances of the individual case or, if appropriate, reduce the amount of that fine?[48]

83. Those two sub-issues, touched upon by the referring court in its second question and further elaborated upon in its order for reference, will now be addressed separately. The suggestion is that a directly effective requirement of proportionality of penalties means that it is EU law that gives the national authorities the power to moderate, if appropriate in individual cases, the disproportionate level of sanction provided in the legislation (1). Moreover, even if it is for each Member State to decide which powers will be exercised by which authorities in individual cases, it is ultimately for the national courts to make sure that EU law is upheld (2).

1. What: annulment or moderation of the sanction?

84. It is settled case-law that a provision of national legislation that is incompatible with EU law must be set aside.[49] In the present case, it is clear that the incompatibility of Hungarian legislation with the proportionality requirement contained in Article 9a of Directive 1999/62 means that that legislation must accordingly be set aside.

85. Less clear is *what* precisely must be set aside. The entire legislative instrument? Or merely the table in the annex that sets the amounts of penalties? Or is it the individual decision that follows the content in that table? Or only the specific provisions in the decisions setting the sanctions?

86. More fundamentally, does direct effect of the requirement of proportionality of penalties contained in Article 9a of Directive 1999/62 mean that any sanction must be set aside? Or could its direct effect actually mean that national courts and/or administrative authorities can decide themselves, on the basis of EU law, to moderate the amount and impose a proportionate sanction as a substitute for the disproportionate sanction initially imposed on the basis of national law? In other words, can the directly effective proportionality requirement, as set out in Article 9a of Directive 1999/62, be plugged into national law in order to empower national bodies to impose penalties complying with that requirement?

87. That issue appears to be of concern to the referring court when it enquires, in its second question, whether national courts and administrative authorities can or even must 'supplement — in the absence of legislative action at national level — the relevant Hungarian legislation … with the substantive criteria of the requirement of proportionality laid down in the [*Euro-Team* judgment]'.

88. For the Hungarian Government, neither the national courts nor the administrative authorities have jurisdiction or competence to supplement the national legislation because it is only for the legislature to enact or amend legislation.

47 It might be added that the arguments made in this section would also be largely applicable if the referring court were to eventually find that national law can be interpreted in conformity with Article 9a of Directive 1999/62.

48 See also judgment of 22 March 2017, *Euro-Team and Spirál-Gép* (C-497/15 and C-498/15, EU:C:2017:229, paragraph 60).

49 See for instance judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 21); of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 61); and of 3 October 2013, *Confédération paysanne* (C-298/12, EU:C:2013:630, paragraph 37).

89. The Commission is also of the opinion that it is for the legislature alone to adopt a proportionate system of sanctions. The fact that the requirement of proportionality contained in Article 9a of Directive 1999/62 is directly effective does not mean that individuals can rely on it and obtain a new, proportionate sanction from a national court. It would appear that, for the Commission, as long as the national legislature has not set up a new system of penalties in full compliance with the proportionality requirement laid down in Article 9a of Directive 1999/62, national courts can only annul the disproportionate sanction.

90. I must admit that the position advocated by the Commission appears to be somewhat disproportionate to me. It amounts, in a nutshell, to suggesting that the direct effect (on which the Commission agreed) of the requirement that *penalties shall be proportionate* effectively means that, as long as the legislature has not adopted a new system of penalties, there can be *no penalties at all*.

91. My view on this question might differ from that of the Commission for two reasons: these are based on the structure of the applicable provisions in the present case and the consequences when a provision of EU law has direct effect.

92. First, when imposing penalties for infringements like the ones in the present proceedings, the legal structure of the rules to be applied tends to be the following: first, there is a rule saying the toll must be paid and how much (the obligation). Second, there is a provision stating that failure to pay the toll is punishable (the legal basis for the punishment). Third, which is sometimes combined with and sometimes separate from the latter provision, is the statement of the level of sanctions, typically stating that for such and such type of behaviour, such and such range of sanctions might be imposed. Fourth, under the same heading, either expressly stated within the same provision in question, sometimes stated throughout several general provisions of a law or even a code of administrative procedure, there tends to be a (typically demonstrative only) list of elements that the adjudicating body is supposed to take into account when setting the level of sanctions, and thus exercising its discretion within the boundaries set by the law and/or the case-law of the courts.

93. Second, direct effect is not, or certainly not only, about *excluding* an incompatible provision of national law. If the finding of the direct effect of a provision of a directive were always to lead simply to the setting aside of the incompatible national legislation, I am bound to agree that direct effect would have no added value to primacy.[50] Setting aside, resulting in the annulment of the sanction, is the necessary consequence of primacy. Direct effect is not needed to that end.

94. In my view, direct effect also means, in cases like the present one, substitution. A directly effective rule of EU law becomes independently justiciable and applicable before the national bodies, irrespective of national legislation adopted to give it effect. Such a directly effective rule does not need to exclude anything on the national level: it may simply add something else, previously unavailable in the fabric of national law.

95. Applying that logic to the present case, a directly effective requirement of proportionality of penalties contained in Article 9a of Directive 1999/62 plugged into the national legal system then means that national bodies are given the power they apparently missed under the fourth step outlined above. That does not necessarily mean that any of the previous steps would need to be set aside: the fact that the toll is due remains valid; so does the fact that if one does not pay the toll, a penalty ensues, and also the *initial* sanction imposed before any moderation of it can take place, as set out in the annex.

50 See, on this discussion for instance Lenaerts, K., Corthaut, T., 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', *European Law Review*, Vol. 31, 2006, pp. 287 to 315; 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 to 69; Gallo, D., *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali, Evoluzione di una dottrina ancora controversa*, Giuffrè, 2018, pp. 351 to 418.

96. However, what changes is that, due to the directly effective requirement of proportionality of penalties, the national bodies are given the power, in cases within the transitional period, that is, unless and until the national legislature has adopted a new system of penalties compatible with EU law, to moderate the penalties imposed in view of the gravity of transgression in question and in view of the individual circumstances of each case. When exercising such a power to amend, the amounts established in Annex 9 to Governmental Decree No 410/2007 may be seen as setting the maximum threshold, above which the fine imposed cannot naturally go, but below which they may be lowered in individual cases, taking into account both the gravity of the infringement and the individual circumstances of each case.

97. For these reasons, I would suggest that the direct effect of the requirement of proportionality of penalties should indeed mean 'proportionate penalties' and not 'no penalties at all'. Similar to what has already been suggested,[51] direct effect can also be applied in a proportionate way, thus to a maximum degree safeguarding the integrity of both systems. Using targeted surgical precision to insert, into the national legal order, a rule that is required in order to secure the latter's immediate compliance with EU law, while naturally leaving the door open to the national legislature to provide otherwise for future cases, is perhaps preferable to effectively incapacitating the further operation of the entire national system of sanctioning.

98. One final point ought to be addressed in conclusion to this section. It is settled case-law that a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the criminal liability of persons who act in contravention of the provisions of that directive.[52] In addition, a directly effective provision of a directive may not of itself impose an obligation upon a private person.[53] It cannot therefore be relied on by *another* person, whether public or private, to the detriment of that private person. This is one of the reasons why the Court has ruled out the possibility for a private person to rely on a directly effective provision of a directive against another private person ('horizontal direct effect') or for a public authority to invoke it against a private person ('descending vertical direct effect').

99. It could perhaps be suggested, on the basis of that line of case-law, that direct effect by substitution as outlined would amount to applying an incorrectly transposed provision of a directive (Article 9a of Directive 1999/62) *to the detriment* of the individual. That provision of the directive would thus be effectively used to make the situation of the individual worse and, in a way, 'save' the defaulting Member State.

100. To my mind, the present case is of a different nature. First, such an argument has gone one step too far. It already assumes that by virtue of primacy, the applicability of sanctions must be categorically excluded, to which direct effect of the requirement of proportionality of penalties means that those are effectively 'reintroduced' into the picture. However, as already outlined above in point 92, the default position, against which any 'worsening' or 'improving' of the legal position of the individual is to be measured is actually different: it is the nationally imposed duty to pay the toll and being sanctioned the full amount of the sanction provided for in national legislation if one fails to.

101. Second, measured against that yardstick, the ultimate outcome will always be favourable to the individuals. The individual will be effectively better off on the basis of the directive as he will incur, in most egregious cases of intentional infringement, the same punishment, but in the majority of cases a milder sanction than the one provided for under incompatible national law.

51 As far as the relationship between direct effect and conform interpretation was concerned (above point 55).

52 See, for instance, judgments of 8 October 1987, *Kolpinghuis Nijmegen* (80/86, EU:C:1987:431, paragraph 13), and of 22 November 2005, *Grøngaard and Bang* (C-384/02, EU:C:2005:708, paragraph 30).

53 See, for instance, judgments of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraph 48); of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 108); and of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 31).

102. Third, it will always be an individual, such as the Applicant, who will rely on Directive 1999/62 in order to benefit from the rights it provides against a Member State. Yet again, it is useful to recall the *exact* nature of that right guaranteed under the directive: it is the establishment of proportionate sanctions. The directive does not state that there shall be no sanctions. Thus, the right deriving from Article 9a of Directive 1999/62 that the Applicant can rely on is not a right to *no* sanctions, but the right not to incur a *disproportionate* sanction.

103. It would be rather peculiar if an individual relying on a directly effective provision of a directive could obtain greater protection than he could ever have been granted under the directive.

2. Who: national courts and/or administrative authorities?

104. The last element relates to a problem raised by the referring court in its order for reference and which becomes apparent in the second question. I understand the nature of the problem to be the following: the national statute does not allow administrative authorities to amend the sanctions and to take individual circumstances into account when deciding on the penalty. The powers given to an administrative court under national law are only to annul the decision of the administrative authority and remit the case for fresh proceedings before the administrative authority, and apparently it cannot amend the penalty imposed. It is in this context that I understand the question of the national court to be: who shall ensure compliance with EU law — the national administrative authority and/or the national court?

105. It is established case-law that 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Union law by withholding from the national court having jurisdiction to apply such law the power *to do everything necessary* at the moment of its application to set aside national legislative provisions which might prevent directly applicable Union rules from having full force and effect are incompatible with the requirements which are the very essence of Union law. … That would be the case if … such an impediment to the full effectiveness of Union law were only temporary'.[54]

106. It is also established that the duty of immediate application of EU law applies equally to national courts[55] and to administrative authorities.[56] Both, within the exercise of their respective jurisdiction or competence, are under a duty to give full effect to provisions of EU law, without having to request or to await the prior setting aside of any conflicting provision of national law by legislative or other constitutional means.[57] Finally, giving full effect to provisions of EU law includes applying all the principles of national application of EU law, such as primacy, direct effect, or conform interpretation.

107. Thus, in practical terms, it is quite clear that both national courts and administrative authorities are bound to apply EU law at national level. Certainly, there are some limits. Even a directly effective provision of EU law should not affect the nature and type of competences that are *generally* conferred on courts and administrative bodies according to the national legal system.[58] However, such a

54 See for instance judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraphs 22 to 23), and of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraphs 56 to 57). Emphasis added.

55 See, for instance, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraph 24); of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 55); and of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 34).

56 See, for instance, judgments of 22 June 1989, *Costanzo* (103/88, EU:C:1989:256, paragraph 31); of 12 January 2010, *Petersen* (C-341/08, EU:C:2010:4, paragraph 80); and of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 34).

57 Recently, for example, judgment of 14 September 2017, *The Trustees of the BT Pension Scheme* (C-628/15, EU:C:2017:687, paragraph 54 and the case-law cited).

58 With the Court thus typically qualifying the scope of that duty, for courts to do so 'for the matters within their jurisdiction' (see, for example, judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 99)), and for national authorities to do so 'within the sphere of their competence' (see, for example, judgment of 12 June 1990, *Germany* v *Commission* (C-8/88, EU:C:1990:241, paragraph 13)); or of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78, paragraph 34)).

provision will have an impact on the *specific* powers attributed by that system to its national bodies in order to carry out certain tasks. In particular, Member States are under the obligation to provide for certain types of remedies before their courts and administrative authorities in order to ensure the immediate and uniform application of EU law.[59]

108. Therefore, when applied to the facts of the case at hand, it follows from the fact that the requirement of proportionality of penalties, enshrined in Article 9a of Directive 1999/62, is directly effective that, within the scope of application of that directive, national authorities are empowered to moderate sanctions in individual cases in such a way as to render them proportionate to the severity of the offence committed, without having to wait until the national legislature amends the relevant legislation. These authorities are given a direct mandate, *as a matter of EU law*, to immediately uphold the Applicant's right to proportionate sanctions (or not to incur disproportionate sanctions) that derive from Article 9a of Directive 1999/62.

109. Within those limits, it is indeed for each Member State and through its own internally structured system to decide, in accordance with the principle of institutional and procedural autonomy, which national body shall be entrusted with the application of the requirement of proportionality. I do not think that it would be either advisable or appropriate for this Court to go beyond that general guidance and effectively make decisions on how powers should be allocated at national level.

110. I wish to add, however, two closing remarks.

111. First, primacy, direct effect and the obligation of conform interpretation bind all authorities of the Member States, both judicial and administrative. Within that framework, it is really a matter for national law as to which specific entity is ultimately entrusted with ensuring those obligations are respected, *provided that somebody does so*. In practice, if a Member State wishes to retain the rule that administrative courts exercise limited review, it must then give the administrative authorities the power to moderate the penalties. If a Member State prefers to circumscribe the discretion of administrative authorities, it must then allow courts to decide on proportionate penalties. However, a 'negative competence conflict', in which both types of bodies declined any such power, would be incompatible with effective enforcement of EU law.

112. Second, in a way, EU law already pre-empts any such problem by maintaining that in a Union based on the rule of law, the default empowerment to provide the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective will rest *in particular* with national courts.[60] After all, the defining element of the system of protection provided under EU law, whether under the second subparagraph of Article 19(1) TEU, or under the first paragraph of Article 47 of the Charter, is that it is a system of effective *judicial* protection.[61] EU law thus not only empowers national courts, but also imposes on them the ultimate obligation to ensure that at national level, (EU) law is observed. That is indeed the full extent of the mandate of an EU law judge.

59 See, for instance, judgments of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257, paragraph 21); of 27 June 2000, *Océano Grupo Editorial and Salvat Editores* (C-240/98 to C-244/98, EU:C:2000:346, paragraph 29); of 26 October 2006, *Mostaza Claro* (C-168/05, EU:C:2006:675, paragraph 39). For the specific context of the powers of administrative authorities, see, for example, judgment of 9 September 2003, *CIF* (C-198/01, EU:C:2003:430, paragraph 58).

60 See for example judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 111).

61 See, for instance, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, point 69); judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 99); or judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 32 to 33).

V. Conclusion

113. In the light of the abovementioned considerations, I suggest that the Court answer the questions posed by the Szombathelyi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szombathely, Hungary) as follows:

– Article 9a of Directive 1999/62/EC 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, inasmuch as it requires that penalties are to be proportionate, is directly effective.

– It is for each Member State to decide, in accordance with the principle of institutional and procedural autonomy, which national body shall be entrusted with the application of that requirement of proportionality. However, in the absence of any such decision, it is the duty of national courts to provide for the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective, including ensuring that penalties imposed in individual cases do not infringe the requirement of proportionality under Article 9a of Directive 1999/62.