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Article 49 of the Charter of Fundamental Rights of the European Union on the principles of legality and proportionality of criminal offences and penalties

SLIDE 1

Hello, welcome. My name is Valentin Bou, and in this publication I am going to talk to you about Article 49 of the Charter, concerning the principles of legality and proportionality of offences and penalties.

SLIDE 2

On the one hand, Article 49 of the Charter of Fundamental Rights of the European Union, entitled "Principles of legality and proportionality of criminal offences and penalties", states the following:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Similarly, a

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heavier penalty may not be imposed than the one applicable at the time the offence was committed. If a lighter penalty is provided for by law after the offence has been committed, that lighter penalty shall apply.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of the penalties shall not be disproportionate to the offence".

On the other hand, the Explanations to the Charter state the following:

First. This Article incorporates the classic rule of non-retroactivity of criminal laws and penalties. The rule of retroactivity of the most lenient penalty, recognised by many Member States and contained in Article 15 of the International Covenant on Civil and Political Rights, has been added.

Secondly. Article 7 of the European Convention on Human Rights reads as follows:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a

heavier penalty be imposed than the one applicable at the time when the offence was committed.

SLIDE 3

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations”.

The word “civilised” has simply been deleted from paragraph 2, which does not alter the meaning of this paragraph, which refers to crimes against humanity. In accordance with Article 52(3), the right guaranteed therefore has the same meaning and scope as that guaranteed by the European Convention on Human Rights.

Third. Paragraph 3 takes over the general principle of proportionality of criminal offences and penalties enshrined in the constitutional traditions common to the Member States and in the case law of the Court of Justice of the European Union.

I should add that the principle of legality of criminal offences and penalties was recognised by the Court of Justice before the Charter was adopted. In a 1996 judgment, it stated that:

> “The principle of the legality of criminal offences and penalties (...) precludes criminal proceedings being instituted for conduct the reprehensible nature of which is not clear from the law. This principle, which forms part of the general principles of law on which the constitutional traditions common to the Member States are based, has also been enshrined in various international treaties, in particular Article 7 of the European Convention on Human Rights”.

The principle of the legality of criminal offences and penalties has two possible meanings. The first meaning, of a material nature, consists in the impossibility of punishing someone for conduct that was not criminalised by law at the time it was committed. This idea is reflected in the Latin maxim *nullum crimen, nulla poena, sine praevia lege penale*.

The second meaning, of a procedural nature, is that only through a process provided for by law, with all the guarantees, can a penalty be imposed for the commission of a crime. This idea is reflected in the Latin maxim *nullum crimen, nulla poena, sine praevio iudicio*.

SLIDE 4

With regard to the principle of the legality of penalties, two important ideas should be highlighted.

The first idea concerns the concept of law and punishment. The Court of Justice has indicated that directives alone cannot be considered criminal law. In a 1987 judgment it stated the following:

> “The national court therefore seeks essentially to know whether Directive 78/659 may have, of itself and independently of the domestic law of a State, the effect of determining or aggravating the criminal liability of those who infringe its provisions.
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> In this respect, the Court of Justice has already decided in its judgment of 26 February 1986 “that a directive cannot of itself create obligations on the part of an individual and that the provisions of a directive cannot therefore be relied on as such against that person”. A directive which has not been transposed into the internal legal order of a Member State cannot therefore give rise to obligations on individuals vis-à-vis other individuals, and a fortiori vis-à-vis the State itself.
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> The answer to the second question must therefore be that Council Directive 78/659 of 18 July 1978 cannot, of itself and independently of a domestic law of a Member State adopted for its implementation, have the effect of

determining or increasing the criminal liability of persons who infringe its provisions."

The Court of Justice of the European Union has also held that the principle of legality:

> "can be invoked not only against decisions imposing criminal sanctions in the strict sense, but also against decisions imposing administrative sanctions."

It is also noteworthy from the case law of this Court that, in the interests of legal certainty, it has held that the principle of legality requires the requirement of certainty. In a 2007 judgment it stated that:

> "This principle implies that the law must clearly define the offences and the penalties for them. This requirement is fulfilled when the defendant can know, from the text of the relevant provision and, if necessary, with the help of the courts' interpretation of it, which acts, and omissions trigger his criminal liability."

SLIDE 5

As regards the non-retroactivity of criminal laws, I must point out that there is a general rule and an exception.

The general rule affirms the non-retroactivity of penalties. Article 49(1) of the Charter of Fundamental Rights of the European Union

expressly states that: “a heavier penalty may not be imposed than the one applicable at the time the offence was committed”.

This general rule has been supplemented by a 2005 judgment of the Court of Justice of the European Union, in which the Court affirmed the non-retroactivity of the most punitive criminal case law. Specifically, the Court stated that:

> “This provision, which enshrines the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability, but it can nevertheless, according to the case law of the European Court of Human Rights, prevent the retroactive application of a new interpretation of a rule establishing an offence.
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> This is particularly the case, according to that case-law, where it concerns a case-law interpretation the result of which was not reasonably foreseeable at the time when the offence was committed, in particular in the light of the interpretation which the case-law gave at the time to the legal provision under consideration.”

The exception to the general rule is the retroactivity of the more favourable rule.

It should be noted that Article 49(1) of the Charter of Fundamental Rights of the European Union expressly states that: “If, after the offence has been committed, the law provides for a lighter penalty, that penalty shall be applied”.

This exception has been recognised and applied by the case law of the Court of Justice of the European Union. By way of example, it should be noted that, in a 2015 Judgment, the Court stated that:

> “As regards the rule of retroactive application of the more favourable criminal law, which is contained in the last sentence of Article 49(1) of the Charter, it provides that if, subsequent to that offence, the law provides for a lighter penalty, that penalty must be applied”.

SLIDE 6

With regard to the principle of proportionality between offences and penalties, I must stress that Article 49(3) of the Charter of Fundamental Rights of the European Union expressly states that: “the severity of penalties shall not be disproportionate to the offence”.

For its part, the case law of the Court of Justice of the European Union has focused on noting that limitations of a fundamental right are subject to

three conditions. As a 2014 General Court Judgment noted:

> “In order to be in conformity with Union law, a limitation on the exercise of a fundamental right must, in any event, meet a threefold requirement.
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> First, the limitation must be 'laid down by law' (...). In other words, the measure in question must have a legal basis.
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> Secondly, the limitation must pursue an objective of general interest, recognised as such by the Union (...).
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> Thirdly, the limitation cannot be excessive. On the one hand, it must be necessary and proportionate in relation to the objective pursued (...). On the other hand, the “essential content” - i.e. the essence - of the right or freedom in question must be respected (...).”

SLIDE 7

That is all I had to say to you. Thank you very much for your attention.