Thomas Hoeren [*]
Philip Mayer [**]
Gesa Schenke [***]

"Poena Sine Culpa" in Data Protection Law? On The Validity and Scope of the Principle of Culpability in the Imposition

In the preliminary ruling proceedings in the Deutsche Wohnen case from 2023, the ECJ clarified that the supervisory authorities must be able to prove fault towards the controller when imposing fines in accordance with Art. 83 GDPR.[1] *Depending on how the decision is read, the Court thus rejected the calls for strict liability.*[2] *Meanwhile, the Berlin Court of Appeal, which referred the case to the ECJ, took note of the decision and referred it back to the competent Berlin Regional Court by order of 22 January 2024, which must reassess the legality of the fine in light of the Court's requirements.*[3] *The decision of the Court of Appeal gives cause to recapitulate the principles established by the ECJ and - as will be shown - to apply a different reasoning than that chosen by the Court of Justice. The ECJ derived the culpability requirement from a methodologically correct interpretation of Art. 83 GDPR and the general system and objective of the General Data Protection Regulation (GDPR) and thus from secondary law. The following article examines whether the culpability requirement does not already follow from*

[*] Professor, Doctor in Law, Director of the Institute for Information, Telecommunications and Media Law at the University of Münster.
[**] Research Assistant and Doctoral Candidate at the University of Münster.
[***] Research Assistant at an International Commercial Law Firm.
[1] ECJ NJW 2024, 343 para. 68.
[2] *Brink S., Wybitul T.,* ZD 2024, 137 (142); *Korte K.,* ZD-Aktuell 2024, 01500, <https://www.lto.de/recht/hintergruende/h/eugh-c80721-deutsche-wohnen-dsgvo-bussgeld-erfolg-datenschutz-beauftragte-kartellrecht> [1.03.2024].
[3] KG Berlin BeckRS 2024, 2154; see on the question referred KG Berlin ZD 2022, 156.

primary law, which is superior in terms of normative hierarchy, insofar as fines under the GDPR are criminal sanctions within the meaning of primary law. In the course of this, the article will deal with the anchoring of the principle of fault in EU law and the case law of the ECtHR on the principle of nulla poena sine culpa.

Keywords: GDPR, Deutsche Wohnen case, ECJ, Supervisory authorities, Administrative fines, Nulla poena sine culpa, European Charter of Fundamental Rights (CFR), Presumption of innocence, European Convention on Human Rights (ECHR).

1. The Principle of Fault in European Primary Law

According to the principle *of nulla poena sine culpa*, the existence of guilt is required for the imposition of punishment.[4] Guilt in the sense of personal reproachability due to intentional or negligent behaviour therefore has the function of justifying punishment and acts as a basis for legitimising the imposition of a criminal penalty (so-called guilt to justify punishment).[5] At the same time, guilt has a penalty-limiting function, which consists of the fact that the penalty may not exceed the established level of guilt (so-called penalty assessment guilt).[6] The function of guilt in justifying and limiting punishment form the core elements of the so-called guilt principle.[7] The linking of guilt to the controllable actions of the individual expresses the state's respect for the human dignity of the individual, who otherwise threatens to become a mere

[4] BVerfGE 95, 96, 131 = NJW 1997, 929 (930); BVerfGE 123, 267, 413 = NJW 2009, 2267 (2289); *Sieber U., Satzger H., von Heintschel-Heinegg F., Esser R.,* Europäisches Strafrecht, 2nd ed. 2014, § 55 para. 60. *Schönke A., Schröder H., Eisele J*., StGB, 30th ed. 2019, Vor. §§ 13 ff. para. 103; *Adam T., Schmidt F., Schumacher L.,* NStZ 2017, 7.

[5] BVerfGE 109, 133, 174 = NJW 2004, 739 (746); BVerfGE 128, 326, 376 = NJW 2011, 1931 (1938); *Roxin C., Greco L.,* Strafrecht AT I, 2020, § 19 para. 54.

[6] BVerfGE 95, 96, 140 = NJW 1997, 929 (932); *Sieber U., Satzger H., von Heintschel-Heinegg F., Esser R.,* Europäisches Strafrecht, 2nd ed. 2014, § 55 para. 60; *Roxin C., Greco L*., Strafrecht AT I, 2020, § 19 para. 9, 62.

[7] Cf. *Keil G.,* Willensfreiheit, 2nd ed. 2013, 157; *Globke*, in: *Brunhöber W., Höffler B., Kaspar F., Reinbacher R., Vormbaum M.* (eds.), Strafrecht und Verfassung, 2012, 67; *Engelhart H*., NZWiSt 2015, 201 (203); similarly *Satzger H*., ZRP 2010, 137 (139).; *Hörnle J.,* JZ 1999, 1080 (1088), is critical of the differentiation between criminal liability and criminal justification liability.

object of state arbitrariness.[8] For this reason, the Federal Constitutional Court locates the constitutional basis of the principle of guilt in the guarantee of human dignity in Article 1(1) of the Basic Law, the general freedom of action in Article 2(1) of the Basic Law and in the principle of the rule of law (Article 20(3) of the Basic Law), which, as part of the "unavailable constitutional identity"[9] of Article 79(3) of the Basic Law, marks a limit to the Europeanisation of criminal law.[10] In Union constitutional law, the dogmatic basis, content and scope of the principle of guilt are comparatively less clear.[11] The principle of *nulla poena sine culpa* is not affirmed either in the European Convention on Human Rights (ECHR) or in the European Charter of Fundamental Rights (CFR), although its recognition as a general principle of human rights is undisputed.[12] The European Court of Justice only implicitly takes the principle of guilt into account when reviewing criminal sanctions as part of the general proportionality test.[13] In contrast, the European Commission, the Council and the European Parliament have explicitly recognised the principle of guilt.[14] Advocate General Kokott also sees the principle *of nulla poena sine culpa* "implicitly contained both in Article 48(1) of the [Charter of Fundamental Rights] and in Article 6(2) of the ECHR" and both provisions "as procedural manifestations of the principle of nulla poena sine culpa."[15] Other This assumption will be analysed below.

1.1. Guarantee of Human Dignity, Art. 1 CFR

The case law of the Federal Constitutional Court on the principle of guilt suggests that the principle of guilt should be anchored in primary law in the

[8] BVerfGE 30, 1, 41 = NJW 1971, 275 (282); on the object formula *Scholz* R., *Dürig* G., *Herzog* R., *Herdegen* M., GG (Vol. I), Art. 1 para. 36.
[9] BVerfGE 123, 267, 344 = NJW 2009, 2267 (2270).
[10] BVerfGE 123, 267, 348 = NJW 2009, 2267 (2271); see *Adam T., Schmidt F.*, *Schumacher L.*, NStZ 2017, 7 (8).
[11] *Böse M., Stuckenberg C.*, Europäisches Strafrecht (EnzEuR Bd. 11), 2nd ed. 2021, § 10 para. 17; *Globke* R., in: *Brunhöber B.*, *Höffler H., Kaspar J., Reinbacher T., Vormbaum M.* (eds.), Strafrecht und Verfassung, 2012, 66 f.; *Vogel J.*, JZ 1995, 331 (337).
[12] *Grabitz E., Hilf M., Nettesheim M., Vogel P., Eisele J., Das Recht der Europäischen Union, 80th ed. 2023, Art. 83 TFEU, para. 46; Sieber U., Satzger H., von Heintschel-Heinegg F., Killmann A.,* Europäisches Strafrecht, 2nd ed. 2014, § 11 para. 18; *Hochmayr G.,* ZIS 2016, 226 (230); *Fromm E.*, ZIS 2007, 279 (287); *Tiedemann K.,* NJW 1993, 23 (28).
[13] ECJ judgement of. 16.11.1983, Case 188/82, ECR 1983, 3721 para. 18 - *Thyssen*; ECJ judgement of 18.11.1987, Case 137/85, ECR 1987, 4587 para. 14 - *Maizena*; ECJ judgement of 11 July 2002, Case C-210/00, ECR 2002 I-6453 para. 44 - *Käserei Champignon Hofmeister*.
[14] See COM(2011) 573 final, 10; Council Doc. 16542/2/09 REV 2 No. 6-8; European Parliament resolution of 22 May 2012 on the EU approach to criminal law (2010/2310(INI)), C 264 E/9.
[15] Opinion GA Juliane Kokott, 28 February 2013, Case C-681/11, EU:C:2013:126, para. 41; see also Opinion GA Carl Otto Lenz, 11 July 1992, Case C-143/91, EU:C:1990:381.

guarantee of human dignity in Art. 1 CFR. Under constitutional law, Art. 1 CFR guarantees the right of every person to social value and respect, which is due to them solely because of their humanity and regardless of their characteristics, performance or social status.[16] Accordingly, all state measures that undermine the quality of the human being as a subject are significant interference and incompatible with human dignity.[17] In criminal and quasi-criminal proceedings, a conflict with the human dignity of the accused arises in any case if the actions of the accused are disapproved of by the state in terms of social ethics and are accused of injustice.[18] In contrast, the mere determination of guilt and measures serving to establish guilt do not conflict with human dignity.[19] A closer look at the case law of the Federal Constitutional Court also reveals that the principle of guilt is regularly derived from the triad of Article 1 (1) of the Basic Law, the principle of the rule of law and Article 2 (1) of the Basic Law and not solely from the guarantee of human dignity.[20] The principle of guilt is therefore - at least directly - not anchored in the guarantee of human dignity in Article 1 of the Basic Law. [21]

1.2. Presumption of Innocence, Art. 48 para. 1 CFR, Art. 6 para. 2 ECHR

Art. 48 para. 1 CFR is part of the catalogue of procedural guarantees under criminal law and corresponds almost entirely to Art. 6 para. 2 ECHR.[22] Both provisions standardise the so-called presumption of innocence, according to which, in criminal or quasi-criminal proceedings, the innocence of every accused or defendant is presumed until guilt is proven in accordance with the law.[23] The presumption of innocence does not only apply to EU citizens and natural persons, as evidenced by the wording "any accused person" and "any

[16] *Jarass H. D.,* GRC, 4th ed. 2021, Art. 1 GRC para. 6, 7.
[17] *Jarass H. D.,* GRC, 4th ed. 2021, Art. 1 GRC para. 8.
[18] *Globke* R., in: *Brunhöber* B., *Höffler* K., *Kaspar* J., *Reinbacher* T., *Vormbaum* M. (eds.), Strafrecht und Verfassung, 2012, 59; *Frister* H., Schuldprinzip, Verbot der Verdachtsstrafe und Unschuldsvermutung als materielle Grundprinzipien des Strafrechts, 1988, 25.
[19] *Rabe P.,* Das Verständigungsurteil des Bundesverfassungsgerichts und die Notwendigkeit von Reformen im Strafprozess, 2017, 147; *Frister H*., Schuldprinzip, Verbot der Verdachtsstrafe und Unschuldsvermutung als materielle Grundprinzipien des Strafrechts, 1988, 25.
[20] The so-called Lisbon judgement BVerfGE 123, 267, 413 = NJW 2009, 2267 (2289) is an exception.
[21] See *Schaut A. B*., Europäische Strafrechtsprinzipien, 2012, 228; *Vogel P*., JZ 1995, 331 (339); See also *Böse M., Satzger H.,* Europäisches Strafrecht (EnzEuR Bd. 9), 1st ed. 2013, § 2 para. 59.
[22] Explanations on the Charter of Fundamental Rights, OJ 2007 No. C 303/17, 30.
[23] *Calliess C., Ruffert M., Blanke H., EUV/AEUV, 6th ed. 2022, Art. 48 CFR para. 1, 4; Meyer J., Hölscheidt S., Eser A., Kubiciel M., CFR, 5th ed. 2019, Art. 48 CFR para. 1.*

person", but is a human right that can also be invoked by legal persons.[24] According to Article 51(1) of the CFR, all institutions, bodies, offices and agencies of the Union are bound by it when implementing Union law, including in particular courts, prosecuting authorities and investigating authorities.[25] In criminal proceedings and proceedings of a quasi-criminal nature, the presumption of innocence therefore manifests itself in the prohibition of a guilty verdict and the imposition of penalties and sanctions without (prior) legal proof of guilt.[26] The prohibition of suspicion-based punishment derived from the presumption of innocence can therefore be understood as a procedural expression of the principle of guilt, as it expresses the function of guilt as a core element of the principle of guilt to justify punishment.[27] The principle of guilt is therefore implicitly anchored in the presumption of innocence in Art. 48 para. 1 CFR and Art. 6 para. 2 ECHR.[28]

1.3. Principle of Proportionality, Art. 49 para. 3 CFR

Art. 49 para. 3 CFR standardises the principle of proportionality under EU law for criminal offences and administrative sanctions and ensures that penalties and quasi-criminal sanctions imposed by courts and authorities must be proportionate in each individual case.[29] In other words, penalties and sanctions must be appropriate, necessary and proportionate. A penalty imposed does not meet the criterion of proportionality in particular if the penalty is not proportionate to the wrongfulness and culpability of the offence, whereby the severity of the offence and the weight of the penalty must be taken into account.[30] The principle of proportionality of guilt and punishment,

[24] *Calliess C., Ruffert M., Blanke H., EUV/AEUV, 6th ed. 2022, Art. 48 CFR para. 2; Jarass H. D., CFR, 4th ed. 2021, Art. 48 para. 12.*

[25] *Meyer J., Hölscheidt S., Eser A., Kubiciel M.,* GRC, 5th ed. 2019, Art. 48 GRC para. 13; *Calliess* C., *Ruffert* M., *Blanke* H., EUV/AEUV, 6th ed. 2022, Art. 48 GRC para. 4..

[26] *Meyer J., Hölscheidt S., Eser A., Kubiciel M.*, GRC, 5th ed. 2019, Art. 48 GRC para. 6, 7; *Calliess* C., *Ruffert* M., *Blanke* H., EUV/AEUV, 6th ed. 2022, Art. 48 GRC para. 4.

[27] *Meyer J., Hölscheidt S., Eser A., Kubiciel M*., GRC, 5th ed. 2019, Art. 48 GRC para. 10.

[28] Cf. *Frister H.,* Schuldprinzip, Verbot der Verdachtsstrafe und Unschuldsvermutung als materielle Grundprinzipien des Strafrechts, 1988, 89; *Engels H.,* , Unternehmensvorsatz und Unternehmensfahrlässigkeit im Europäischen Kartellrecht, 2002, 71; *Böse M., Satzger C.,* Europäisches Strafrecht (EnzEuR vol. 9), 1st ed. 2013, § 2 para. 59; differentiated *Klaas A., Momsen C., Wybitul T*., 71; *Böse M., Satzger C.,* Europäisches Strafrecht (EnzEuR Bd. 9), 1st ed. 2013, § 2 para. 59; differentiated *Klaas A., Momsen C., Wybitul T., Cornelius K., Datenschutzsanktionenrecht*, 1st ed. 2023, § 2 para. 22.

[29] *Jarass H.D.,* GRC, 4th ed. 2021, Art. 49 GRC para. 17; *Pechstein M., Nowak R., Häde U., Schröder R.*, Frankfurter Kommentar EUV/AEUV/GRC, 2nd ed. 2023, Art. 49 para. 20.

[30] *Jarass H.D.,* GRC, 4th ed. 2021, Art. 49 GRC para. 19; *Pechstein M., Nowak R., Häde U., Schröder R.,* Frankfurter Kommentar EUV/AEUV/GRC, 2nd ed. 2023, Art. 49 para. 20.

which is expressed in Article 49(3) of the CFR, therefore has a penalty-limiting function.[31] The penalty-limiting function of guilt is also a core element of the principle of guilt. In this respect, the principle of guilt is also implicit in the principle of proportionality in Art. 49 para. 3 CFR. [32]

1.4. Interim Result

In conclusion, it should be noted that the principle of guilt is enshrined in primary law both in the presumption of innocence in Art. 48 para. 1 CFR and Art. 6 para. 2 ECHR as well as in the principle of proportionality in Art. 49 para. 3 CFR.

2. Derivation of the Culpability Requirement in the "Deutsche Wohnen Judgement"

In the preliminary ruling procedure, the ECJ had to deal with the question of whether Art. 83 GDPR requires proof of culpability in the sense of an intentional or negligent breach of Art. 83 (4) - (6) GDPR for the imposition of fines on the controller as a legal person.[33] With regard to the second question referred, the Court of Justice first states that Art. 83 GDPR does not expressly require a negligent or culpable breach for the imposition of fines. Instead, the ECJ refers to the wording of Art. 83 para. 2 sentence 2 lit. b) GDPR, according to which the intentional or negligent nature of an infringement must be duly taken into account when deciding on the imposition of a fine.[34] None of the other criteria mentioned in Art. 83 para. 2 sentence 2 GDPR suggest that the controller is liable regardless of fault.[35] Rather, Article 83(3) GDPR also speaks against strict liability, according to which a culpable breach by the controller is also required.[36] The result resulting from the wording of Art. 83 GDPR is confirmed by the purpose and the general system of the GDPR, which grants the supervisory authorities a margin of discretion with regard to the imposition

[31] *Meyer J., Hölscheidt S., Eser A., Kubiciel M.,* GRC, 5th ed. 2019, Art. 49 GRC para. 38.
[32] *Klaas A., Momsen C., Wybitul T., Cornelius K.,* Datenschutzsanktionenrecht, 1st ed. 2023, § 2 para. 36; Kaufmann, JURA 1986, 225 (227); *Schaut A.*, Europäische Strafrechtsprinzipien, 2012, 228.
[33] ECJ, NJW 2024, 343 para. 61.
[34] ECJ, NJW 2024, 343 para. 62.
[35] ECJ, NJW 2024, 343 para. 66.
[36] ECJ, NJW 2024, 343 para. 67.

of fines and other remedial measures with the provision of Art. 58 para. 2 lit. i) GDPR and thus provides a differentiated system of sanctions.[37] The Union legislator has deliberately dispensed with the possibility of imposing fines regardless of fault.[38] As a result, in the view of the Court of Justice, both the wording of Art. 83 GDPR and the system and purpose of the GDPR speak in favour of the requirement of a culpable breach of the obligations set out in Art. 83 (4) - (6) GDPR for the imposition of fines.

3. GDPR Fines as Part of Criminal Law?

Although the European Court of Justice refrained from categorising the GDPR fines in the system of sanctions under EU law, it still considers proof of fault to be necessary when issuing fines under the GDPR and is therefore unspokenly committed to the validity of the principle of fault. This is unspoken because it does not cite considerations of Union constitutional law to justify the culpability requirement, but instead endeavours to interpret secondary law. However, the question arises as to whether this result does not already follow from EU constitutional law, insofar as the GDPR fines, by their legal nature, prove to be criminal law in at least a broader sense.[39] To this end, the requirements for the existence of criminal law sanctions in general are developed below in order to then apply the criteria to data protection sanctions law in concrete terms.

3.1. Engel Criteria

According to established case law of the ECJ, three criteria are decisive in assessing the legal nature of the prosecution measures and sanctions in question: firstly, the legal classification of the offence under national or supranational law, secondly, the nature of the offence and thirdly, the severity of the sanction threatening the person concerned.[40] To this end, the ECJ has adopted the Engel case law of the ECtHR, which defined the concept of

[37] ECJ, NJW 2024, 343 para. 70, 73.
[38] ECJ, NJW 2024, 343 para. 74.
[39] Similarly*, Hochmayr G.*, ZIS 2016, 226.
[40] ECJ, BeckRS 2012, 81043 para. 37 - Bonda; ECJ, BeckRS 2018, 6055 para. 26 f. - Menci Luca; ECJ, BeckRS 2022, 5011 para. 25 - bpost; *Gassner K., Seith S.,* Ordnungswidrigkeitengesetz, 2nd ed. 2020, Introduction para. 6.

criminal proceedings.[41] The factors known in the literature as the *Engel criteria* are initially independent of each other and thus open up alternative access to the criminal law guarantees such as the principle of guilt.[42]

a) The will of the Legislator

According to the first criterion, the intention of the (supra-)national legislator must first be taken into account and the question asked as to whether it categorises the proceedings and measures in question as administrative or criminal law proceedings and measures.[43] The national judgement is a sufficient but not a necessary condition.[44] Otherwise, the categorisation would depend on the free decision of the member states or contracting states.[45]

b) The Nature of the Offence

Secondly, the type of offence, i.e. the nature of the offence, must be used to determine whether the sanction imposed pursues a repressive objective.[46] According to this, it is the nature of criminal sanctions to pursue both preventive and repressive purposes.[47] The material and personal scope of application of the norm is particularly important on the factual side; especially if it is (potentially) directed at the general public, this speaks in favour of the criminal nature of the offence.[48] The protection of particularly important community interests can also be used in favour of a criminal sanction.[49]

[41] ECtHR, EuGRZ 1976, 221 - Engel et al. v Netherlands; ECtHR, BeckRS 2010, 21072 para. 53 - Zolotoukhine v Russia; ECJ, NJW 2024, 33, para. 45 - Volkswagen Italia SpA; *Grabenwarter C., Pabel K.*, ECHR, 6th ed. 2016, § 24 para. 19; critical *Wegner*, NZWiSt 2023, 401.
[42] A cumulative application of the second and third criteria is only necessary if the consideration of individual criteria does not produce a clear result; *Meyer-Ladewig J., Nettesheim M., von Raumer S., Harrendorf H., König P., Voigt T.,* ECHR, 5th ed. 2023, ECHR Art. 6 para. 23.
[43] ECJ, BeckRS 2023, 8994 para. 40.
[44] ECJ, BeckRS 2022, 5011 para. 26; *Karpenstein U., Mayer F.C.,* ECHR, 3rd ed. 2022, Art. 6 para. 25.
[45] *Barrot W.,* ZJS 2010, 701, 702; *Gerhold S.*, 41st ed., Introduction to the OWiG para. 5.
[46] ECJ, BeckRS 2018, 6055 para. 31.
[47] ECJ, BeckRS 2023, 8994 para. 42; ECJ, BeckRS 2023, 24054 para. 49; *Grabenwarter C., Pabel K.*, ECHR, 6th ed. 2016, § 24 para. 21.
[48] *Dörr C., Grote H., Marauhn T.,* ECHR/GG, 3rd ed. 2022, ch. 14 para. 26; *Grabenwarter C., Pabel K.,* ECHR, 6th ed. 2016, § 24 para. 21.
[49] *Karpenstein U., Mayer F.C.,* ECHR, 3rd ed. 2022, Art. 6 para. 26.

c) The Severity of the Sanction

Thirdly, with regard to the severity of the sanctions, a distinction must be made between fines and custodial sentences. While custodial sentences are generally of a criminal nature, fines and other measures restricting freedom must be assessed on a case-by-case basis according to the severity of the consequences.[50] The degree of severity is determined in particular by the maximum penalty provided for in the regulations, which must be of a not entirely insignificant weight in order to represent a serious consequence for the person concerned.[51]

3.2. Art. 58 para. 2 lit. i), 83 para. 4-6 GDPR in the Light of the Engel Criteria

Against the background of the culpability requirement stipulated in the *Deutsche* Wohnen *decision*, the following examines whether - applying the Engel criteria just described - the offence of imposing a fine under Art. 83 GDPR is criminal law in (at least) the broader sense and whether the culpability requirement therefore already follows from the principle of culpability under EU law.[52]

a) The will of the legislator

With the above in mind, the first Engel criterion must first be applied in such a way that the will of the supranational legislator in Brussels itself must be investigated as to what legal nature it assigns to data protection fines.[53] A clear commitment to or against criminal law cannot be inferred from Art. 58 para. 2 lit. i), 83 para. 4-6 GDPR. In European antitrust law, the situation is different *de lege lata*. Art. 23(5) of the Cart Regulation makes it clear that the fines imposed on companies pursuant to Art. 23(1) and (2) of the Cart Regulation in the event of infringements of antitrust provisions are not of a criminal nature.[54] In legislative practice, the antitrust fines act as a blueprint

[50] ECtHR, BeckRS 2010, 2107253 - Zolotoukhine v Russia; *Dörr C., Grote H., Marauhn T.*, ECHR/GG, 3rd ed. 2022, ch. 14 para. 26; *Barrot W.,* ZJS 2010, 701 (702).
[51] A sanction in the amount of EUR 500 is not sufficient in any case; ECtHR, BeckRS 2010, 21072; ECJ, BeckRS 2023, 8994 para. 46; ECJ, BeckRS 2023, 24054 para. 53; *Grabenwarter C., Pabel K.,* ECHR, 6th ed. 2016, § 24 para. 22; *Jarass H.*, GRC, 4th ed. 2021, Art. 48 GRC para. 9.
[52] ECJ, NJW 2024, 343 para. 75, 78 - Deutsche Wohnen.
[53] *Meyer-Ladewig H., Nettesheim M., von Raumer S., Harrendorf H., König R., Voigt P*., ECHR, 5th ed. 2023, ECHR Art. 6 para. 24.
[54] *Bechtold R., Bosch N., Brinker I., Bechtold R.,* EU-Kartellrecht, 4th ed. 2023, Regulation (EC) 1/2003, Art. 23 para. 91.

for sanction mechanisms in other areas of law determined by EU law.[55] There are also certain overlaps between fines in antitrust law on the one hand and data protection law on the other, as can be seen explicitly in recital 150 of the GDPR. Accordingly, when fining controllers that are also companies, the functional concept of an undertaking under Art. 101, 102 TFEU must be used, at least on the legal consequences side, to determine the amount of the fine based on the amount of the previous year's total turnover.[56] In view of these obvious overlaps with fines under antitrust law, the EU legislator probably pursued an objective comparable to Art. 23(5) GDPR when adopting the GDPR and did not assign the fines under data protection law to criminal law either.

This interpretation is in line with the few indications in the GDPR regarding the legal nature of fines under data protection law. For example, Art. 84 para. 1 GDPR in conjunction with recital 149 GDPR. Recital 149 of the GDPR stipulates that Member States should impose criminal sanctions for breaches of data protection law, in particular if the offences are not already sanctioned under Art. 83 of the GDPR. The German legislator has willingly made use of this opening clause in Section 42 BDSG.[57] If the criminal sanctions under data protection law are located at this point in contrast to Art. 83 GDPR, the European legislator considers the fines under data protection law to be an aliud and therefore purely administrative sanctions.[58] Accordingly, recitals 150 and 152 of the GDPR also refer to administrative sanctions as distinct from criminal law.[59] This finding is consistent with the legislative genesis, according to which the GDPR is based solely on Art. 16 para. 2 GDPR and therefore no criminal law authorisation basis was used. In any case, such a basis has only been established in EU law in the area of financial sanctions law pursuant to Art. 325 para. 4 TFEU.[60] It can therefore be assumed overall that the European legislator merely intended to enact purely administrative sanctions with Art. 58 para. 2 lit. i), 83 GDPR.[61] According to the above, however, the first Engel criterion is merely indicative, so that the legislator is not allowed to decide for

[55] *Ackermann T.,* ZEuP 2023, 529 (555 et seq.) on the transfer of the functional concept of an undertaking under antitrust law to other areas of law; see also *Zelger F.,* EuR 2021, 478 (481 et seq.).
[56] However, the ECJ made it clear that the principle of the "functionary" under antitrust law is not relevant at the level of the substantive establishment of liability. Rather, the concept of an undertaking under antitrust law is only to be used on the legal consequences side; ECJ, NJW 2024, 343 para. 53, 57 - Deutsche Wohnen; see also LG Bonn, MMR 2021, 173 para. 30 on the use of the concept of an undertaking to establish liability.
[57] *Parigger M., Helm T., Stevens-Bartol E., Müller R.,* Labour and Social Criminal Law, 1st ed. 2021, Section 42 BDSG para. 1.
[58] See *Bülte J.*, StV 2017, 460 (461).
[59] See *Bülte J.*, StV 2017, 460 (461).
[60] *Sydow G., Marsch N., Sydow H*., DS-GVO/BDSG, 3rd ed. 2022, Introduction para. 21; cf. *Schwarze J., Becker U., Hatje A., Schoo J., Schoo M.*, EU Commentary, 4th ed. 2019, TFEU Art. 325 para. 27.
[61] See also *Bülte J*, StV 2017, 460, 461.

itself on the application of the criminal law guarantees enshrined in international and primary law, such as the principle of guilt.[62]

b) The nature of the offence

The second Engel criterion is therefore of decisive importance, according to which the nature of the offence must now be examined with regard to the GDPR fines.

aa) Addressees of the GDPR fines

The fact that the fines in data protection law are not directed at the general public, but rather as a special offence primarily against controllers and processors, speaks against a criminal sanction.[63] With regard to the narrow group of addressees, Art. 83 para. 4-6 GDPR is similar to disciplinary law, which is traditionally not categorised as criminal law according to the case law of the ECtHR.[64] In the application of the standard, however, the group of addressees under data protection law is considerably wider, as the GDPR does not impose any explicit restrictions on the personal nature of the addressee of the standard, so that in addition to any natural person processing data, legal persons can also be suitable offenders as controllers or processors (Art. 4 No. 7, 8 GDPR).[65] In this respect, data protection law differs from disciplinary law.

bb) Sanctioning of legal persons

However, this also shows a further difference to core criminal law, as legal persons are also suitable addressees of fines via the broadly understood concept of the data controller under data protection law. In criminal law in the

[62] *Meyer-Ladewig H., Nettesheim M., von Raumer S., Harrendorf H., König R., Voigt P*., ECHR, 5th ed. 2023, ECHR Art. 6 para. 24.
[63] On the classification of Art. 83 para. 4-6 GDPR as a special offence *Böttger M., Zoch S.,* Wirtschaftsstrafrecht, 3rd ed. 2023, ch. 17 Data Protection Criminal Law para. 136.
[64] ECtHR, BeckRS 1976, 107962 para. 81 f.; *Meyer-Ladewig H., Nettesheim M., von Raumer S., Harrendorf H., König R., Voigt P.,* ECHR, 5th ed. 2023, ECHR Art. 6 para. 25.
[65] According to Art. 4 No. 7 Hs. 1 GDPR, the controller is the "natural or legal person who alone or jointly with others determines the purposes and means of the processing of personal data"; *Simitis S., Hornung G., Spiecker i., Petri T.,* Datenschutzrecht, 1st ed. 2019, GDPR Art. 4 No. 7 para. 23; *Böttger M., Zoch S.,* Wirtschaftsstrafrecht, 3rd ed. 2023, Chapter 17 Data Protection Criminal Law para. 137.

narrower sense, only natural persons are traditionally sanctioned as legal entities, particularly in view of the history of German legislation.[66] In line with this, the Federal Constitutional Court has consistently linked the principle of guilt to human dignity in accordance with Article 1 (1) of the Basic Law, which cannot necessarily be attributed to legal persons as a legal fiction. As a result, some argue that the constitutional anchoring of the principle of *nulla poena sine culpa* precludes the introduction of corporate criminal law at national level. [67]

Nevertheless, these doubts do not apply to the criminal law categorisation of sanctions against legal persons at supranational level. It has already been emphasised that the ECJ allows the principle of guilt to be incorporated into the principle of proportionality in Art. 49 (3) CFR; this does not differentiate between natural and legal persons.[68] Accordingly, the cartel law fines set out in Article 23 (1) and (2) of the Cartel Regulation are already based on intentional or negligent behaviour on the part of the company itself.[69] Ultimately, Art. 23 para. 5 of the Cart Regulation is merely intended to clarify in this context that the European legislator - aware of its lack of legislative competence in this area - did not intend criminal offences in the original sense against natural persons.[70] The ECJ also recognises the original culpability of legal persons in its decision in the *Deutsche Wohnen* case, in which, as in antitrust law, it refers to the fault of the company itself.[71]

cc) Administrative Procedure and Opportunity Principle

However, the argument that fines are subject to the discretion of the supervisory authorities pursuant to Art. 58 (i), 83 GDPR as part of the administration, whereas criminal law judgements are generally issued by the courts, is of greater importance in the classification of fines under data protection law in the context of the second Engel criterion.[72] This has far-reaching consequences for the sanctioning procedure: The principle of legality

[66] Nevertheless, criminal law in the narrower sense against associations already exists in other countries outside of common law, as has been the legal practice in the Netherlands since 1951; *Mitsch W., Rogall K.,* KK OWiG, 5th ed. 2018, OWiG § 30 para. 258, 270.
[67] For example, *Geco*, GA 2015, 503 (504).
[68] *Sieber U., Satzger H., von Heintschel-Heinegg F., Esser R*., European Criminal Law, 2nd ed. 2014, § 55 para. 63.
[69] On culpability in European antitrust law *Schröter H., Jakob M., Klotz R., Mederer W., Kienapfel P.,* Europäisches Wettbewerbsrecht, 2nd ed. 2014, Art. 23 Kart-VO para. 39 f.
[70] In addition, the purpose of Art. 23(5) of the Cart Regulation is to ensure that the criminal law consequences of some national legal systems apply to antitrust fines; *Bechtold R., Bosch W., Brinker I.,* EU-Kartellrecht, 4th ed. 2023, Art. 23 Cart Regulation para. 91.
[71] ECJ, NJW 2024, 343, 347 para. 68, 78 - Deutsche Wohnen.
[72] *Ehmann E., Selmayr M.,* DS-GVO, 2nd ed. 2018, Art. 58 DS-GVO para. 18, 27.

applies in criminal law in the narrower sense in accordance with Section 152 (2) of the German Code of Criminal Procedure (StPO), whereas the supervisory authorities have a discretionary power and therefore the principle of opportunity applies, as confirmed by the reference in Section 41 (2) sentence 1 BDSG to Section 47 OWiG.[73] The principle of opportunity also underlies Recital 148 GDPR, according to which "in the case of a minor infringement or where the fine likely to be imposed would impose a disproportionate burden on a natural person, a warning may be issued instead of a fine".[74]

However, this does not result in any significant discrepancies between data protection sanctions law and core criminal law. The opportunity principle in data protection law must be interpreted autonomously to the effect that, as a rule, the supervisory authorities' discretion to effectively enforce Union law is reduced to zero. Only in exceptional cases is it possible to refrain from imposing fines, so that the principle of opportunity approaches the principle of legality in legal practice.[75] Furthermore, sanctions issued in administrative proceedings can also be categorised as criminal law in the broader sense. National courts only have a corresponding monopoly for criminal offences as criminal law in the narrower sense.[76]

dd) Repressive Purpose of the Fine

Finally, it depends on whether the European legislator is pursuing repressive punitive purposes with the fines under data protection law.[77] The wording of Art. 83(1) GDPR at least suggests that the sanctions regime has a preventive purpose. Accordingly, each supervisory authority shall ensure that "the imposition of fines pursuant to this Article for infringements of this Regulation [...] is effective, proportionate and dissuasive in each individual case." Above all, the last criterion of deterrence has both a special (against the addressee of the fine) and general preventive (against the general public)

[73] On the application of the opportunity principle *Böttger M., Zoch S.,* , Wirtschaftsstrafrecht, 3rd ed. 2023, ch. 17 Datenschutzstrafrecht para. 280-282; on the illegality of the reference to Section 47 OWiG in Section 47 para. 2 sentence 1 BDSG in favour of a legality principle, see *Kühling J., Buchner B., Bergt M.*, DS-GVO/BDSG, 4th ed. 2024, Section 41 BDSG para. 16; *Barthe C., Gericke J., Diemer H.*, StPO, 9th ed. 2023, Section 152 StPO para. 4.

[74] *Bülte J.*, StV 2017, 460 (463).

[75] See also *Böttger M., Zoch S.*, Wirtschaftsstrafrecht, 3rd ed. 2023, ch. 17 Data Protection Criminal Law para. 282; *Gola P.,* CR 2018, 353 (355 f.).

[76] *Meyer-Ladewig H., Nettesheim M., von Raumer S., Harrendorf H., König R., Voigt P.*, ECHR, 5th ed. 2023, Art. 6 ECHR para. 23.

[77] ECJ, BeckRS 2023, 8994 para. 42; ECJ, BeckRS 2023, 24054 para. 49; BeckRS 2023, 24054 para. 49; *Grabenwarter C., Pabel K.* ECHR, § 24 para. 21.

thrust with a view to future compliance with data protection law.[78] In addition, Art. 58(2)(i), 83 GDPR should also penalise data protection violations per se in a repressive manner in order to do justice to the fundamental importance of Art. 16 TFEU and Art. 7, 8 CFR under Community law. [79]

Finally, even according to the principle of *ultra posse nemo obligatur*, which dates back to Roman law, behaviour can only be controlled by fines if the addressee can be proven to be at fault in accordance with the principle of culpability applicable in criminal law .[80] No one can be obliged to behave in an impossible manner. If the obligated party has no alternative options and is therefore not at fault, they will not deviate from their behaviour in the future. The fine therefore not only fails to have the intended steering effect; it also lacks a reason to legitimise the sanction. [81]

ee) Interim Result

Even if the last argument circularly infers the criminal nature of the GDPR fines from the necessary fault requirement, there is much to be said for interpreting the second Engel criterion in favour of the criminal nature of the sanction.

c) The Severity of the Sanction

The application of the third criterion also leads to this result: According to this criterion, the maximum amount of the fine under Art. 58 para. 2 lit. i), 83 GDPR must represent a not insignificant weight. The (potential) amount of the fines pursuant to Art. 83 (5), (6) GDPR of up to 4% of the total global annual turnover achieved in the previous financial year therefore represents a maximum sanction with considerable weight.[82] Irish *Data Protection Commission* recently imposed a fine of EUR 1.2 billion on a social network, demonstrating that this sharp sword is indeed used in practice.[83]

[78] *Parigger M., Helm T., Stevens-Bartol E., Müller R.,* Labour and Social Criminal Law, 1st ed. 2021, Art. 83 GDPR para. 92.
[79] See also recitals 148 and 152 GDPR; *Sydow G., Marsch N.*, DS-GVO/BDSG, 3rd ed. 2022, Art. 83 GDPR para. 2.
[80] *Hassemer W.,* ZRP 2011, 192, illustrates this principle, which goes back to *Publius Iuventius Celsus*.
[81] *Heckmann D.*, MMR 2023, 816 (818); in a different context on the validity of the principle of *ultra posse nemo obligatur* in data protection law *Hacker,* MMR 2018, 779 (784).
[82] *Paal B., Pauly D. A., Frenzel E.*, DS-GVO/BDSG, 3rd ed. 2021, Art. 83 DS-GVO para. 18-26; *Jarass H.*, GRC, 4th ed. 2021, Art. 48 GRC para. 9.
[83] *Klaas A., Basar B.*, ZD 2023, 477.

3.3. Result

The application of the second and third Engel criteria to the offence of fines under Art. 83 GDPR means that - contrary to the aim of the European legislator - GDPR fines are to be regarded as sanctions under criminal law in the broader sense, in line with the case law of the ECJ and ECHR. Consequently, the principle of *nulla poena sine culpa* enshrined in primary and international law applies, which means that the supervisory authorities are obliged to prove culpability to the controller when imposing fines due to the legal nature of the sanctions regime pursuant to Art. 58 (2) (i), 83 GDPR.[84]

4. Wasted Potential of the "Deutsche Wohnen Judgement"

The derivation of the culpability requirement from the assignment of data protection sanctions to criminal law is not only important from a dogmatic point of view. An understanding of criminal law means that, in addition to the principle of culpability, other guarantees of the rule of law also apply.[85] In preliminary ruling proceedings brought by the VW Group against a fine imposed by the Italian competition authority, the ECJ recently ruled that fines under unfair competition law are criminal law in the broader sense, thus confirming the validity of the *ne bis in idem* principle pursuant to Art. 50 CFR.[86] The prohibition of double jeopardy is not entirely foreign to data protection law, as Art. 84 GDPR in conjunction with recital 149 GDPR shows. Recital 149 GDPR clarifies in relation to national data protection sanctions.[87] Nevertheless, a clarification by the ECJ that this legal principle is also secured under primary law in accordance with Art. 50 CFR via the legal nature of data protection sanctions as criminal law in the broader sense would have been very welcome. The same applies to the principle of legality under Art. 49 para. 1 sentence 1 CFR in conjunction with Art. 7 para. 1 ECHR. Art. 7 para. 1 ECHR, although in connection with the GDPR's fines, compliance with the principle of certainty in

[84] Also interpreting the GDPR fines as criminal sanctions, *Drewes S., Walchner W.*, CR 2023, 163 (168); with further comments *Sydow G., Marsch N.,* DS-GVO/BDSG. 3rd ed. 2022, Art. 83 GDPR para. 3; Wolff H. A., Brink S., von *Ungern-Sternberg M. A., Holländer*, Data Protection Law, 46th edition 2021, Art. 83 GDPR para. 4.2.
[85] *Vogel*, JZ 1995, 331 (337).
[86] ECJ, NJW 2024, 33 para. 55.
[87] *Klaas A., Momsen C., Wybitul T., Klaas A.,* Datenschutzsanktionenrecht, 1st ed. 2023, § 27 para. 34.

particular has often been questioned in the literature.[88] Furthermore, the rule of law guarantees of the presumption of innocence pursuant to Art. 6 para. 2 ECHR in conjunction with Art. 48 para. 1 CFR are also relevant. Art. 48 para. 1 CFR, the right to a fair trial pursuant to Art. 6 para. 1 ECHR and, last but not least, the principle of the prohibition of self-incrimination (*nemo teneur se ipsum accusare*) in data protection sanctions law must also be observed.[89] To the extent that the ECJ derives the principle of guilt in data protection law primarily from systematic considerations and does not tie it to the classification of the sanctions regime in terms of its legal nature as criminal law in the broader sense, the Court of Justice forfeits the opportunity to clarify the foundation of data protection sanctions law under Union constitutional law and to outline the rule of law guarantees of Union constitutional law more clearly.

5. Summary

In its landmark decision in the Deutsche Wohnen case, the ECJ rightly clarifies that fines may only be imposed under the GDPR if the controller is at fault. Regrettably, Luxembourg only takes into account the system and purpose of the data protection sanction instrument. Furthermore, the application of the culpability principle is already mandatory due to the categorisation of GDPR fines as criminal sanctions. To the extent that the ECJ disregards the legal nature, it mitigates the scope of its decision with regard to the validity of the rule of law guarantees in data protection sanctions law as a whole. Nevertheless, one aspect of the ECJ judgement is beyond question: the principle of nulla poena sine culpa also applies in the GDPR.

[88] This applies all the more with the recognition of direct corporate liability; ECJ, NJW 2024, 343, 347 para. 60 - Deutsche Wohnen; *Sydow G., Marsch N.*, DS-GVO/BDSG, 3rd ed. 2022, Art. 83 DS-GVO para. 3 f.; *Gola P., Heckmann D.,* DS-GVO/BDSG, 3rd ed. 2022, Art. 83 DS-GVO para. 24.

[89] For the concretisation of the prohibition of self-incrimination in simple law, see Section 43 (4) BDSG in conjunction with Art. 33 GDPR. Art. 33 GDPR; *Klaas A., Momsen C., Wybitul T., Cornelius K.*, Datenschutzsanktionenrecht, 1st ed. 2023, § 2 Grundlagen para. 126; *Sydow G., Marsch N.* DS-GVO/BDSG, 3rd ed. 2022, Art. 83 GDPR para. 3.

Bibliography:

1. *Ackermann T.,* ZEuP 2023, 529 (555 et seq.).
2. *Adam T., Schmidt F., Schumacher L.*, NStZ 2017, 7-8.
3. *Barrot W.,* ZJS 2010, 701-702.
4. *Barthe C., Gericke J., Diemer H.*, StPO, 9th ed. 2023, Section 152 StPO para. 4.
5. *Bechtold R., Bosch N., Brinker I., Bechtold R.,* EU-Kartellrecht, 4th ed. 2023, Regulation (EC) 1/2003, Art. 23 para. 91.
6. *Böse M., Satzger H.*, Europäisches Strafrecht (EnzEuR Bd. 9), 1st ed. 2013, § 2 para. 59.
7. *Böse M., Stuckenberg C.*, Europäisches Strafrecht (EnzEuR Bd. 11), 2nd ed. 2021, § 10 para. 17.
8. *Böttger M., Zoch S.,* Wirtschaftsstrafrecht, 3rd ed. 2023, ch. 17 Data Protection Criminal Law para. 282; *Gola,* CR 2018, 353 (355 f.).
9. *Brink S., Wybitul T.,* ZD 2024, 137 (142).
10. *Bülte J*, StV 2017, 460 (461).
11. *Calliess C., Ruffert M., Blanke H.*, EUV/AEUV, 6th ed. 2022, Art. 48 CFR para. 1-2, 4.
12. COM(2011) 573 final, 10; Council Doc. 16542/2/09 REV 2 No. 6-8.
13. *Dörr C., Grote H., Marauhn T.,* ECHR/GG, 3rd ed. 2022, ch. 14 para. 26.
14. *Drewes S., Walchner W.*, CR 2023, 163 (168).
15. *Dürig G., Herzog R., Herdegen M.,* GG (Vol. I), Art. 1 para. 36.
16. *Ehmann E., Selmayr M.,* DS-GVO, 2nd ed. 2018, Art. 58 DS-GVO para. 18, 27.
17. *Engelhart H.,* NZWiSt 2015, 201, 203.
18. *Engels H.*, Unternehmensvorsatz und Unternehmensfahrlässigkeit im Europäischen Kartellrecht, 2002, 71.
19. European Parliament resolution of 22 May 2012 on the EU approach to criminal law (2010/2310(INI)), C 264 E/9.
20. Explanations on the Charter of Fundamental Rights, OJ 2007 No. C 303/17, 30.
21. *Frister H.*, Schuldprinzip, Verbot der Verdachtsstrafe und Unschuldsvermutung als materielle Grundprinzipien des Strafrechts, 1988, 25, 89.
22. *Fromm E.*, ZIS 2007, 279, 287.
23. *Gassner K., Seith S.,* Ordnungswidrigkeitengesetz, 2nd ed. 2020, Introduction para. 6.
24. *Geco*, GA 2015, 503 (504).
25. *Gerhold S.*, 41st ed., Introduction to the OWiG para. 5.

26. *Globke*, in: *Brunhöber W., Höffler B., Kaspar F., Reinbacher R., Vormbaum M.,* (eds.) Strafrecht und Verfassung, 2012, 59, 66, 67.
27. *Gola P., Heckmann D.,* DS-GVO/BDSG, 3rd ed. 2022, Art. 83 DS-GVO para. 24.
28. *Grabenwarter C., Pabel K.*, ECHR, § 24 para. 19, 21, 22.
29. *Grabenwarter C., Pabel K.*, ECHR, 6th ed. 2016, § 24 para. 21.
30. *Grabitz E., Hilf M., Nettesheim M., Vogel P., Eisele J.,* Das Recht der Europäischen Union, 80th ed. 2023, Art. 83 TFEU, para. 46.
31. *Hassemer W.,* ZRP 2011, 192.
32. *Heckmann D.,* MMR 2023, 816 (818); in a different context on the validity of the principle of *ultra posse nemo obligatur* in data protection law *Hacker,* MMR 2018, 779, 784.
33. *Hochmayr G.*, ZIS 2016, 226, 230.
34. *Hörnle J.*, JZ 1999, 1080 (1088), is critical of the differentiation between criminal liability and criminal justification liability.
35. *Jarass H.*, CFR, 4th ed. 2021, Art. 48 para. 9, 12, 19.
36. *Karpenstein U., Mayer F.C.,* ECHR, 3rd ed. 2022, Art. 6 para. 25, 26.
37. *Keil G.*, Willensfreiheit, 2nd ed. 2013, 157.
38. *Klaas A., Momsen C., Wybitul T.*, Datenschutzsanktionenrecht, 1st ed. 2023, § 2 para. 22.
39. *Korte K.*, ZD-Aktuell 2024, 01500; https://www.lto.de/recht/hintergruende/h/eugh-c80721-deutsche-wohnen-dsgvo-bussgeld-erfolg-datenschutz-beauftragte-kartellrecht/ (last accessed on 1 March 2024).
40. *Kühling J., Buchner B., Bergt M.*, DS-GVO/BDSG, 4th ed. 2024, Section 41 BDSG para. 16.
41. KG Berlin BeckRS 2024, 2154; see on the question referred KG Berlin ZD 2022, 156.
42. *Meyer J., Hölscheidt S., Eser A., Kubiciel M.,* CFR, 5th ed. 2019, Art. 48 CFR para. 1, 6-7, 10, 13, 38.
43. *Meyer-Ladewig H., Nettesheim M., von Raumer S., Harrendorf H., König R., Voigt P.*, ECHR, 5th ed. 2023, Art. 6 ECHR para. 23-25.
44. *Mitsch W., Rogall K,* KK OWiG, 5th ed. 2018, OWiG § 30 para. 258, 270.
45. Opinion GA Carl Otto Lenz, 11 July 1992, Case C-143/91, EU:C:1990:381.
46. Opinion GA Juliane Kokott, 28 February 2013, Case C-681/11, EU:C:2013:126, para. 41.
47. *Paal B., Pauly D. A., Frenzel E.*, DS-GVO/BDSG, 3rd ed. 2021, Art. 83 DS-GVO para. 18-26.
48. *Parigger M., Helm T., Stevens-Bartol E., Müller R.,* Labour and Social Criminal Law, 1st ed. 2021, Section 42 BDSG para. 1.

49. *Pechstein M., Nowak R., Häde U., Schröder R.*, Frankfurter Kommentar EUV/AEUV/GRC, 2nd ed. 2023, Art. 49 para. 20.
50. *Rabe P.*, Das Verständigungsurteil des Bundesverfassungsgerichts und die Notwendigkeit von Reformen im Strafprozess, 2017, 147.
51. *Roxin C., Greco L.*, Strafrecht AT I, 2020, § 19 para. 9, 62.
52. *Satzger H.,* ZRP 2010, 137, 139.
53. *Schaut A.*, Europäische Strafrechtsprinzipien, 2012, 228.
54. S*chönke A., Schröder H., Eisele J.*, StGB, 30th ed. 2019, Vor. §§ 13 ff. para. 103.
55. *Schröter H., Jakob M., Klotz R., Mederer W., Kienapfel P.,* Europäisches Wettbewerbsrecht, 2nd ed. 2014, Art. 23 Kart-VO para. 39 f.
56. *Sieber U., Satzger H., von Heintschel-Heinegg F., Esser R.,* Europäisches Strafrecht, 2nd ed. 2014, § 55 para. 60, 63.
57. *Simitis S., Hornung G., Spiecker i., Petri T.,* Datenschutzrecht, 1st ed. 2019, GDPR Art. 4 No. 7 para. 23.
58. *Sydow G., Marsch N.* , DS-GVO/BDSG, 3rd ed. 2022, Art. 83 DS-GVO para. 2, 3 f.
59. *Tiedemann K.*, NJW 1993, 23, 28.
60. *Vogel P.*, JZ 1995, 331 (337).
61. *Wolff H. A., Brink S., von Ungern-Sternberg M. A.,* Data Protection Law, 46th edition 2021, Art. 83 GDPR para. 4.2.
62. *Zelger F.,* EuR 2021, 478 (481 et seq.).
63. BVerfGE 109, 133, 174 = NJW 2004, 739 (746).
64. BVerfGE 128, 326, 376 = NJW 2011, 1931 (1938).
65. BVerfGE 123, 267, 348 = NJW 2009, 2267 (2271).
66. BVerfGE 123, 267, 413 = NJW 2009, 2267 (2289).
67. BVerfGE 123, 267, 413 = NJW 2009, 2267 (2289).
68. BVerfGE 30, 1, 41 = NJW 1971, 275 (282).
69. BVerfGE 95, 96, 131 = NJW 1997, 929 (930).
70. BVerfGE 95, 96, 140 = NJW 1997, 929 (932).
71. ECJ judgement of 11 July 2002, Case C-210/00, ECR 2002 I-6453 para. 44 – *Käserei Champignon Hofmeister*.
72. ECJ judgement of 18.11.1987, Case 137/85, ECR 1987, 4587 para. 14 – *Maizena*.
73. ECJ judgement of. 16.11.1983, Case 188/82, ECR 1983, 3721 para. 18 – *Thyssen*.
74. ECJ NJW 2024, 343 para. 68.
75. ECJ, BeckRS 2012, 81043 para. 37 – Bonda.
76. ECJ, BeckRS 2018, 6055 para. 26 f. - Menci Luca.
77. ECJ, BeckRS 2018, 6055 para. 31.

78. ECJ, BeckRS 2022, 5011 para. 25 – bpost.
79. ECJ, BeckRS 2022, 5011 para. 26.
80. ECJ, BeckRS 2023, 24054 para. 49, 53.
81. ECJ, BeckRS 2023, 8994 para. 40, 42, 46.
82. ECJ, NJW 2024, 33, para. 45 - Volkswagen Italia SpA.
83. ECJ, NJW 2024, 343 para. 55, 60, 61, 62, 66, 67,70, 73, 74, 75, 78.
84. ECJ, NJW 2024, 343, 347 para. 68, 78 - Deutsche Wohnen.
85. ECtHR, BeckRS 1976, 107962 para. 81 f.
86. ECtHR, BeckRS 2010, 21072 para. 53 - Zolotoukhine v Russia.
87. ECtHR, BeckRS 2010, 21072.
88. ECtHR, BeckRS 2010, 2107253 - Zolotoukhine v Russia.
89. ECtHR, EuGRZ 1976, 221 - Engel et al. v Netherlands.