PENALTIES (CHAPTER XII) *

Diego Rodríguez Cembellín
Assistant Professor of Administrative Law
University of Oviedo

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1. *Introduction*

The AI Act, like other European regulations and directives, contains a detailed, though not unfinished, regulation of the sanctioning regime arising from the application of the AI Act in Articles 99, 100 and 101. The exercise of the sanctioning power is mainly up to the Member States, which must also adopt their corresponding laws as an implementing measure of the AI Act in order to specify those issues left open in the Regulation.[1] Article 99(1) already provides that 'Member States *shall lay down* rules on penalties and other enforcement measures...' and that they shall do so 'in accordance with the terms and conditions laid down in this Regulation', with the aim of ensuring 'effective, proportionate and dissuasive' penalties (Art. 99(1)).[2] This regulatory technique bears notable similarities to that of the GDPR, whose sanctioning regime is very similar to that of the AI Act.

Firstly, and as a consequence of the above, the analysis in this commentary of the sanctioning regime of the AI Act is *necessarily* incomplete, moreover, for a complete study of it, it would be necessary to know the content of the laws passed by the different Member States. Nevertheless, some criteria are offered for the appropriate configuration of administrative sanctions in this area, bearing in mind that the Member States have practically no margin of appreciation (or very little) for determining infringing conduct, the amounts of fines or the criteria for their graduation.

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[1] As a general rule, the 'direct applicability' of regulations means that no implementing act is necessary at a national level because the regulation itself is incorporated into the legal order of the Member States. In fact, the case law of the ECJ directly prohibits the transposition into national law of the content of a Regulation. However, these acts of legislative implementation of the European Regulation are admissible when the Regulation itself contains an express authorisation for the Member States to do so (as in the case of the AI Act) or when this necessity is derived from the content of the Regulation. On this issue, *vid.* G.M. Díaz González, *La reserva de Ley en la transposición de las directivas europeas,* Madrid, Iustel, 2016, 177-182, where this case law is collected.

[2] On the value and scope of these three concepts, *vid.* J. Fuentetaja Pastor, *La potestad sancionadora de la Unión Europea: fundamento y alcance*, in M. Rebollo Puig, A. Huergo Lora, J. Guillén Caramés, and T. Cano Campos (dirs.), *Anuario de Derecho Administrativo Sancionador 2021,* Cizur Menor, Thomson Reuters-Civitas, 2021, 227-268, 242-247.

Secondly, the AI Act also grants certain sanctioning powers to certain EU institutions and, specifically, to the European Data Protection Supervisor (EDPS) for the sanctioning of infringements committed by EU institutions, agencies and bodies and to the European Commission, which in this case exercises its supervisory and sanctioning powers over providers of general-purpose AI models. Here the final shape of the sanctioning regime does not depend on the legislative action of the Member States, but one must bear in mind, on the one hand, the usual practice of the EU institutions to adopt guidelines on the imposition of sanctions and, on the other hand, the possibility for the European Commission, according to Article 101(6) of the AI Act, to adopt 'implementing acts containing detailed arrangements and procedural safeguards for proceedings given the possible adoption of decisions pursuant to paragraph 1 of this Article (i.e. the imposition of sanctions on providers of general purpose AI systems)'.

2. *The role of Member States in shaping the sanctioning regime*

This section will analyse the issues that the AI Act leaves to the Member States regarding shaping its sanctioning regime. As noted in the introduction, the AI Act does not design a closed and unfinished regime but allows Member States to decide mainly on the catalogue of sanctions and other enforcement measures of the Regulation (with the exception of the fine), on the design of the administrative sanctioning procedure and on the competent body for the imposition of sanctions.

2.1. *The possibility of incorporating other enforcement measures*

Article 99(1) provides that 'Member States shall lay down the rules on penalties and other enforcement measures, which may also include warnings and non-monetary measures, applicable to infringements of this Regulation by operators, and shall take all measures necessary to ensure that they are properly and effectively implemented, thereby taking into account the guidelines issued by the Commission pursuant to Article 96'.

As can be seen, the AI Act gives a fairly wide margin to Member States in shaping their catalogue of administrative sanctions or other types of measures of different nature, as long as they are aimed at ensuring compliance with the provisions of the Regulation. The reference to

'warnings or non-pecuniary measures' has only a purely exemplary or informative value, however, Member States may incorporate those penalties or measures they consider necessary to ensure their sanctioning system is 'effective, proportionate and dissuasive'. The only thing that Member States are really obliged to do is to provide for the penalty of a fine, the limits and criteria for the imposition of which are regulated in Article 99(3) to (7) of the AI Act. Of course, as noted, the AI Act opens up a range of very interesting possibilities, especially with regard to warnings, due to their intimate link with discretion in the exercise of the sanctioning power.

2.1.1. *Warnings*

Warnings are similar to what in other areas has been called 'warning letters'. These letters serve to notify (to 'warn') the individual that his conduct could constitute an administrative infringement and to invite him to rectify or modify it as an alternative to the imposition of an administrative sanction. Warnings are not of a sanctioning nature because in no case do they declare the commission of an administrative infringement or impose any reproach. Their purpose is, as the word itself indicates, to 'warn' or give a sort of 'second chance' to cease or rectify a behaviour before the start of the administrative sanctioning procedure. [3] For this reason, warning letters should not be confused with administrative sanction of 'private warning', which is included in some legal systems such as the Spanish one. In the latter case, an administrative sanctioning procedure is carried out (with all the guarantees associated with the right of defence), the commission of an administrative offence is declared, where appropriate, and a real sanction is imposed, which can be taken into account, unlike 'warnings', for the purposes of recidivism. [4]

On the other hand, warnings are closely linked to discretion in the exercise of administrative sanctioning powers. The very nature of the figure allows the Administration to decide whether to initiate an administrative sanctioning procedure or simply to issue such a warning in order to modify

[3] On warning letters, consult the work of J. García Luengo, *Cartas admonitorias como alternativa al ejercicio de la potestad sancionadora*, in A. Huergo Lora (Dir.), *Problemas actuales del Derecho administrativo sancionador,* Madrid, Iustel, 2018, 101-129.

[4] Again, J. García Luengo, *ibid.,*112-114.

the conduct that allegedly violates the provisions of the Regulation. This directly raises two questions: the discretionary nature or not of the initiation of a sanctioning procedure and the cases in which the use of such a warning is appropriate.

Regarding the initiation of sanctioning proceedings, the ECJ has given the European Commission sufficient discretion for many years to decide whether to initiate proceedings in respect of infringements of Articles 101 and 102 TFEU. As the Commission has limited resources, the requirements of effective enforcement of competition law demand it to select, when exercising its powers, those areas where there is a greater interest for the Commission or those infringements which are of greater gravity. The Commission is not obliged to follow the order in which complaints are received when initiating sanctioning proceedings and may even close them on the grounds of 'lack of sufficient Union interest to pursue the matter further', even if an infringement is indeed committed and found to have been committed.[5] These reflections, confined to the field of competition law, can be perfectly transferable to almost any sector of administrative activity, especially when practically any culpable or wilful infringement is qualified as an infringement. In fact, in legal systems such as the German one, this discretion of the administration, which is expressly recognised in Article 47 of the Law on 'administrative offences' (Ordnungswidrigkeitengesetz or OWiG), is accepted without major problems.

The AI Act does not impose in any way the need to initiate a sanctioning procedure. The reference to 'warnings' already reflects this, but Article 99(7) also lists criteria to be taken into account when *deciding whether to impose an administrative fine and when deciding of the amount of the administrative fine,* thus

[5] There is well-established European case law on this issue. Suffice it to cite, inter alia, Judgment of 2 February 2022, Polskie Górnictwo Naftowe i Gazownictwo, ECLI:EU:T:2022:44, paragraph 46, Judgment of 16 May 2017, Agria Polska, T-480/15, ECLI:EU:T:2017:339, paragraphs 34 and 35, Judgment of 15 December 2010, CEAHR, T-427/08, ECLI:EU:T:2010:517, paragraph 26, Judgment of 4 March 1999, Ufex, C-119/97 P, ECLI:EU:C:1999:116, paragraph 88. The discretion of the European Commission in the initiation of the administrative sanctioning procedure has already been dealt with by A. Huergo Lora, *La desigualdad en la aplicación de potestades administrativas de gravamen: remedios jurídicos*, in *Revista de Administración Pública*, n. 137, 1995, 189-238, 222-238.

expressly recognising that the Administration may (or may not) impose a fine when it finds that an infringement has been committed. However, this discretion is, of course, subject to limits. Opening this possibility to any type of infringement is inappropriate and dangerous. The legal systems that openly recognise this discretion limit it to those cases in which there is no malice or serious negligence on the part of the offender ('small culpability' according to German doctrine), [6] or in which there is no real public interest in the punishment of the offence as it is a minor conduct, which has not caused damage or in which the offender is not a repeat offender. These criteria, easily transferable to the case at hand, are derived from the very requirement that the sanctioning system be effective, proportionate and dissuasive. If the Administration decides not to sanction conduct that is indeed of a certain seriousness or that has been committed intentionally, it would be in breach of that duty of effectiveness and deterrence in the application of European law. Therefore, the use of warnings as an alternative technique to the processing of an administrative sanctioning procedure should be limited to those situations mentioned above.

2.1.2. *Non-monetary measures*

The AI Act mentions the possibility for Member States to transpose 'non-monetary measures' without specifying their content or legal nature. It is, therefore, impossible to predict what the final configuration of the set of charging measures, whether punitive or non-punitive, will look like in each Member State. However, it is at least possible to identify some which are already provided for in other rules of EU law and which could be incorporated into the non-compliance regime of the provisions of the AI Act.

One possibility would be the publication of the name of the offender. This measure could consist, simply, in the publication of the sanctioning decision (as in competition law or data protection) or in an announcement in an official journal or bulletin. European law tends to deny that the publication of the name of the offender has a sanctioning nature [7] and some

[6] W. Mitsch, *47 Verfolgung von Ordnungswidrigkeiten*, in *Karlsruher Kommentar, Ordnungswidrigkeitengesetz,* München, C.H. Beck, 2018, 757-780, 774.

[7] Without expressly mentioning it, the publication of the name of the offender or of the sanctioning decision itself is included in the final or 'general' provisions of the

Courts, such as the Spanish Constitutional Court, have not considered it as such either.[8] However, contrary to what one might think, the classification of the measure as an administrative sanction is not always so relevant. The main consequence of classifying any measure as a sanction is the application of a series of 'reinforced' guarantees for its imposition, but in this case, those guarantees already exist because the publication of the offender's name is preceded by the imposition of a sanction.[9] At most, it would be relevant to classify it as a sanction if the publication of the offender's name were incorporated after the entry into force of the rule regulating the sanctioning regime derived from the AI Act in order to assess whether the measure can be applied to offences committed prior its entry into force.

Other measures that could be incorporated into Member States' sanctioning regime include a prohibition to carry out a certain economic activity for a certain period of time (the one linked to the one in which the infringement was committed), a prohibition to market or, where appropriate, to make use of a product or software linked to the infringement or, also, the debarment from public procurement. In the latter case, it should be recalled that public administrations, instead of developing themselves the AI systems they use, normally conclude contracts with some providers to provide them with these tools. Therefore, the imposition of this sanction on providers could also have deterrent effects, even greater than those of the fine.

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legislation (European Digital Markets Act or Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty), or in a separate section from administrative sanctions (Directive (EU) 2019/2034 on the prudential supervision of investment firms or the Digital Markets Act)

[8] STC 23/2022, 21 February. However, some authors in Spain have considered that this measure does indeed have a punitive nature, or at least under certain circumstances. *See*, in this regard A. Huergo Lora, *La publicación del nombre de los infractores como sanción administrativa (Name and Shame)*, in M. Rebollo Puig, A. Huergo Lora, J. Guillén Caramés, and T. Cano Campos (dirs.), *Anuario de Derecho Administrativo Sancionador 2021*, *cit.*

[9] In similar terms, F. P. Irmscher, *Öffenlichkeit als Sanktion,* Tübingen, Mohr Siebeck, 2019, 239-240.

2.2. *The possibility of sanctioning public administrations*

Like the GDPR, the AI Act leaves open the possibility of imposing fines on public administrations that will have to be regulated by the Member States, as stated in Article 99(8): 'Each Member State shall lay down rules determining the extent to which administrative fines may be imposed on public authorities and bodies established in that Member State'.

Member States are expected to follow the practice they have previously adopted for data protection offences. For example, Germany has expressly excluded the imposition of fines on public administrations in its Federal Data Protection Act (Bundesdatenschutzgesetz), specifically in Article 43(3). The Spanish case is somewhat peculiar because, although Article 77 of the LOPDGDD excludes the imposition of a fine, it allows the processing of a sanctioning procedure that ends with the mere declaration of the commission of an infringement and, where appropriate, the obligation to cease or modify the conduct. This sanctioning resolution may serve as a basis for the initiation of the corresponding disciplinary proceedings within the infringing Administration itself so that the material perpetrators of the infringement are punished, but, as I have said, it must be the infringing Administration itself that initiates the corresponding disciplinary proceedings, the AEPD lacking this power.

Another issue that could pose problems in practice is 'public authority and public body' concept referred to in Article 99(8) of the AI Act. This idea of a body governed by public law obviously excludes public commercial companies, which, even if they have a majority public shareholding, are entities governed by private law. However, in theory, these public companies can exercise administrative powers, and therefore, it is worth considering whether the imposition of administrative penalties could also be excluded in these cases. This is important because the Regulation allows the non-imposition of fines only on 'authorities' and 'public bodies' but in no case on other types of subjects. If one were to consider that commercial companies, regardless of their functions, cannot be considered as public bodies, the exclusion of their liability would be contrary to the AI Act. Despite the traditional anti-formalist approach with which EU law tends to deal with these issues,[10] it might have been useful for the Regulation to

[10] For example, European competition law excludes sanctions for those public entities whose activity is outside the market and which exercise 'prerogatives of

incorporate a definition of this concept. The same mistake was also made in the GDPR at the time, which has led to disparate solutions regarding the sanctioning of public companies among some Member States. [11]

2.3. *The autonomy of the Member States and the sanctioning procedure*

2.3.1. *The competetent body to sanction*

The so-called procedural autonomy of the Member States allows them to establish and regulate how European law is implemented, respecting the principles of effectiveness and equivalence and, where appropriate, the limitations to this autonomy established by Community law itself. This is also evident in the procedure for the imposition of sanctions arising from non-compliance with the AI Act. The sanctioning provisions included in the AI Act belong to what can be called substantive sanctioning law; they only contain the classification of infringements, their corresponding fines and the criteria for their graduation. However, it is left to the Member States to determine the procedure for imposing administrative penalties.

In this regard, Member States must determine to which body they grant

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public authority'. Apart from these cases, public administrations can be sanctioned for non-compliance with competition law, regardless of their legal nature or sources of financing. *Vid.* F. Marcos Fernández, *¿Puede sancionarse a las Administraciones Públicas cuando no actúan como operador económico si restringen la competencia o promueven conductas anticompetitivas?*, in *InDret,* n.1, 2018, 1-41.

[11] Again, if we look at the comparison between Spain and Germany, we can observe such divergences. Article 77 of the Spanish Data Protection Act establishes a catalogue of public law subjects to which this particular sanctioning liability regime applies based on the mere declaration of the commission of an infringement. Those subjects do not include public corporations, which are subject to the ordinary sanctioning regime regardless of their functions. By contrast, the German Federal Data Protection Act again includes in the concept of public bodies (*öffenliche Stellen*), for the purposes of non-imposition of sanctions, those private-law entities which 'perform tasks of public administration (*öffentlichen Verwaltung*)'. In my opinion, I believe that this German criterion is also admissible if we take into account the anti-formalist approach of European Union law to which I referred earlier, and I believe that it is the one that should predominate when excluding certain subjects from the imposition of administrative sanctions or when configuring a particular regime for them, adapted to their status as a public administration.

the competence for handling administrative sanctioning procedures and the imposition of sanctions. It will be common for the market surveillance authority to hold this power, as will be the case in Spain through the Spanish Agency for the Supervision of Artificial Intelligence, but the Regulation does not impose it.[12] In fact, by virtue of this procedural autonomy, the Regulation does not even require the existence of administrative sanctions in the sense that it is a public administration that imposes them. Thus, Article 99(9) provides that 'depending on the legal system of the Member States, the rules on administrative fines may be applied in such a way that fines are imposed by the competent national courts or by other bodies, as appropriate in those Member States'. This serves the interests of those Member States that concentrate the exercise of *ius puniendi* in the courts.

As regards the procedure for the imposition of the sanction, the Regulation provides in Article 99(10) that 'The exercise by a market surveillance authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with national and Union and Member State law, including effective judicial protection and due process'. The article, in my opinion, is unnecessary since these guarantees are established by the CFREU, which enshrines in Article 47 the right to effective judicial protection and in Article 48 the right to the presumption of innocence [Article 48(1)] and the right of defence of everyone who has been charged [Article 48(2)], which includes the right to offer evidence, access to the file, the right to be heard and the right not to testify against oneself. Under no circumstances does the term 'charged' allow these guarantees to be reduced to criminal proceedings. The case law of the ECJ has clarified that they also apply to those procedures that allow the imposition of an administrative sanction of a 'criminal nature', incorporating a fairly consolidated case law of the ECtHR concerning the qualification of an administrative sanction as 'criminal' for the mere purpose of applying to

[12] Article 10.1 k) of Royal Decree 729/2023 of 22 August, approving the Statute of the Spanish Agency for the Supervision of Artificial Intelligence, provides that the Agency shall be responsible for 'the supervision of artificial intelligence systems to ensure compliance with both national and European regulations on artificial intelligence involving the use of this technology, the competence of which is assumed by the Agency. More specifically, it shall be responsible for supervision and, where appropriate, *sanctioning* in accordance with the provisions of European regulations on the supervision of Artificial Intelligence systems'.

them the guarantees that are also incorporated in the ECHR.[13] In this case, the fines set out in the AI Act clearly comply with what is known as the *Engel* criteria, taken up by the ECJ in the *Bonda* Judgment.[14]

2.3.2. *The setting of limitation periods*

Another issue that is linked to the sanctioning procedure is the establishment of limitation periods both for infringements and for the sanctions to be imposed. Indeed, there has traditionally been a debate on the procedural or substantive nature of the statute of limitations, a debate which is important because, if considered as a substantive issue (as a ground for excluding liability), it would prevent, for example, the retroactive application of longer limitation periods.[15] The case law of the ECJ has been inclined to give a procedural nature to limitation periods and has clarified that 'the rules governing limitation periods in criminal matters do not fall within the scope of Article 49(1) of the Charter', thus excluding their link with the principle of criminal legality and, therefore, with the prohibition of retroactivity.[16]

Regardless of the above, the existence of limitation periods is essential insofar as it is directly linked to the principle of legal certainty. In European sanctioning law, the statute of limitations is also well known, and some European regulations expressly provide for limitation periods for the exercise of sanctioning powers, such as Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Therefore, 'there can be no objection to Member States laying down limitation periods for the penalties which they are required to impose under Community

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[13] On the concept of sanctions in Union law, see the work of A. De Moor-van Vugt, *Administrative Sanctions in EU Law*, in *REALaw,* n.1, 2012, 5-41, 11-15. On this case law, *see.* B. Bahceci, *Redefining the Concept of Penalty in the Case-law of the European Court of Human Rights*, in *European Public Law,* vol. 26, n.4, 2020, 867-888 and O. Bouazza Ariño, *El concepto autónomo de sanción en el sistema del Convenio Europeo de Derechos Humanos*, in M. Rebollo Puig, A. Huergo Lora, J. Guillén Caramés, and T. Cano Campos (dirs.), *Anuario de Derecho Administrativo Sancionador 2021, cit.*

[14] Judgment of 5 June 2012, Bonda, C-489/10, ECLI:EU:C:2012:319.

[15] M. Gómez Tomillo, M., and I. Sanz Rubiales, *Derecho administrativo sancionador. Parte general,* Cizur Menor, Thomson Reuters Aranzadi, 2023, 954-958.

[16] Judgment of 24 July 2023, Lin, C-107/PPU, ECLI:EU:C:2023:606.

law'[17] even though the AI Act does not provide for them. At most, it may be objectionable if limitation periods (especially of the infringement) are too short so that the 'effective repression of infringements' is jeopardised, as the ECJ has sometimes held.[18] However, beyond this limit, Member States have a wide margin in setting the relevant time limits.

3. *Infringements of the AI Act*

The AI Act considers virtually any substantive rule breach as an administrative offence. The technique used is simple and involves simply classifying as an offence the failure by a given subject to comply with the obligations established by another article of the Regulation, referring directly to it. Sometimes, this reference is double because the article it refers to contains a further reference to other articles. In order to improve legal certainty, it is perfectly possible for Member States to specify precisely what this reference is in their implementing legislation. In other words, they should lay down the content of the obligations to which the Regulation refers and the infringement of which constitutes an administrative offence.

In summary, depending on their seriousness, we can distinguish three groups of infringements, each regulated in Articles 99(3), 99(4) and 99(5) of the AI Act respectively. The most serious infringements, as is logical, are related to non-compliance with the regime of prohibited AI practices, while the second group of infringements refers to the use of 'high-risk' AI systems and the third group simply to refusals to cooperate with the Administration in the exercise of its powers.

3.1. *Infringements arising from non-compliance with the prohibited practices regime*

Article 99(3) of the AI Act provides that 'Failure to comply with the prohibition of AI practices referred to in Article 5 shall be subject to administrative fines of up to EUR 35 000 000 or, if the offender is an undertaking, up to 7 % of its total worldwide turnover in the preceding

[17] Opinion of Advocate General Kokott of 30 April 2015 in Case C-105/14.

[18] Judgment of 24 July 2023, Lin, C-107/PPU, ECLI:EU:C:2023:606, paragraph 86.

business year, whichever is the higher'. As mentioned above, this infringement is the most serious under the AI Act, and the highest fines are envisaged for it. These are AI applications that the Regulation directly prohibits or, as is the case with real-time biometric identification systems, limits their use only in exceptional cases due to the high risks involved, which justifies this more severe sanctioning regime.

Firstly, we are dealing with an infringement of a 'special' nature in such a way that only the persons referred to in Article 5 of the AI Act can be liable to a penalty. What Article 5 prohibits is the placing on the market, putting into service or use of the AI systems mentioned therein, and these tasks are those of subjects perfectly defined in the list of definitions in Article 3 of the AI Act. Therefore, in principle, those responsible for this infringement can only be the providers, the importers (when the provider is established in a third country) and the deployers without it being possible to impose a sanction on subjects other than the above who, for example, have induced the commission of this infringement or have actively collaborated in it. [19] What is possible is that there are several parties responsible for the commission of an infringement. Indeed, this may be common since placing the product on the market, which gives rise to the liability of the provider, is likely to lead to its use by another party, which, in this case, will be responsible for the deployment. However, in relation to the latter, the mere acquisition of the product should not give rise to any sanctioning liability because what is expressly prohibited by Article 5 of the AI Act is the use, not the mere purchase or acquisition.

On the other hand, it is important to clarify that not every failure to comply with the provisions of Article 5 constitutes an administrative offence. What is expressly punished is the 'non-compliance with the prohibition of AI practices referred to in Article 5', thus excluding other provisions of Article 5 that are not aimed at prohibiting or conditioning the use of such AI systems. Thus, for example, non-compliance with the rules governing the granting of judicial or administrative authorisation for the use of a real-time biometric identification system should in no case lead to the imposition of an administrative sanction, if any, on the judicial or administrative authority that grants such authorisation without complying with those rules (in addition to the fact that in the case of the judicial

[19] On the limits of the parties responsible for sanctions in cases of special infringements, *see.* M. Rebollo Puig, *Responsabilidad de los autores de las infracciones y de los partícipes*, in *Revista Vasca de Administración Pública,* n. 99-100, 2014, 2527-2546, 2540-2544.

authority, this would be an intrusion into the judicial function that would be completely contrary to the principle of the separation of powers). In the event of non-compliance with the rules laid down in the AI Act, the administrative or judicial decision may be challenged. It would, therefore, be interesting, as noted at the outset, if the Member States were to better define the administrative offences arising from the AI Act.

3.2. *Infringements arising from non-compliance with the high-risk artificial intelligence systems regime*

The aim of the AI Act, beyond prohibiting certain practices, is to establish requirements for the use of AI systems that the Regulation itself qualifies as 'high risk'. Therefore, as the bulk of the AI Act is precisely the establishment of requirements and controls on the use of these high-risk AI systems, most administrative infringements are related to non-compliance with these requirements. With the exception of the infringements related to the prohibited practices mentioned above and that of supplying incorrect, incomplete or misleading information to notified bodies or competent national authorities, which is regulated in Article 99(5) and whose fines are the lowest provided for in the AI Act (7,500,000 or 1% of turnover), the rest of the infringements are set out in Article 99(4):

'Failure to comply with any of the following provisions concerning operators or notified bodies, other than those set out in Articles 5, shall be punishable by administrative fines of up to EUR 15 000 000 or, if the offender is an undertaking, up to 3 % of its total annual worldwide turnover in the preceding business year, whichever is the higher:

(a) Obligations of providers under Article 16;

(b) obligations of professional representatives in accordance with Article 22;

(c) the obligations of importers under Article 23;

(d) obligations of distributors under Article 24;

(e) the obligations of deployers under Article 26;

(f) the requirements and obligations of the bodies notified under Article 31, Article 33(1), (3) and (4) or Article 34;

(g) transparency obligations for providers and implementers in accordance with Article 50'. [20]

[20] Article 50 does not refer to the use of AI systems listed in the Regulation as

Here again, some of the issues that we have alluded to in relation to infringements related to the use of prohibited AI systems are reproduced. The technique of renvoi is used so that Member States could specify or improve the definition of infringements, and these are 'special' administrative offences, which limits the possibility of sanctioning other parties involved in the infringing conduct.

On the other hand, how the requirements for the use of high-risk artificial intelligence systems are regulated poses a real problem from the point of view of administrative sanctioning law, especially with regard to the principle of culpability. The AI Act does not incorporate clear and concise prohibitions or mandates but rather sets out principles and objectives, the degree of compliance with which may be variable and uncertain.[21] For example, Article 9 (4) states that risk management systems should aim to 'minimise risks more effectively while achieving an appropriate balance in implementing the measures to fulfil those requirements'. This regulatory technique is also used with regard to human supervision (Article 14). Thus, it imposes that high-risk AI systems shall be designed and developed in such a way that they can be 'effectively' overseen. Furthermore, these measures are 'proportionate to the risks, level of autonomy and the context of the use of the high-risk AI system' [Article 14(3)].

This regulatory configuration that has just been described means that the administrations in charge of *enforcing* the rule do not rely solely on sanctions and must complement it with recourse to 'informal' administrative activity. It is precisely for this reason that discretion is granted to initiate the procedure, that warnings are mentioned, or that, among the criteria for the graduation of the fine, the 'degree of responsibility of the operator, *taking into account the technical and organisational measures implemented by it*' is included. Also, as I have explained elsewhere, the existence of regulatory *sandboxes* in which the administrations 'accompany' the promoter of the selected AI product or system in complying with the regulation in such a way as to provide them with a 'safe harbour' against possible administrative sanctions, serves to 'palliate' the indeterminacy of some precepts and the risk of being

high risk but sets out several rules for using some AI systems, such as *chatbots* or systems that generate *deepfakes,* i.e. false images from the use of AI systems.

[21] A. Huergo Lora, *Hacia la regulación europea de la inteligencia artificial*, in E. Gamero Casado (dir.), F. Pérez Guerrero (coord.), *Inteligencia artificial y sector público: retos, límites y medios,* Valencia, Tirant lo Blanch, 2023, 743-761, 761.

sanctioned.[22] In short, the AI Act allows administrations a model for the exercise of sanctioning powers that do not necessarily involve the punishment of any breach of the Regulation. In those, shall we say, 'grey' areas, the Administration has other tools to 'guide' the possible offender towards compliance with the law without the need, at least initially, to impose a sanction.

4. *The regulation of fines and its graduation*

The catalogue of sanctions established by the Member States may be very varied, but it must necessarily include administrative fines, which are regulated in some detail in the AI Act, especially as regards the amount and the criteria for imposing and grading them. This does not mean that the Administration cannot dispense with imposing a fine in a specific case or that the sanctioning response is channelled exclusively through another administrative sanction, for example, through a private warning for an infringement that is not serious enough to merit a fine. All that the AI Act requires is that there is a possibility to impose a fine, but not to impose it in every case. Otherwise, the reference to 'warnings' in Article 99(1) would make no sense. However, Article 99(7) of the AI Act also establishes criteria that serve both the individualisation of the fine and the decision on its imposition. Thus, it states that '*when deciding whether to impose an administrative fine and when deciding on the amount of the administrative fine in each individual case,* all relevant circumstances of the specific situation shall be taken into account and, as appropriate, regard shall be given to the following:'; this highlights that not necessarily every sanctioning procedure has to result in the imposition of a fine, although this will be the most frequent.

4.1. *The alternative between dynamic and fixed limits*

The AI Act makes a difference depending on whether the infringer is an undertaking or not. If the offender is an undertaking, the upper limit of the

[22] D. Rodríguez Cembellín, *Los sandboxes regulatorios y el ejemplo español en materia de IA*, in P. Valcárcel Fernández and F. Hernández Fernández (dirs.), *El Derecho administrativo en la era de la inteligencia artificial. Actas del XVIII Congreso de la AEPDA,* Madrid, INAP, 2025, 187-199.

fine may be either a 'dynamic' figure, i.e. a percentage of the undertaking's total annual worldwide turnover for the preceding business year (7%, 3% or 1% depending on the type of infringement), or a fixed amount (35,000,000, 15,000,000 or 7,500,000 euros) but only when this figure is higher than this percentage of turnover. If the offender cannot be categorised as an 'undertaking', then only the fixed amounts are used.

The Regulation does not clarify what is considered to be an 'undertaking', but one can easily fall back on the anti-formalist definition that has consistently been used in the case law of the ECJ for the application of competition law. For the European Court, an undertaking is 'any economic entity engaged in an economic activity, regardless of the nature of that entity and how it is financed'.[23] Therefore, as long as this condition is met and as long as the subject in question is obliged to draw up annual accounts, the concept of turnover must be used to calculate the fine.

4.2. *Some doubts about turnover*

The AI Act does not specify which turnover should be used when sanctioning a commercial company that is part of a larger group of companies or the parent company of a group of companies. This is important because, in principle, if the consolidated turnover (i.e. the turnover of all the companies in the group) is used, the higher amount of the fine will be much higher than if the individual turnover of each company is used, regardless of whether it is a subsidiary or a parent company.

In competition law, this concept of 'undertaking' has been used not only to determine the parties to which competition law applies but also to establish the joint and several liability of the parent company for infringements by its subsidiary. The ECJ considers that if the subsidiary has no autonomy of its own on the market and its parent company exercises a 'decisive influence', both are part of the same 'undertaking' or 'economic

[23] There are many judgments which use these words. Suffice it to cite, by way of example, the following: Judgment of 1 July 2008, MOTOE, C-49/07, ECLI:EU:C:2008:376, paragraph 20, Judgment of 11 December 2007, ETI, C-280/06, EU:C:2007:775, paragraph 38 or Judgment of 27 April 2017, Akzo Nobel II, C-516/15P, ECLI:EU:C:2017:314.

unit'.[24] This liability of the parent company also makes it possible to use the turnover of the whole group of companies for the calculation of the fine and thus to increase its ceiling.[25]

This does not mean that the sanctioning of the parent company is indispensable for the use of the consolidated turnover of the group of companies of which an infringing subsidiary may form part. There are sectoral rules in the European Union that no longer require such an imputation of the parent company for the use of turnover, but only that the offending company belongs to a group of companies. For example, Directive 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing provides that, for the purposes of calculating the fine, 'where the obliged entity is a parent company, or a subsidiary of a parent company, which is required to preparate consolidated financial accounts [...], the total relevant turnover [...] shall be shall be the total annual turnover or the corresponding type of income in accordance with the relevant accounting Directives according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking'. Finally, the sanctioning model closest to the AI Act, that of the GDPR, states in recital 150 that 'Where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 TFEU for those purposes'. Although there were already

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[24] This case law of the CJ is well established. Suffice it to cite a few judgments: Judgment of 27 January 2021, The Goldman Sachs Group, C-595/18 P, ECLI:EU:C:2021:73, paragraph 31, Judgment of 10 April 2014, Areva, C-247/11 P and C-253/11 P (joined cases), ECLI:EU:C:2014:257, paragraph 30, or also, some of the most iconic ones such as the CJ of 10 September 2009, Akzo Nobel, C-97/08 P, cit, paragraph 58 or the more remote Judgment of 25 October 1983, AEG, C-107/82, ECLI:EU:C:1983:293, paragraph 49I have dealt more extensively with this issue in D. Rodríguez Cembellín, *Potestad sancionadora y grupos de empresas,* Madrid, Iustel, 2024, 165-273.

[25] Judgment of 26 November 2013, Groupe Gascogne, C-58/12 P, ECLI:EU:C:2013:770. On this issue, C. Koenig, *Enforcement of EU Competition Law against group of competitors: The calculation of fines*, in T. Florence and A. Tzanaki (eds.), *Research Handbook on Competition and Corporate Law,* Edward Elgar Publishing, Cheltenham, forthcoming (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4546559), pp. 1-22, pp. 5-7.

precedents in the practice of some data protection authorities, [26] the ECJ has recently clarified that fines imposed on undertakings in the application of the GDPR have to be calculated based on the consolidated turnover of the group to which the offender belongs. [27]

Despite the examples given above, I do not believe that the reference to the term 'undertaking' in the AI Act allows either the sanctioning of the parent company or the calculation of the fine on the consolidated turnover, even if the parent company has not been sanctioned. The AI Act does not contain any rules in this respect, as do other European rules. Therefore, the principle of legality requires that the individual turnover of each company be used. [28] If the Regulation had wanted to use the competition law concept of 'undertaking' as an instrument for the imputation of liability to parent companies or merely for the use of consolidated turnover, it should have specified this, as the GDPR did. Finally, the reference to 'total worldwide' turnover does not at all open the way to the calculation of the fine on consolidated turnover. The reference to total and worldwide has a different dimension. It refers to counting the total revenue derived from sales, regardless of the sector (total) and country (worldwide) in which that sale takes place, but that sale will always be associated with a company (individual turnover).

In short, it seems clear that the AI Act does not properly address the phenomenon of corporate groups, which is surprising considering the structure of the main actors developing AI systems, the GDPR and the special attention that EU sanctioning law has paid to corporate groups.

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[26] I refer to the decision of 20 August 2021 of the Irish Data Protection Commission in which the turnover of the Meta group (at that time Facebook, Inc) was used to calculate the fine imposed on WhatsApp.

[27] Judgment of 5 December 2023, Deutsche Wohnen, C-807/21, ECLI:EU:C:2023:950, paras 54-60.

[28] M. Izquierdo Carrasco, *¿Tienen que adaptar las multas a empresas a su situación económica? Un estudio del principio de proporcionalidad en materia sancionadora*, in M. Rebollo Puig, A. Huergo Lora, J. Guillén Caramés, and T. Cano Campos (dirs.), *Anuario de Derecho Administrativo Sancionador 2021*, *cit.* 141-176, 172-173.

4.3. *Reducing the discretion of the sanctioning administration*

A common feature of European sanctioning law is the wide margin of discretion granted to the authorities, an issue we have already referred to in this commentary. In the area of the calculation of fines, one factor contributing to this discretion is the use of such wide upper limits for calculating the fine, which is higher the larger the subject to be sanctioned. Consider that 1%, 3% or 7% of the turnover of a large company can translate into millions of euros, to which must be added the fact that European law do not contemplate lower limits on the range of fines. In this way, the Administration can move within an extensive range despite the regulation introducing graduation criteria. However, for quantifying these criteria in determining the fine, the Administration again enjoys a fairly wide margin of appreciation. This makes it difficult for the courts to control the amount of the fine on appeal.

European Union law consciously admits this margin of discretion of the administrations because they themselves subsequently reduce it by approving guides or guidelines on the calculation of the fine, which detail how the basic amount of the fine is determined, how aggravating and attenuating circumstances are applied and how, for example, the amount of the fine is differentiated according to the size of the offender. This regulatory model is present in the field of competition law and banking supervision, where the European institutions themselves exercise executive powers. The European Commission, in the first case, and the European Central Bank, in the second, have both approved Guidelines detailing how they will calculate fines, taking into account the criteria for the graduation of the fine and the maximum permitted amount set out in the regulations in question. The European Data Protection Board has also approved its own guidelines for the imposition of fines under the GDPR, although in this case, the sanctioning powers lie solely with the national authorities. This ensures that there is some uniformity in the application of the GDPR, otherwise, there could be large differences between countries in terms of the average amount of fines imposed.

This system could be replicated for the AI Act, where, with the exception of penalties for providers of general-purpose AI models, penalties will have to be imposed by the authorities of the relevant Member States. The problem is that while Article 70 GDPR empowers the European Data Protection Board to issue guidelines to supervisory authorities for 'the setting of administrative fines', the AI Act does not contain a similar empowerment. It is true that Article 96 allows the European Commission to

adopt guidelines on certain matters, but none of them refers to the system of calculation of administrative fines. Thus, in principle, unless there is some willingness to communicate between national authorities with a view to establishing a common system for the calculation of fines, this could lead to significant and dangerous differences in application between Member States.

4.4. *The criteria for the graduation and imposition of fines*

The criteria set out in Article 99(7) of the AI Act for the graduation or, as the case may be, imposition of fines are as follows:

(a) the nature, gravity and duration of the infringement and of its consequences, taking into account the purpose of the AI system, as well as, where appropriate, the number of affected persons and the level of damage suffered by them;
(b) whether administrative fines have already been applied by other market surveillance authorities to the same operator for the same infringement;
(c) whether administrative fines have already been applied by other authorities to the same operator for infringements of other Union or national law when such infringements result from the same activity or omission constituting a relevant infringement of this Regulation;
(d) the size, the annual turnover and market share of the operator committing the infringement;
(e) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement;
(f) the degree of cooperation with the national competent authorities, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
(g) the degree of responsibility of the operator taking into account the technical and organisational measures implemented by it;
(h) the manner in which the infringement became known to the national competent authorities, in particular whether, and if so, to what extent, the operator notified the infringement;
(i) the intentional or negligent character of the infringement;
(j) any action taken by the operator to mitigate the harm suffered by the affected persons.

These criteria (seriousness of the infringement, cooperation with the authorities, intentionality, recidivism or economic capacity) are very similar

to those set out in Article 83(2) of the GDPR. However, as far as data protection is concerned, not all of them play the same role, so the gravity of the offence and the size of the offender serve to set the basic amount of the fine, and the rest are considered aggravating or mitigating circumstances, as provided for in the Guidelines 04/2022 on the calculation of administrative fines adopted by the European Data Protection Committee. This calculation methodology does not necessarily have to be reproduced in the scope of the AI Act, firstly because, as I said, there is no provision in the Regulation that empowers any European institution to issue such guidelines, which would not prevent national authorities from doing so on their own.

4.4.1. *Previously committed infringements*

One of the criteria incorporated in Article 99(7) of the AI Act is that of administrative fines previously imposed by other market surveillance authorities for the commission of the same 'infringement' or those fines resulting from the infringement of other rules of 'Union or national law' which in turn constitute infringements of the Regulation itself. It is not clear whether what the Regulation intends, in this case, is to increase the fine in the case of recidivism (infringements of the Regulation) and repetition (infringements of any other rule) or, on the contrary, mitigation, or even the non-initiation of the procedure to avoid incurring in a case of *ne bis in idem*. The logical thing would be to contemplate both phenomena, but, as I say, it is not clear at first glance what the AI Act is referring to.

In my opinion, what is contemplated in this article is the need to take into account fines previously imposed for the commission of the same offence for the purposes of *ne bis in idem*. I come to this conclusion, firstly, because if it referred to recidivism, it would make no sense to refer exclusively to administrative fines imposed by *other authorities* and not by the same authority that, in this case, exercises the sanctioning competence. Moreover, it does not make sense to take into account other administrative fines for infringements of rules other than the AI Act, but not previous infringements, but of a different nature from the Regulation itself. Finally, when recidivism is incorporated into European legislation, it is usually done in much broader terms. Thus, for example, the GDPR speaks of 'any relevant previous infringements committed by the controller or processor' in Directive 2019/2034 on the prudential supervision of investment firms of 'previous breaches by the natural or legal persons responsible for the

breach', or in Directive 2015/849 on the prevention of the use of the financial system for money laundering or terrorist financing of 'possible previous breaches by the natural or legal person responsible for the breach'. Therefore, the AI Act, in this case, is referring to the need to take into account that first offence in order to avoid incurring *ne bis in idem*.

This criterion of previously committed infringements is split into two letters. Firstly, point b (penalties imposed by other supervisory authorities for the commission of the same infringement) refers to cases where the same infringement is repeated in several Member States so that each authority decides to initiate its own administrative sanctioning procedure and impose the corresponding sanction.[29] In principle, the case law of the ECJ allows for the imposition of a second or successive administrative penalty but establishes several conditions for it to be understood that *ne bis in idem* has not been violated. In essence, the issue revolves around the requirement of *idem factum*. The ECJ considers that for this requirement to be met, the sanctioning procedure must have dealt with the same facts, 'taking into account the territory, the product market and the period to which the decision refers'.[30] Thus, it is necessary that, in the decision to impose a fine, the effects of the infringement in the other Member State have been taken into account, i.e. that jurisdiction has been exercised extraterritorially. If this is not the case, in principle, there would be no factual identity because the proceedings would not be directed against the same facts, from a geographical point of view, that have already been sanctioned.

Notwithstanding the above, the cumulation of penalties for an

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[29] On this chaining of sanctioning procedures and its relationship with *ne bis in idem*, *see*. R. Nazzini, *Parallel Proceedings in Eu Competition Law. Ne Bis in Idem as a Limiting Principle*, *in* B. Van Bockel (ed,), *Ne bis in Idem in EU Law,* Cambridge, Cambridge University Press, 2016, 131-166, and F. Meyer, *Multiple Sanktionierung von Unternehmen und ne bis in idem*, in U. Stein, L. Greco, C. Jäger, J. Wolter, (Hrsg.), *Systematik in Strafrechtswisenschaft und Gesetzgebung. Festschrift für Klaus Rogall zum 70. Geburstag am 10. August 2018,* Berlin, Duncker & Humblot, Berlin, 2018, 535-557. This issue is also dealt with in detail in D. Rodríguez Cembellín, *Potestad sancionadora y grupos de empresas,* cit. 321-336.

[30] Judgment of 22 March 2022, Nordzucker v Südzucker, C-151/20, ECLI:EU:C:2022:203 and Judgment of 14 September 2023, Volkswagen Group Italia and Volkswagen Aktiengesellschaft, C-27/22, ECLI:EU:C:2023:265.

infringement whose effects are spread over several Member States may raise problems from the point of view of the principle of proportionality. It should also be borne in mind that although the punishment is limited to acts committed within a given territory, the parameter for calculating the fine is the overall turnover. Therefore, this criterion for the graduation of the sanction incorporated in the AI Act would allow the amount of the second sanction to be calculated, taking into account, in some way, the first one, in order to at least assess whether the 'global' sanctioning response is disproportionate. This is the main objective, in my opinion, of the provision in question.

A different matter is provided for in paragraph c (sanctions arising from the infringement of other national or European legislation), which regulates the ideal concurrence of infringements: the same conduct infringes several laws.[31] In principle, the most recent case law of the ECJ, under certain conditions, also allows the imposition of a second sanction despite the existence of a prior administrative sanctioning procedure. To this end, the ECJ requires that the proceedings have been conducted in a 'coordinated and timely manner' and that the first sanction imposed following the first procedure 'has been taken into account in assessing the second sanction, so that the burden on the persons concerned resulting from such cumulation is limited to what is strictly necessary and that the totality of the sanctions imposed corresponds to the gravity of the infringements committed'.[32] It is

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[31] On this concept, *vid.* T. Cano Campos, *Sanciones administrativas,* Madrid, Francis Lefebvre, 2018, 142.

[32] This case law can be found in Judgment of 20 March 2018, Menci, C-524/15, ECLI:EU:C:2018:197, Judgment of 22 March 2022, Bpost, C-117/20, ECLI:EU:C:2022:202 and Judgment of 22 March 2022, Nordzucker/Südzucker, C-151/20, ECLI:EU:C:2022:203. For an analysis, see J.L. Escobar Veas, *Ne bis in idem and Multiple Sanctioning Systems. A Case Law Study of the European Court of Human Rights and the Court of Justice of the EU,* Springer, 2023, 119-128 and also in V. Mitsilegas, *EU Criminal Law*, Bloomsbury, 2022, 148-195. Also relevant in Spanish are the works of C. Martín Fernández, *La jurisprudencia europea sobre los procedimientos punitivos vinculados: Una oportunidad para que España se alinee con Europa en la garantía del non bis in idem*, in M. Rebollo Puig, A. Huergo Lora, J. Guillén Caramés, and T. Cano Campos, (dirs), *Anuario de Derecho Administrativo Sancionador 2023,* Cizur Menor, Thomson Reuters-Civitas, 2023, 243-275, T. Cano Campos, *Los claroscuros del non bis in idem en el espacio jurídico europeo*, in *Anuario de Derecho Administrativo Sancionador 2022,*

precisely this need to consider the first sanction that the introduction of paragraph c responds to in order to comply with this proportionality criterion. However, the first and the second procedure must pursue 'complementary' interests. In other words, they must seek to protect different legal interests. This would be the case, for example, if a sanction is imposed for the same conduct in the field of data protection and a breach of the AI Act. If these complementary interests were not pursued, this prohibition of *ne bis in idem* would be violated.

Finally, these sanctions must come from Member States, not from third countries, even if they concern the same offence. In principle, *ne bis in idem* has a national character so that unless a law or an international treaty provides otherwise, sanctions imposed in one State do not limit the sovereignty and, therefore, the exercise of the corresponding sanctioning power of another State.[33] In this sense, the CFREU has given a European, but not an international character to *ne bis in idem*, which excludes such sanctions of third countries. Article 50 of the CFREU provides that 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted *within the Union in* accordance with the law'.

4.4.2. *The organisational defect*

The AI Act also refers to the self-organisation of the offender. In this regard, Article 99(7) incorporates the criterion of 'the degree of responsibility of the operator, taking into account *the technical and organisational measures implemented by it*', which in the field of criminal law has been known as 'organisational defect' and has led to the introduction of *compliance* programmes. Of course, these programmes cannot serve as a mere 'cosmetic' operation but must be effectively applied and implemented within the company, which must be analysed by the sanctioning body when imposing the sanction.

Cizur Menor, Thomson Reuters-Civitas, 2022, 28-69 and A. Bueno Armijo, *Carácter procedimental del non bis in idem en la Unión Europea*, *Revista de Administración Pública,* n. 218, 2022, 171-206.

[33] K. Rogall, *§ 5 Räumliche Geltung*, in W. Mitsch, (Hrsg.), *Karlsruher Kommentar. Ordnungswidrigkeitengesetz*, cit., 126-138 and J. Vervaele, *Ne bis in idem - a transnational principle of constitutional rank in the European Union?*, *Indret,* n. 1, 2014, 1-32, 6-12.

However, it seems unlikely that these programmes can serve to exonerate the legal person from liability to penalties, but only as a mere mitigating factor of liability. The European Commission, in the field of Competition, rejects even this value of mitigating the fine and does not grant any type of reduction of the sanction. [34] In this case, the existence of this article already makes it necessary to take them into account in some way, although hardly for the exoneration of the sanctioning liability.

Finally, this mention of the offender's mode of organisation cannot serve to introduce differences, in the field of the liability of legal persons, between offences committed by employees and by the representatives of the legal person. The liability of legal persons has traditionally been explained based on the organ theory, which made it possible to impute the actions of the representatives to the legal persons they represented. In the case of employees, the imputation model is different and is based on the *organisational defect* of the legal person, as they cannot act as their representatives. [35] However, the case law of the ECJ has already reiterated, following the implementation of the GDPR by national authorities, that legal persons are liable for any infringement committed on their behalf and within the scope of their activities without distinguishing for the purposes of attributing liability between 'representatives, directors or managers' or 'any other person acting in the course of the business of such legal persons and on their behalf'. [36] This case law is fully transferable to the application of the

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[34] This is expressed in the following document: European Commission, Directorate-General for Competition, Compliance matters - What companies can do better to respect EU competition rules, Publications Office, 2012, https://data.europa.eu/doi/10.2763/60132. On the practice of the European Commission on this issue, *see.* W. Wils, *Antitrust compliance programmes & Optimal antitrust enforcement*, *Journal of Antitrust Enforcement,* vol. 1, n. 1, 2013, 52-81, 54-59.

[35] This explanation can be found in M. Rebollo Puig, *Responsabilidad sancionadora de personas jurídicas, entes sin personalidad y administraciones*, in L. Parejo Alfonso and J. Vida Fernández (coords.), *Los retos del Estado y de la Administración en el Siglo XXI. Libro homenaje al Profesor Tomás de la Quadra-Salcedo Fernández del Castillo,* Valencia, Tirant lo Blanch, 2017, 1041-1078, 1042-1054.

[36] Judgment of 5 December 2023, Deutsche Wohnen, C-807/21, ECLI:EU:C:2023:950, paragraph 44. This judgment is particularly interesting because it concerns a sanction imposed by a German authority, a country in which there is a difference between offences committed by representatives of the legal

AI Act, and therefore, no such differences can be made when attributing an infringement to the legal person.

4.4.3. *The degree of cooperation of the offender*

The Administration should also take into account criteria related to the cooperation of the offender after the infringement has been committed. Article 99(7)(f) refers to 'the degree of cooperation with the national competent authorities, in order to remedy the infringement and mitigate the possible adverse effects of the infringement', (h) to 'the manner in which the infringement became known to the national competent authorities, in particular whether, and if so to what extent, the operator notified the infringement' and, finally, (j) refers to the measures taken by the operator 'to mitigate the harm suffered by the affected persons'.

Finally, the AI Act incorporates a sort of 'catch-all' that allows taking into account 'any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement', provision that is also found in Article 83(2)(k) GDPR and that has served, for example in the Spanish case, for the legislator to incorporate another series of criteria, in addition to those already included in the GDPR itself.

4.5. *The special situation of SMEs*

The AI Act aims to ensure that the obligations it contains for the use of certain AI systems do not, as far as possible, place an excessive burden on SMEs and start-ups. In fact, Article 62 of the Regulation contemplates a series of measures aimed at helping SMEs in this process of compliance and adaptation of their activity to the AI Act, including priority access to *sandbox* systems, the organisation of training and awareness-raising activities, the use or creation of channels for communication with SMEs and start-ups or their integration in standardisation processes. National competent authorities are

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person (Article 30 of the OWiG) and by employees (Article 130 of the OWiG). In the latter case, the intentional or reckless omission of supervisory measures is required for the punishment of the legal person and is, therefore, close to the Spanish model described above.

even allowed to provide SMEs with 'guidance and advice on the implementation of this Regulation' [Article 70(8)].

This differentiated or special treatment of SMEs also carries over to the sanctioning provisions of the Regulation. Article 99(1), when referring to Member States to establish the system of penalties and other enforcement measures, states that they shall consider 'the interests of SMEs, including start-ups, and their economic viability'. On the other hand, Article 99(6) obliges to use as the upper limit of the fine, instead of the highest amount, the lowest amount resulting from the percentage of turnover or the fixed amounts set out in the Regulation. Of course, among these provisions, we could include the need to consider the economic capacity of the offender when calculating the fine, but this is not exclusively aimed at SMEs but at all offenders.

The concept of SME at the European level is regulated in the Commission Recommendation of 6 May 2003 on the definition of micro, small and medium-sized enterprises, to which the AI Act itself refers in several paragraphs. However, there is no standard definition of 'emerging enterprise' or *start-up*. However, the law regulating the penalty regime derived from the AI Act may incorporate a definition.

On the other hand, the mandate to Member States to 'take into account the interests of SMEs, including start-ups, and their economic viability' is somewhat vague and unclear precisely what it refers to. Systematically, the mandate is found in Article 99(1), which delegates to Member States the specification of the sanctioning regime of the AI Act. Therefore, the way in which Member States 'take into account the interests of SMEs' may vary from one State to another. In my opinion, I believe that this attention to SMEs can be assessed when initiating sanctioning procedures or using measures other than fines, such as warnings, or even when calculating the amount of the fine when it comes to assessing the degree of guilt or the self-organisation measures of companies. In this respect, for budgetary and resource reasons and, in the case of start-ups, experience, it is much more complicated and proportionally more costly for these companies to comply precisely with the provisions of the AI Act. The intention is, therefore, to facilitate these channels of communication, and this advice from the national authorities, which could also be translated into a certain waiver of the exercise of the power to impose penalties when the infringement is negligent, does not cause damage to third parties and, for example, there are no previous infringements. I also believe that a distinction should be made within the SMEs themselves between those companies that fall into the

category of micro, small or medium-sized enterprises. There can also be significant differences between them.

Finally, the reference to 'economic viability' is linked to the possibility of exempting from the payment of the fine or reducing its amount in situations where the full payment of the fine could put the company in a complex economic situation. In EU sanctioning law, especially in competition law, this possibility has been very limited, as it could constitute a perverse incentive for those companies that are aware of their inability to pay a fine and, therefore, would be more willing to commit an infringement. In fact, according to the case law of the ECJ, it is not enough to merely 'jeopardise the economic viability of the undertaking in question', but it is also necessary that the disappearance of the undertaking should create a particular economic and social context, which would be the case when the disappearance of the undertaking would lead to 'an increase in unemployment or a deterioration in the economic sectors to which the undertaking concerned sells or from which it obtains its supplies'. [37]

This 'specific social and economic context' is also referred to in the Guidelines on calculating fines under the GDPR. Thus, as the disappearance of the company must have a serious impact on the economy, this would lead to what has sometimes been referred to as *too big to fail*, as only companies of a certain size would be eligible for such a reduction in the amount of the fine. Therefore, this reference to 'economic viability' could function as an invitation to the Member States to consider the inability to pay in a less restrictive way than has been done in the European Union, dispensing with the 'social context' criterion. However, I do not believe that this inability to pay can always be assessed in the event of any infringement (especially when certain types of sanctions deliberately seek the 'economic death of the company'), nor do I believe that the only solution is to reduce or waive the fine. In this sense, payment in instalments or deferments could also be considered.

[37] All quotation marks are taken from Judgment of 2 June 2016, Moreda-Riviere Trefilerías and others/, Joined Cases T-426/10 to T-429/10 and T-438/12 to T-441/12, ECLI:EU:T:2016:335, paragraphs 491 to 500, citing a wealth of case law of the ECJ confirming the constancy of these criteria.

5. *The sanctioning competence of the European Union Institutions*

The sanctioning powers deriving from the AI Act are mainly exercised by the Member States. However, two situations are envisaged in which the competence lies with the institutions of the European Union itself. These are administrative fines on EU institutions, agencies and bodies (Art. 100) and fines on providers of general-purpose AI models (Art. 101). In the first case, the sanctioning competence lies with the European Data Protection Supervisor, who has the status of market surveillance authority when the AI system is put into service by the bodies and agencies of the European Union. In the second case, as on other occasions, it is the European Commission that has the power to impose penalties.

In this regard, in European Union law, we find several examples of this division between Member States and European Union institutions in the exercise of the power to impose penalties. Usually, this criterion may be linked to the scope of the infringing conduct, as is the case in competition law, [38] or to the size of the subject being sanctioned, as in the case of the Digital Services Regulation, in which the European Commission is competent in the case of large online platform providers or search engines. In this case, the criterion for the assumption of competence by the European Commission is that of the activity carried out by the subject, regardless of its size or the number of Member States affected by a hypothetical infringing conduct.

5.1. *Fines on institutions, agencies and bodies of the European Union*

Article 100 of the AI Act contemplates the possibility of the European

[38] The criteria for the allocation of cases between national competition authorities and the European Commission are set out in the Commission Notice on cooperation within the Network of Competition Authorities. The main criterion for handling the procedure is that the authority 'is well placed to deal with the case', establishing a series of conditions or criteria to determine when this situation arises. In the case of the European Commission, it is considered to be well placed 'if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets)' (paragraph 14 of the Notice).

Data Protection Supervisor imposing administrative fines on the institutions, bodies, offices and agencies of the Union for the use of AI systems in breach of the provisions of the Regulation. As can be seen, the European Union also seems to have opted for using this control technique between administrations, which is very present in our country but does not seem to have a place in others, such as Germany, as we recalled in the wake of the GDPR. Regulation 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data empowered the European Data Protection Supervisor to impose fines when EU bodies violate European data protection regulations. In the recitals of the Regulation, this possibility was justified in order to 'strengthen the supervisory role of the European Data Protection Supervisor and the effective enforcement of this Regulation' and, furthermore, adding that 'fines should aim at sanctioning the Union institution or body — rather than individuals', thus getting out of the way of the debate on whether it is sufficient to merely demand disciplinary liability from the defaulting employee or whether it is necessary to impose a sanction on the institution. On these premises, it seemed logical that the AI Act should contain similar provisions.

Irrespective of its acceptance, it is clear that the regulation of the sanctioning liability of public administrations must necessarily be different from that of private operators. In the AI Act the amount of fines, for example, is much lower. In the case of non-compliance with the prohibition of prohibited practices regulated in Article 5 of the AI Act, fines can reach the amount of 1,500,000 euros, while for non-compliance with the rest of the obligations imposed by the Regulation, the amount is reduced to 750,000 euros. In addition, among the criteria for the graduation of the sanction, which substantially coincide with those contemplated in the case of private entities, the 'annual budget of the Union institution, body, office or agency' is included, and Article 100(6) establishes that 'fines shall not affect the effective operation of the Union institution, body, office or agency sanctioned'. All these provisions are aimed at avoiding the imposition of excessively high fines, bearing in mind that public administrations serve general interests which should not be undermined by the misconduct of certain public employees.

Finally, this sanctioning liability of EU bodies is independent of the disciplinary liability that EU officials may incur for the commission of the infringements that are subsequently imputed to the administrative body.

Regulation 2018/1725, referred to above, specifically provides for this possibility. Article 69 provides that 'Where an official or other servant of the Union fails to comply with the obligations laid down in this Regulation, whether intentionally or through negligence on his or her part, the official or other servant concerned shall be liable to disciplinary or other action, in accordance with the rules and procedures laid down in the Staff Regulations'. The AI Act lacks a similar provision, which does not preclude such proceedings as long as they comply with the requirements of the Staff Regulations of European Officials. [39]

5.2. *Fines on providers of general-purpose AI models*

The AI Act directly entrusts the European Commission with the supervision and sanctioning of providers of general-purpose AI systems. This regime is regulated in Article 101, notwithstanding that paragraph 6 states that the European Commission 'implementing acts containing detailed arrangements and procedural safeguards for proceedings in view of the possible adoption of decisions pursuant to paragraph 1 of this Article'. Article 101(1) defines the following four infringements: (a) infringed the relevant provisions of this Regulation', (b) failed to comply with a request for a document or information pursuant to Article 91, or supplied incorrect, incomplete or misleading information, (c) failed to comply with a measure requested under Article 93 and (d) failed to make available to the Commission access to the general-purpose AI model or general-purpose AI model with systemic risk with a view to conducting an evaluation pursuant to Article 92.

For all such infringements, Article 101(1) of the AI Act provides a fine of up to 3% of the total annual worldwide turnover in the preceding financial year or EUR 15,000,000, whichever is higher. No distinction is made in this case between infringements committed by an AI system provider classified as 'systemic risk' within the meaning of Article 52 and those committed by

[39] In this respect, *vid.* J.A. Fuentetaja Pastor, *El régimen disciplinario de los funcionarios de la Unión Europea*, in M. Rebollo Puig, A. Huergo Lora, J. Guillén Caramés, and T. Cano Campos, (dirs), *Anuario de Derecho Administrativo Sancionador 2023,* cit.

another AI system provider not classified as such. Again, it is for the Commission to take this into account when setting the fine.

In this respect, it is surprising that the criteria for the graduation of the fine are stated so tersely, which is in contrast to the detailed list that is given both in the case of sanctions imposed by the Member States and in the case of sanctions by the European Data Protection Committee on the institutions of the European Union. In this case, the criteria are 'the nature, gravity and duration of the infringement, taking due account of the principles of proportionality and appropriateness'. Also added to these criteria are 'the commitments made in accordance with Article 93(3) or made in relevant codes of practice in accordance with Article 56'. However, these last two cases seem more like criteria for not initiating such an administrative sanctioning procedure or for refusing to impose a fine.

As regards the adoption of commitments between the provider and the European Commission, Article 93(3) provides that if, during the structured dialogue that the Commission may have with the provider of a general-purpose AI model with systemic risk, the provider 'offers commitments to implement mitigation measures to address a systemic risk at Union level, the Commission may, by decision, *make those commitments binding and declare that there are no further grounds for action*'. This introduces competition law 'commitment decisions', whereby the provider gives certain binding commitments in exchange for the Commission's waiver of a finding of infringement and the imposition of a fine.

On the other hand, the reference to the commitments made in the codes of practice regulated in Article 56 of the AI Act is directly related to the presumptive value given to them by the AI Act. Both Article 53(2) (providers of general-purpose AI models) and Article 55(2) (providers of general-purpose AI models with systemic risk) state that such providers may 'rely on codes of practice within the meaning of Article 56 to demonstrate compliance with the obligations set out'. Thus, if the provider adheres to such a code of practice approved by the IA Office, it cannot be sanctioned. This is a consequence of the principle of culpability linked to the principle of legitimate expectations: if the Regulation itself gives this value to codes of good practice, the provider cannot be made to rely on the verification of the validity of the code. The provider will be in the belief, induced by the AI Act itself, that it complies with the provisions of the Regulation and, therefore, no sanction can be imposed. Of course, the sanctioning procedure itself, if any, will have to prove that it does indeed comply with this code of conduct and that its adherence is not merely formal.

In addition to fines, the European Commission has the power to impose periodic penalty payments on providers of general-purpose AI models. This possibility is provided for in passing when regulating the criteria for the graduation of the above-mentioned fines without further specification. It is provided that 'in fixing the amount of the fine *or periodic penalty payment*, account shall be taken of the nature, gravity and duration of the infringement...'. This regulation is surprising since it 'embeds' the periodic penalty within the regulation of the penalty fine and subjects it to the same criteria of graduation and, above all and more importantly, theoretically, to the same maximum amounts. Furthermore, it does not clarify in which cases it is possible to use this figure and whether it is compatible with the imposition of a penalty fine (which must be accepted due to the non-sanctioning nature and the different purposes that periodic penalties pursue).

In European Union law, many regulations also include periodic penalties as a measure to ensure compliance with certain decisions of the European Union bodies. However, this is generally done in a much more detailed manner, indicating the cases in which these periodic penalties may be imposed and contemplating maximum limits that differ from those of the sanctions. For example, Article 24 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty stipulates that periodic penalty payments may not exceed '5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision', as does Article 31 of the Digital Markets Regulation.

This regulation of the periodic penalty, together with the sanctioning fine, should not lead to granting such a nature to the former. [40] The fact that the same limits and criteria are used to impose both does not lead to this conclusion. In the first place, it is logical that there are criteria that allow for graduating the scope of the periodic penalty when the fine amount is not fixed based on fixed amounts. This is the case, for example, in Germany, where the law regulating enforcement in the field of public administration (Verwaltungsvollstreckungsgesetz) allows for the imposition of periodic penalty payments of up to 25,000 euros. However, case law has established a series of criteria that can be taken into account for the graduation of this periodic penalty, such as the economic situation, the importance of the

[40] On the non-punitive nature of the periodic penalty, *vid.* A. Huergo Lora, *Las sanciones administrativas,* Madrid, Iustel, 2007, 269-275.

objective pursued by the administration, the intensity of the resistance offered or the economic interest of the individual in maintaining a situation that is contrary to the legal order.[41] In our case, it is the legislator who has set such criteria, which is perfectly lawful.

Furthermore, contrary to what has sometimes been suggested by some isolated pronouncements of the ECtHR, from my point of view, the high amount of the periodic penalty in no case makes it a sanction. This does not prevent it from being annulled for lack of proportionality,[42] but it is not necessary to classify it as a sanction. I refer to the ECtHR decision of 11 September 2018 in the *Aumatell i Arnau v. Spain* case, in which the ECtHR, despite rejecting the application, considering that the periodic penalty that the Constitutional Court could impose in this case after the reform of Article 92 of the LOTC had 'criminal overtones' and, therefore, Article 6 of the ECHR was applicable. In accordance with the famous *Engel* criteria, the ECtHR considered that coercive fines were essentially 'punitive and dissuasive' in nature and that the amount of the fine (in the abstract, up to 30,000 euros) was sufficiently serious to be considered a criminal fine.[43] In my opinion, this case law is wrong because the purpose of periodic penalties is not at all punitive, they are not intended to punish a person for committing an offence but simply to force him to comply with a due obligation. Of course it can be recognised as a deterrent, but that does not automatically mean it is a sanction.

6. *References*

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[42] On the application of the principle of proportionality to the control of periodic penalty payments, T. Troild, *ibid*, 125-127.

[43] J. Barcelona Llop, *Cuestiones sobre la ejecución forzosa de los actos administrativos*, in *Revista de Administración Pública,* n. 223, 2024, 43-90, 82-84. The curious thing about this case, which also highlights the fact that this classification as a sanction is not always as relevant as it sometimes seems, is that the ECtHR, despite classifying the coercive fine as a sanction of a criminal nature, rejected the application because it considered that all the relevant material and procedural guarantees had been respected.

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