



RESEARCH NOTE

RESEARCH AND DOCUMENTATION DIRECTORATE

Principle of the retroactivity of the more lenient law

Application to administrative penalties

Mitigations of and exceptions to the principle

[...]

[...]

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[...]

SUMMARY

INTRODUCTION

1. The Research and Documentation Directorate (RDD) received a request for a research note on the applicability, in the laws of the Member States, of the principle of the retroactivity of the more lenient law (*lex mitior*).¹ The request covers both the application of that principle outside the criminal law and any exceptions to and limitations of the principle provided for in the various legal orders.
2. In this study, the legal orders of 14 Member States are covered, namely **Germany, Bulgaria, Spain, France, Greece, Ireland, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Slovenia** and **Sweden**.²
3. More specifically, the questions put to the RDD are the following:
 - (1) 'Does the principle of the retroactive application of the more favourable law apply outside the criminal field, within the meaning of Article 7 of the European Convention on Human Rights [and Fundamental Freedoms ("the ECHR")] and Article 49 of the Charter [of Fundamental Rights of the European Union ("the Charter")] and, more specifically, to administrative penalties not of a criminal nature, within the meaning of those two articles?'
 - (2) 'Does the principle of the retroactive application of the more favourable law apply with regard to any amendment that appears to be more favourable to the accused or are there exceptions to the application of that principle, resulting, for example, from the nature of the offences in question, the procedures whereby the relevant legislation was amended or the stage of the judicial proceedings at which such an amendment occurs?'
4. In that regard, it should be noted that, while the first question focuses on administrative penalties, the second transcends the different areas of law and relates to both administrative penalties, whether or not they

¹ Instead of the expression 'more (most) lenient law', the formulation 'more (most) favourable law' is sometimes also found. Those terminological differences do not reflect conceptual differences. Thus, the English expressions 'more (most) lenient law' and 'more (most) favourable law', just like, moreover, the Latin term '*lex mitior*', refer to the same concept. They can therefore be used as synonyms and will be used as such in the present note.

² [...]

are criminal in nature, and criminal penalties in the strict sense. In addition, this second question, the purpose of which is to identify the exceptions to and limitations of the *lex mitior* principle, concerns both substantive exceptions to and limitations of that principle and those of a procedural nature. The answer to the second question will therefore be the subject of two separate parts.

5. Thus, in order to answer the questions raised, this note will be divided into three parts. The first part will deal with the scope of the *lex mitior* principle in the field of administrative penalties (I.). The second part will address the substantive exceptions to the application of that principle (II.), while the third part will examine the various stages of the proceedings, both administrative and judicial, up to which a more favourable law may intervene in order for that principle to be applicable (III.).

I. SCOPE OF THE *LEX MITIOR* PRINCIPLE IN THE FIELD OF ADMINISTRATIVE PENALTIES

6. In order to answer the question whether the *lex mitior* principle applies to administrative penalties that are not of a criminal nature within the meaning of Article 7 of the ECHR and Article 49 of the Charter, it is necessary to identify, in principle, the penalties in question.
7. It should be noted that in 12 of the legal orders studied, namely in **Germany, Bulgaria, Spain, France, Greece, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Slovenia** and **Sweden**, the *lex mitior* principle applies to administrative penalties irrespective of the nature of the penalty. The application of the principle does not depend on the penalty being classified as an 'administrative penalty of a criminal nature' according to the criteria originating in the case-law of the European Court of Human Rights ('the *Engel* case-law' and 'the ECtHR').³ In those legal orders, the *lex mitior* principle applies to all penalties which they classify as administrative – or at least to some of them –,

³ See, in particular, ECtHR, 8 June 1976, *Engel and Others v. The Netherlands*, [CE:ECHR:1976:1123JUD000510071](#), §§ 82 and 83; ECtHR, 21 February 1984, *Öztürk v. Germany*, [CE:ECHR:1984:0221JUD000854479](#), § 53; ECtHR, 21 February 1994, *Bendenoun v. France*, [CE:ECHR:1994:0224JUD001254786](#), § 47; ECtHR, 9 October 2003, *Ezeh and Connors v. United Kingdom*, [CE:ECHR:2003:1009JUD003966598](#), § 120; and ECtHR, 6 October 2020, *Pfenning Distributie S.R.L. v. Romania*, [CE:ECHR:2020:1006JUD007588213](#), § 25.

irrespective of their criminal or non-criminal nature within the meaning of the *Engel* case-law.

8. Accordingly, the discussion in the following paragraphs of this part will deal with the application of the *lex mitior* principle to administrative penalties generally, without distinction according to whether or not they are administrative penalties of a criminal nature within the meaning of the ECHR and the Charter.
9. Only two legal orders do not recognise the *lex mitior* principle, or restrict its application to administrative penalties of a criminal nature within the meaning of the *Engel* case-law; these are, respectively, **Irish** law and **Italian** law. These two legal orders will be dealt with separately.

A. APPLICATION OF THE *LEX MITIOR* PRINCIPLE TO ADMINISTRATIVE PENALTIES INDEPENDENTLY OF THEIR CRIMINAL NATURE

10. The application of the *lex mitior* principle to administrative penalties may have its basis in a provision of the national Constitution which expressly provides for its application (1). Its application may also be based on an unwritten general principle (2), or an ordinary law, without any basis in the Constitution or in an unwritten general principle (3). In one State – namely **Sweden** – the case-law applies the *lex mitior* principle to administrative penalties by analogy with a statutory provision according to which that principle is to apply to criminal penalties (4).

1. BASIS IN A RULE EXPRESSLY LAID DOWN IN THE NATIONAL CONSTITUTION

11. In **Portugal**,⁴ **Slovakia**⁵ and **Slovenia**,⁶ the national Constitution contains a provision enshrining the *lex mitior* principle. Although the application of that principle to administrative penalties is not expressly provided for in the wording of those constitutional provisions, in those three States the application of the principle to those penalties is provided for in ordinary laws based directly or indirectly on those constitutional principles, in particular in laws defining the ordinary system of administrative penalties that may be imposed for minor offences.⁷
12. Thus, in **Slovenia**, Article 2 of the Law on minor offences of 23 January 2003⁸ makes express provision for the application of that principle to such offences. According to that article, after such an offence has been committed, if the substantive provisions of that law or of another rule that provides for the offence in question are amended, the new rule, if it is more favourable to the offender, is applied to him or her.
13. In the interest of completeness, it should be noted that Slovenian law has three categories of punishable offences, namely criminal offences in the strict sense, minor offences penalised by administrative authorities and disciplinary offences.⁹ Unlike the first two categories of

⁴ See Article 29(4) of the [Constitution of the Portuguese Republic](#), which states that 'criminal laws which are more favourable to the accused shall apply with retroactive effect'.

⁵ See Article 50(6) of the Constitution of the Slovak Republic, which states that 'the later law shall apply if it is more favourable to the offender'.

⁶ See the second subparagraph of Article 28 of the [Constitution of the Slovenian Republic](#), which states that 'the punishable acts shall be established and the corresponding penalties shall be pronounced in accordance with the law in force at the time when the act was committed, unless a new law is more lenient towards the offender'.

⁷ Called, respectively, in the three legal orders, 'contra-ordenações' – a term which may be translated into English as '(public order) offences' – 'priestupky' and 'prestopki' – terms which may be translated into English as 'transgressions'. On that terminology, see also footnote 55, below.

⁸ Zakon o prekrških (Law on minor offences) (Uradni list RS No 29/11 – Official Consolidated Version, 21/13, 111/13, 74/14 – odl. US, 92/14 – decision of the Constitutional Court, 32/16, 15/17 – decision of the Constitutional Court, 73/19 – decision of the Constitutional Court, 175/20 – ZIUOPDVE, 5/21 – decision of the Constitutional Court and 38/24). In that regard, it should be noted that the official consolidated version contains the initial version of the Zakon o prekrških – ZP-1 (Uradni list RS, No 7/03) of 23 January 2003, and all subsequent amendments.

⁹ L. Bavcon, A. Šelih, K. Filipčič, V. Jakulin, D. Korošec, M. Ambrož: Kazensko pravo, splošni del, Uradni list RS, Ljubljana 2013, p. 43.

offences, the Slovenian legislature has not provided for the application of the *lex mitior* principle to the third category, namely disciplinary offences. However, the case-law has recognised that it is also applicable to that category.¹⁰

14. In **Slovakia**, Article 7(1) of the Law on minor offences of 28 August 1990¹¹ provides that liability for an offence is to be assessed on the basis of the law in force when the offence was committed; it is assessed on the basis of a subsequent law only if the latter is more favourable to the offender. Paragraph 2 of that article states that the offender can be subject only to the type of penalty permitted by the law in force when the offence is assessed.¹²
15. According to the le Najvyšší súd (Supreme Court), the principle of the retroactivity of the more favourable law ‘also applies [to administrative offences not coming within the scope of the Law on minor offences], even if the applicable law does not expressly so provide. The obligation to apply that principle derives directly from Article 50(6) of the Constitution’.¹³ In fact, that court has repeatedly held that the principle applies ‘to all public-law offences’.¹⁴
16. In **Portugal**, Article 3(2) of the Legislative Decree on the general regime of minor offences of 27 October 1982¹⁵ provides that ‘if the law in force at the time when the offence was committed is subsequently amended, the law that is more favourable to the accused shall be applied, unless the accused has already been found guilty by a decision that is final or has become final and has already been enforced [...]’. That article, which

¹⁰ Vrhovno sodišče (Supreme Court), judgment of 20 June 2000, No [VIII Ips 198/99](#); Upravno sodišče (Administrative Court), judgment of 30 September 2015, No [I U 1274/2015](#), and Višje sodišče v Ljubljani (Court of Appeal, Ljubljana), order of 15 September 2021, No [II Cp 1083/2021](#).

¹¹ Zákon č. 372/1990 Zb. [o priestupkoch](#) (Law No 372/1992 Rec. on minor offences) of 28 August 1990 (čistka No 61/1990 Zb.) (‘the Law on minor offences’).

¹² Article 11 makes provision for several types of penalty, namely reprimand, administrative fine, prohibition of activity and seizure of assets.

¹³ Najvyšší súd (Supreme Court), *Boris Januch v. Colné riaditeľstvo SR*, No 3 Sžf/32/2007, of 24 April 2008.

¹⁴ See, inter alia, , Najvyšší súd (Supreme Court), judgments No 3 Szd/12/2009 of 18 February 2010 and No 3 Asan/11/2017 of 31 July 2018.

¹⁵ [Decreto-Lei n.º 433/82](#) (Legislative Decree No 433/82) of 27 October 1982 (‘the RGCO’), which repeals and replaces Legislative Decree No 232/79 de 24 de Julho (Legislative Decree No 232/79 of 24 July), which already contained a provision specifying that the most favourable law was to be applied in the field of minor offences not covered by criminal law in the strict sense.

is the equivalent of the rule laid down in the penal code for criminal offences,¹⁶ which is based on the Constitution of the Portuguese Republic, thus provides for the application of the more favourable law in the field of administrative penalties.

2. APPLICATION ON THE BASIS OF AN UNWRITTEN GENERAL PRINCIPLE

17. In **Greece**, as in **France**, no text (whether constitutional or ordinary) adopted by the legislature provides, expressly and generally,¹⁷ for the application of the *lex mitior* rule to administrative penalties, but its application derives from a general principle derived from principles of a constitutional rank.
18. In **Greece**, the application of the *lex mitior* rule to administrative penalties was first recognised by the Symvoulío tis Epikrateias (Council of State) in 1955, as a general principle of administrative law, derived from the principle of equality expressly laid down in the Greek Constitution.¹⁸ Furthermore, after the Greek legislature amended the Constitution of that State in 2001, expressly enshrining therein the principle of proportionality, the Council of State also referred to that principle in 2018 as a basis for the application of the *lex mitior* rule to administrative penalties.¹⁹
19. However, the Greek courts derive the application of that rule to administrative penalties not only from the general principles of the national Constitution, but also from the *lex mitior* principle enshrined in European Union law (provided that the penalties in question have a sufficient link with EU law), while considering, in that context, that the latter principle has a scope analogous to the principle recognised in national law.²⁰
20. Furthermore, other judgments of the Greek Council of State²¹ make the application to administrative penalties conditional on the penalties in

¹⁶ See [Article 2\(4\) of the Penal Code](#).

¹⁷ See, however, for Greece, paragraph 22 below.

¹⁸ ΣτΕ (Council of State), apofasi tis 4 November 1955, No 1525/1955.

¹⁹ ΣτΕ (Council of State), apofasi tis 29 June 2018, No 1438/2018, paragraphs 5 to 7.

²⁰ ΣτΕ (Council of State), apofasi tis 24 October 2018, No 2221/2018, and ΣτΕ (Council of State), apofasi tis 20 February 2019, No 352/2019.

²¹ ΣτΕ (Council of State), apofasi tis 4 March 2009, No 689/2009, paragraph 6, and ΣτΕ (Council of State), apofasi tis 4 July 2011, No 2067/2011, paragraph 9.

question being included in the criminal field within the meaning of Article 7 of the ECHR, as defined by the *Engel* case-law.²²

21. Consequently, although the case-law referred to above, in paragraph 19, seems to argue in favour of the assertion that Greek law applies the *lex mitior* rule to all administrative penalties, whether or not they are criminal in nature within the meaning of Article 7 of the ECHR (or, where appropriate, Article 49 of the Charter), the judgments cited above, in paragraph 20, none the less seem to call in question, at least in part, such a general assertion.
22. Notwithstanding the absence, in **Greece**, of a written text of general application, it should be observed that there are, in Greek law, some laws that apply to the members of certain professions having a particular statute and that expressly provide for the application of that principle to disciplinary penalties that might be imposed where the persons subject to that statute fail to fulfil their professional obligations. Thus, Article 108(4) of the Code establishing the Statute of Courts and Judges²³ provides that where a number of laws succeed one another between the date on which the disciplinary offence is committed and the date on which an irrevocable judgment is delivered, the more lenient law is to apply to the judge who has committed the offence. Likewise, Article 139(7) of the Bar Code contains a comparable rule in favour of lawyers who have failed to fulfil their ethical obligations.²⁴
23. In **France**, the Conseil d'État (Council of State) has held that it is for the trial court hearing a dispute concerning a penalty which the administration has imposed on an individual to take a decision which replaces that taken by the administration and, where appropriate, to apply a new more lenient law which has entered into force between the date on which the offence was committed and the date on which the court makes its adjudication'²⁵ The application of the *lex mitior* principle

²² See above, paragraph 7 and footnote 3.

²³ Nomos 4938/2022, Kodikas organismou dikastirion kai katastasis dikastikon leitourgon kai loipes diatakseis (Law 4938/2022, Code on the statute of courts and judges) FEK A' 109/06-06-2022. On that article, see also: N. Πανταζής, *Ειδικό πειθαρχικό δίκαιο: διαγράμματα, ερμηνεία, νομολογία, σχετικές διατάξεις*, Αθήνα, Νομική Βιβλιοθήκη, 2017, p. 234.

²⁴ Nomos 4194/2013 Kodikas Dikigoron (Law 4194/2013, Code of lawyers), FEK A' 208/27.09.2013).

²⁵ Conseil d'État (Council of State) (France), Assembly, judgment of 16 February 2009, *Société Atom*, [No 274000.Rec.](#)

to administrative penalties is therefore fully recognised in France, except for disciplinary penalties,²⁶ which, as the case-law now stands, remain outside the scope of that principle.²⁷

24. The application of that principle to administrative penalties in French law is based on the constitutional principle of the necessity of penalties, as interpreted by the Conseil constitutionnel (Constitutional Council). The Constitutional Council had already enshrined as a constitutional principle the principle of the immediate application of the more lenient law, adhering to the principle set out in Article 8 of the Declaration of the Rights of Man and of the Citizen of 1789, which states that ‘the law must prescribe only the punishments that are strictly and evidently necessary’. The Constitutional Council then considered that that principle of the necessity of offences and penalties ‘not only concern[ed] penalties ordered by the criminal courts but extend[ed] to any penalty having the character of punishment even if the legislature left it to an authority of a non-judicial nature to impose it’,²⁸ which covers penalties imposed by the administrative authority.

3. APPLICATION OF A RULE LAID DOWN IN AN ORDINARY LAW

25. In six legal orders, although the *lex mitior* principle is not expressly enshrined in the Constitution, its application to administrative penalties is none the less expressly provided for in ordinary laws, either for all such penalties (**Bulgaria, Spain and Lithuania**), or, at least, for pecuniary administrative penalties (**Germany, the Netherlands and Poland**).
26. In that context, it should be noted that, without prejudice to the existence in those legal orders of an ordinary law expressly providing for the *lex mitior* rule, the case-law and/or the literature sometimes employ general principles of constitutional law to justify its basis.

²⁶ See, on that subject, Guyomar, M., comments on Council of State, judgment of 12 October 2009, *Petit*, [No 311641](#).

²⁷ See, for example, Conseil d'État (Council of State), judgments of 13 November 2013, *M. Dahan*, No 347704, Rec., [ECLI:FR:CEASS:2013:347704.20131113](#); of 22 June 2007, *Arfi*, [No 272650, Rec. of 20 May 2011, Lecat](#), [No 332451](#); of 2 March 2010, *Fédération française d'athlétisme*, [No 324439](#); and of 20 May 2011, *Letona Biteri*, No 326084, Rec., [ECLI:FR:XX:2011:326084.20110520](#).

²⁸ Conseil constitutionnel (Constitutional Council), decision of 30 December 1987, Finance Act 1988, No 87-237 DC (JORF, 31 December 1987, p. 15761, [ECLI:FR:CC:1987:87.237.DC](#)).

27. Thus, as regards the ordinary laws that expressly recognise the application of the *lex mitior* to administrative penalties, **Bulgarian** law seems to provide for the broadest application. The principle of the retroactive application of the most favourable law is expressly provided for not only in the Penal Code,²⁹ but also in the ZANN, the Law on administrative offences and penalties,³⁰ Article 3(2) of which has since 1969 provided that, 'if different legal provisions succeed one another up to the time when the decision imposing an administrative penalty enters into force, the provision that is most favourable to the offender shall apply'. Furthermore, under Article 14(3) of the Law on normative acts of 1973,³¹ that principle is to apply generally to all penalties, whether they are classified as criminal penalties, administrative penalties or penalties of a different nature.³² According to the Bulgarian literature, that principle is based on the principle of equity.³³
28. In **Spain**, where, according to the case-law, the *lex mitior* principle is based on an interpretation *a contrario* of the constitutional principle of the non-retroactivity of penalties that are not favourable to or restrictive of individual rights, enshrined in Article 9(3) of the Constitution of Spain,³⁴ the Law on the legal regime of the public sector of 1 October 2015³⁵ also contains express recognition of the principle of the retroactivity of the most favourable law in relation to administrative penalties. Article 26(2) of that law provides that 'the provisions relating to penalties shall have retroactive effect in so far as they are favourable to the presumed or proven perpetrator of the offence, as regards both the definition of the offence and the determination of the penalty and the corresponding limitation periods, including for penalties which have not been enforced at the time when the new position enters into force'.

²⁹ See Article 2(2) of the Nakazatelen kodeks (Penal Code) (DV No 26 of 2 April 1968).

³⁰ Zakon za administrativnite narushenia i nakazania (Law on administrative offences and administrative penalties) (DV No 92 of 28 November 1969) ('the ZANN').

³¹ Zakon za normativnite aktove (Law on normative acts) (DV No 27 of 3 April 1973).

³² This rule states that provisions laying down penalties can have retroactive effect only if they are less harsh than those repealed.

³³ See, Topurov, P., *Norma No 9/2019, Prilaganeto na po blagopryatnata normativna razporedba v administrativno nakazatelno proizvodstvo*.

³⁴ Tribunal Supremo (Supreme Court), judgment [No 333/2023](#) of 15 March 2023.

³⁵ Ley 40/2015 de Régimen Jurídico del Sector Público (Law 40/2015 on the legal regime of the public sector), of 1 October 2015 (BOE No 236, 2 October 2015, p. 89411, 'Law 40/2015').

29. The aforementioned provision is applicable to penalties imposed by the public authorities in the broad sense, including the regulatory bodies and professional orders having the status of legal person governed by public law.³⁶
30. A similar provision also existed under the preceding legislation, namely the Law on the regime of public administrations and the common administrative procedure,³⁷ Article 128(2) of which stated: 'Provisions involving a penalty shall have retroactive effect provided that they are favourable to the presumed perpetrator of the offence.'
31. In **Lithuania**, the Konstitucinis Teismas (Constitutional Court) has held that, in accordance with the Latin legal maxim '*lex benignior retro agit*',³⁸ where the legislature considers that particular conduct no longer constitutes a punishable offence or where it mitigates the penalty for an offence, the new legislation is to have retroactive effect.³⁹ Furthermore, in that context, that Constitutional Court has explicitly accepted that that rule is to apply both in the criminal field and in the administrative field, which thus includes administrative penalties.
32. In any event, the *lex mitior* principle concerning administrative penalties is provided for in that State by the Code of Administrative Offences of 25 June 2015 and, more specifically, by Article 3(2) of that code,⁴⁰ which provides that an administrative law which mitigates or eliminates liability for administrative offences or which otherwise assists the legal situation of the person prosecuted for such an offence or the person

³⁶ See, in particular, Tribunal Supremo (Supreme Court), judgments of 23 January 1997, No 516/1994 [ECLI:ES:TS:1997:338](#), concerning an appeal against an agreement of the General Council of the Judiciary imposing disciplinary measures on a judge, and of 23 April 2007, No 4968/2002, [ECLI:ES:TS:2007:3165](#), concerning the application of that principle in the review of the agreements of the Supreme Council of Architects of Spain, and Juzgado de lo Contencioso administrativo de Santiago de Compostela (Administrative Court, Santiago de Compostela), judgment of 25 May 2023, No 78/2023, [ECLI:ES:JCA:2023:3648](#), concerning the application of the principle of retroactivity provided for by Article 26 of Law 40/2015 in the review of the resolution of the Colegio oficial de Psicología de Galicia (Order of Psychologists, Galicia).

³⁷ Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law No 30/1992 on the regime of public administrations and the common administrative procedure) of 26 November 1992.

³⁸ In English, 'the more lenient law shall have retroactive effect'.

³⁹ Konstitucinis Teismas (Constitutional Court), [judgment of 25 March 1998, No 12/97](#).

⁴⁰ Lietuvos respublikos administracinių nusižengimų kodeksas ([Code of Administrative Offences](#)) of 25 June 2015, No XII-1869 (TAR, 2015, No 11216), entered into force on 1 January 2017.

found guilty of such an offence, but where the enforcement of the penalty has not yet been completed, is to have retroactive effect.

33. A comparable provision was already to be found in the preceding Code of 1985, namely of the Soviet era.⁴¹
34. In the **Netherlands**, the Awb, the General law on administrative law,⁴² distinguishes, in Article 5:2, two categories of administrative penalties ('bestuurlijke sancties'), namely restorative penalties ('herstelsancties') and punitive penalties ('bestraffende sancties'). According to the definition provided in that article, an administrative penalty is to be regarded as 'punitive' 'in so far as it is intended to inflict pain on the person who committed the offence'. That category includes, in particular, administrative fines, but also the withdrawal and the modification of a favourable decision, in so far as the purpose of that measure is to inflict pain on the offender.⁴³
35. As regards the application of the *lex mitior* to administrative penalties, the Awb refers to the Netherlands Penal Code, which, for criminal offences, codifies the *lex mitior* principle in Article 1(2),⁴⁴ where it provides that 'in the event of a change in the legislation after an offence has been committed, the provisions that are most favourable for the offender must be applied'. Pursuant to Article 5:46(4) of the Awb, that provision of the Penal Code is to apply, *mutatis mutandis*, to administrative fines. As regards punitive administrative penalties other than administrative fines, it follows from Article 5:54 of the Awb that the *lex mitior* rule is not to apply generally, as a principle, but is to apply only in so far as a special law provides for its application. As regards restorative administrative penalties, on the other hand, it must be stated that there is no provision linking them with the *lex mitior* rule.

⁴¹ Lietuvos TSR administracinių teisės pažeidimų kodeksas ([Code of Administrative Offences](#)) of 13 December 1984, No X-4449 (Vyriausybės žinios, 185, No 1), entered into force on 1 April 1985.

⁴² Algemene wet bestuursrecht (General law on administrative law) of 4 June 1992 ([Stb. 1992, No 315](#)) ('the Awb'), as supplemented by the Wet tot aanvulling van de Algemene wet bestuursrecht, Vierde tranche (Law supplementing the General law on administrative law, Fourth Section) of 25 June 2009, ([Stb. 2009, No 264](#)), entered into force on 1 July 2009 ([Stb. 2009, No 266](#)).

⁴³ Bröring, H.E., De Graaf, K.J. and Others, Bestuursrecht 1. Systeem, bevoegdheid, bevoegdheidsuitoefening, handhaving, zevende druk, Boomjuridisch, Den Haag, 2022, pp. 676 to 680 and 714.

⁴⁴ [Wetboek van Strafrecht](#) (Netherlands Penal Code).

36. The abovementioned provision that permits the *lex mitior* rule to be applied to administrative fines was inserted in the Awb by a Law of 2009.⁴⁵ To explain the reasons for the insertion of that provision, the *travaux préparatoires* of the Law of 2009 refer to Article 15(1) of the International Covenant on Civil and Political Rights ('the ICCPR'),⁴⁶ to the fact that administrative fines are capable of assuming a criminal nature within the meaning of that provision and to the case-law of the Centrale Raad van Beroep (Higher Social Security and Civil Service Court), which had already applied that principle to disputes relating to the administrative fines referred to in that provision.⁴⁷
37. The **Polish** legislation also expressly provides, in the Code of Administrative Procedure,⁴⁸ for the application of the *lex mitior* to pecuniary administrative penalties.⁴⁹ Article 189c of that code, inserted in 2017,⁵⁰ provides that 'if, at the time when the decision relating to the pecuniary administrative penalty is taken, a different law from that in force at the time of the offence against the law following which the penalty must be imposed is in force, the new law shall be applied, but the law previously in force must be applied if it is more favourable to the party concerned'. In the *travaux préparatoires*, the reason stated for

⁴⁵ By the Wet tot aanvulling van de Algemene wet bestuursrecht, Vierde tranche (Law supplementing the General law on administrative law, Fourth Section) of 25 June 2009 ([Stb. 2009, 264](#)).

⁴⁶ [International Covenant on Civil and Political Rights](#), adopted by the General Assembly of the United Nations on 16 December 1966 and entered into force on 23 March 1976 (United Nations Treaty Collection, vol. 999, p. 171).

⁴⁷ [Kamerstukken 2003/2004, 29 702, nr. 3](#), p. 143 et seq.. Centrale Raad van Beroep (Higher Social Security and Civil Service Court), decisions of 1 March 2000, [ECLI:NL:CRVB:2000:AA6848](#); and also of 14 February 2001, [ECLI:NL:CRVB:2001:AB0469](#).

⁴⁸ Ustawa – Kodeks postępowania administracyjnego (Law establishing the Code of Administrative Procedure), of 14 June 1960 ([Dz. U. de 2024, position 572, consolidated text, as amended](#)).

⁴⁹ According to the definition given in Article 189b of the Code of Administrative Procedure, a 'pecuniary administrative penalty' is a 'pecuniary penalty provided for by law, imposed by a body of the public administration, by decision, following an infringement of the law consisting in a failure to fulfil an obligation or a prohibition imposed on a natural person, a legal person or an organisational unit without legal personality'. According to the Polish case-law and literature, pecuniary administrative penalties have a primarily preventive and restorative function in Polish law without precluding the possibility that they also fulfil a punitive function; see, in that respect, Sala-Szczypiński, M., *Administracyjne kary pieniężne czasu epidemii i zasada stosowania „ustawy względniejszej”*, *Roczniki Administracji i Prawa* 2021/1, p. 149.

⁵⁰ By the ustawa o zmianie ustawy – Kodeks postępowania administracyjnego oraz niektórych innych ustaw (Law amending the Law establishing the Code of Administrative Procedure and certain other laws), of 7 April 2017 ([Dz. U. de 2017, position 935](#)).

the insertion of that provision was the desire to align the regime of administrative penalties with, inter alia, criminal law.⁵¹

38. Before that provision was inserted into the Code of Administrative Procedure, namely in 2009 and 2013 respectively, both the Trybunał Konstytucyjny (Constitutional Court)⁵² and the Naczelny Sąd Administracyjny (Supreme Administrative Court)⁵³ refused to apply the *lex mitior* principle to administrative penalties in the absence of a legislative text providing for its application in that field.
39. Since the scope of Article 187c of the Code of Administrative Procedure seems to be limited solely to pecuniary penalties,⁵⁴ the *lex mitior* rule could apply to non-pecuniary administrative penalties only in so far as the Polish legislature provides for its application with regard to a particular penalty by a specific law.
40. The same may be said for **Germany**. In that State, the statutory recognition of the application of the *lex mitior* principle to offences regarded as 'minor'⁵⁵ and therefore penalised by an administrative fine took place in 1968, on the occasion of a reform of the regime applicable to offences of that type. In making that amendment, the German legislature took inspiration from the legal provision which enshrined that principle for criminal law⁵⁶ and was already to be found in the first German Penal Code of 1871.⁵⁷

⁵¹ The Polish Penal Code provided for the application of the *lex mitior* principle to criminal offences from 1932 (Article 2(1) of the rozporządzenie Prezydenta Rzeczypospolitej – Kodeks karny (Regulation of the President of the republic establishing a Penal Code), of 11 July 1932 ([Dz. U. de 1932, No 60, position 571](#))). At present, that principle is enshrined, in the field of Polish criminal law, in Article 4(1) of the ustawa – Kodeks karny (Law establishing the Penal Code), of 6 June 1997 ([Dz. U. de 2024, position 17, consolidated text, as amended](#)).

⁵² Trybunał Konstytucyjny (Constitutional Court), judgment of 22 September 2009, [SK 3/08](#).

⁵³ Naczelny Sąd Administracyjny (Supreme Administrative Court), judgment of 26 September 2013, [II GSK 839/12](#).

⁵⁴ See, to that effect, Chlipała M., *Sankcje administracyjne o charakterze niepieniężnym – wybrane zagadnienia*, Przegląd ustawodawstwa gospodarczego 2023/2, p. 33.

⁵⁵ Designated, in German law, by the term 'Ordnungswidrigkeiten', a term which may be translated into English as 'offences against public order'; see, in that regard, footnote 7 above.

⁵⁶ See the drafting history of the legislative reform of 1968: [BT-Drucksache V/1269](#), p. 44, and also Hirsch, M., [Schriftlicher Bericht zu Drucksachen V/2600, V/2601](#), p. 3.

⁵⁷ Article 2 of the [Strafgesetzbuch für das Deutsche Reich](#) (Penal Code for the German Empire) of 15 May 1871 (RGBl. 1871, p. 127).

41. In its present version, the OWiG, the Law relating to minor offences,⁵⁸ provides for the application of the *lex mitior* principle to offences of that type in Article 4(3), according to which ‘where the law in force at the time of the facts is amended before the decision [on the penalty] is taken, the most favourable law shall apply’.
42. It should be made clear that, in the **German** case-law and literature,⁵⁹ it is generally accepted that the *lex mitior* rule has no constitutional basis and that its application may, in principle, be repealed by an ordinary law,⁶⁰ both as regards administrative penalties and in the criminal field in the strict sense.⁶¹ The Bundesverwaltungsgericht (Federal Administrative Court) has none the less qualified that point, as it considers that, while the Constitution admittedly does not require the general application of that rule, its non-application must – even in the absence of a text expressly providing for its application – be justified by a sufficiently serious reason, in the light of the principle of equal treatment enshrined in the German Constitution.⁶²

⁵⁸ [Gesetz über Ordnungswidrigkeiten](#) (Law on administrative offences) of 24 May 1968 (BGBl. 1968 I, p. 481) (‘the OWiG’), most recently amended by the Law of 24 March 2023 (BGBl. 2023 I, No 73).

⁵⁹ Bundesverfassungsgericht (Federal Constitutional Court), order of 29 November 1989, 2 BvR 1491/87; and Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), order of 21 December 2007, IV-2 Ss (OWi) 83/07 - (OWi) 64/07 III; and also Graf, J. (ed.), BeckOK OWiG, 42nd ed., 2024, C.H. Beck, Munich, annotation 16, subparagraph 4 OWiG.

⁶⁰ According to Gaede, K., *Zeitgesetze im Wirtschaftsstrafrecht und rückwirkend geschlossene Ahndungslücken*, wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht, 2011, p. 365, that possibility exists only if the offence does not fall within the scope of Article 49 of the Charter and if such repeal is therefore capable of conflicting with the provision laid down in the final sentence of paragraph 1 of that article.

⁶¹ To that effect, expressly, Bundesverfassungsgericht (Federal Constitutional Court), order of 18 September 2008, 2 BvR 1871/08, [ECLI:DE:BVerfG:2008:rk20080918.2bvr181708](#).

⁶² Bundesverwaltungsgericht (Federal Administrative Court), judgment of 17 March 2004, 1 D 23.03, [ECLI:DE:BVerwG:2004:170304U1D23.03.0](#).

4. APPLICATION BY ANALOGY OF CRIMINAL LAW

43. In **Sweden**, the principle of the retroactive application of the most favourable law is provided for, for criminal offences, by the Law introducing the Penal Code,⁶³ Article 5(2) of which provides that where a different law is applicable at the time when judgment is delivered, that law must be applied if it entails impunity or provides for a lighter penalty. On the other hand, there is no equivalent written rule applicable to administrative penalties.
44. None the less, it is apparent from the *travaux préparatoires* of the constitutional reform that took place in Sweden in⁶⁴ that Article 5(2) of the Law introducing the Penal Code is also intended to cover, 'at least by analogy, administrative penalties of a punitive nature', mentioning, by way of example, various fiscal penalties.
45. Furthermore, in 2016, the Högsta domstolen (Supreme Court) expressly accepted, in the context of criminal proceedings, that 'according to settled case-law, the grounds of Article 5(2) of the Law introducing the Penal Code also apply outside the field of the Penal Code',⁶⁵ citing, in that respect, five of its decisions delivered between 1975 and 2008.⁶⁶ There are, in addition, some decisions of other Swedish courts – including the Supreme Administrative Court – in which that criminal principle has been applied by analogy to administrative penalties of a punitive nature.⁶⁷
46. The existing case-law therefore gives the impression that in **Sweden**, too, the principle of the retroactive application of the most favourable law applies to administrative penalties, although that case-law does not establish with certainty criteria on which it is possible to determine in which cases the principle is or is not applicable.

⁶³ Lag (1964:163) om införande av brottsbalken ([Law \(1964:163\) introducing the Penal Code](#)).

⁶⁴ As regards the expression administrative penalty of a punitive nature, the expression used in Swedish is 'straffliknande administrativa påföljder' ([Prop. 1975/76:209, s. 125](#)).

⁶⁵ Högsta domstolen (Supreme Court), judgment of 22 June 2016, [NJA 2016 s. 649](#).

⁶⁶ Namely, Högsta domstolen (Supreme Court), judgments of 7 May 1975, [NJA 1975 s. 265](#); of 30 September 1993, [NJA 1993 s. 511](#); of 26 May 1995, [NJA 1995 s. 333](#); of 21 October 1996, [NJA 1996 s. 613](#); and of 27 May 2008, [NJA 2008 s. 637](#).

⁶⁷ Regeringsrätten (Supreme Administrative Court), judgment of 9 November 1976, RÅ 1976 ref. 142; and also Miljööverdomstolen (Environmental Court of Appeal), judgments of 19 March 2007, [MÖD 2007:9](#); of 20 March 2007, [MÖD 2007:8](#); and of 27 December 2007, [MÖD 2007:40](#).

B. NON-APPLICATION OF THE *LEX MITIOR* PRINCIPLE TO ADMINISTRATIVE PENALTIES NOT OF A CRIMINAL NATURE

47. In two of the States in the sample used for the purposes of the present note – namely **Ireland** and **Italy** –, the *lex mitior* principle does not apply to administrative penalties which are not of a criminal nature, which is explained, in particular, by an interpretation of the principle of the non-retroactivity of laws that is recognised in those two States and is both strict and broad. None the less, the legal order in those States does not preclude the *lex mitior* rule also being applied to administrative penalties in certain situations, not as a principle, but by way of exception.
48. **Irish** law does not recognise the *lex mitior* principle, and that applies not only in relation to administrative penalties but also in the criminal field in the strict sense.⁶⁸ The general principle that prevails in Irish law is that laws do not have retroactive effect.⁶⁹
49. However, the fact that the *lex mitior* rule is not recognised as a principle does not preclude the Irish legislature from making provision for its application, by way of exception, in a specific measure. In that regard, reference may be made, by way of example, to the national anti-doping rules which entered into force on 21 January 2021 and expressly provide that the *lex mitior* principle may apply to penalties for breaches of those rules committed before that date.⁷⁰
50. In addition, the non-recognition of the *lex mitior* principle seems to be mitigated by other characteristics of Irish law. First of all, with the exception of the determination of the maximum penalty, which is fixed by law, the assessment of a penalty is within the discretion of the court. Next, that discretion is essentially circumscribed by judicial precedents⁷¹ and, more specifically, by judicial guidelines in the form of

⁶⁸ See also, in that regard, Research Note 2023/006 in the case of *Lin* (C-107/23 PPU), ‘Applicability of the principle of the retroactivity of the more lenient criminal law (*lex mitior*) to final criminal convictions and the effects of the invalidation of criminal provisions on the application of that principle’.

⁶⁹ See Supreme Court, [judgment of 16 January 2001, Minister for Social, Community and Family Affairs v Scanlon \[2001\] 1 IR 64](#).

⁷⁰ See [The Irish Anti-Doping Rules 2021](#), Rules 19.1 to 19.3.

⁷¹ O'Malley, T., *Sentencing Law and Practice*, Round Hall, Dublin, 2016, 3rd ed., [1-01].

so-called 'guideline judgments', concerning, in particular, the sentencing criteria.⁷² Last, where a number of 'guideline judgments' follow one another over time, the ensuing guidelines that are relevant for the determination of the penalty in a specific case are those in force on the date on which the decision is delivered, not those applicable at the time when the offence was committed.⁷³ It therefore appears that the result achieved with the use of that legal mechanism is, in essence, the same as that obtained by means of the *lex mitior* principle – at least where the guidelines in force on the date of delivery of the decision in question result in a more lenient penalty.

51. Furthermore, the author of the reference work on Irish law and sentencing practice suggests that the *lex mitior* principle should also be introduced into the legal order of that State, at least for penalties provided for by national law which come within the criminal field within the meaning of the *Engel* case-law,⁷⁴ and refers to the fact that Ireland is a party to the ECHR.⁷⁵ However, that suggestion has thus far not been favourably reflected either in the Irish legislation or in the Irish case-law.
52. In **Italy**, the case-law has inferred the principle of the application of the most favourable law, in the criminal field, from constitutional principles. More particularly, the Corte Costituzionale (Constitutional Court) infers that principle, first, from the principle of equality enshrined in Article 3 of the Italian Constitution.⁷⁶ Second, it also refers in that regard to the need for the Italian legislature to comply with 'the constraints resulting from Community law and from international obligations', enshrined in Article 117(1) of that Constitution, and to implement, in that respect, both Article 49 of the Charter and Article 15(1) of the ICCPR and Article 7 of the ECHR, as interpreted by the ECtHR.⁷⁷
53. In addition, for criminal penalties, the *lex mitior* principle is codified in Article 2(3) and (4) of the Italian Penal Code, which provides that:

⁷² O'Malley, T., see footnote 71, [1-16] to [1-23].

⁷³ O'Malley, T., footnote 71, [1-16] to [3-10].

⁷⁴ See above, paragraph 7 and footnote 3.

⁷⁵ O'Malley, T., see footnote 71, [3-10] to [3-11].

⁷⁶ Corte costituzionale (Constitutional Court), judgments No 236/2011 of 19 July 2011, [ECLI:IT:COST:2011:236](#); No 394/2006 of 8 November 2006, [ECLI:IT:COST:2006:394](#); and No 215/2008 of 9 June 2008, [ECLI:IT:COST:2008:215](#).

⁷⁷ Corte costituzionale (Constitutional Court), judgment No 236/2011 (see footnote 76).

'Where a custodial sentence has been passed and the subsequent law provides only for a criminal fine, the custodial sentence shall immediately be converted into the corresponding fine [...]

When the law in force at the time when the infringement was committed and the subsequent laws are different, the law the provisions of which are most favourable to the offender shall apply, unless a final judicial decision has been delivered.'

54. Outside the criminal field, on the other hand, the principle of legality in the strict sense applies, which means that the retroactive application not only of an unfavourable rule but also of the favourable rule which has intervened is prohibited.⁷⁸ That follows generally from Article 11 of the preliminary provisions of the Civil Code,⁷⁹ which applies to all areas of law⁸⁰ and according to which 'the law makes provision only for the future' and 'does not have retroactive effect'.
55. As regards, more specifically, administrative penalties, in order to strengthen their preventive function (which, apart from their restorative function, was their originally preeminent function in Italian law), in 1981 the Italian legislature expressly precluded the application of the *lex mitior* principle. Article 1(2) of Law 689/1981⁸¹ provides that 'laws laying down administrative penalties shall apply only in the cases and for the periods referred to therein'.
56. In addition, the Corte suprema di cassazione (Supreme Court of Cassation) has expressly recognised that the *lex mitior* principle enshrined in the Penal Code for criminal offences cannot be applied by analogy to the administrative sector.⁸²

⁷⁸ Carrato A., *Rapporti tra norme penali e norme amministrative: le acquisizioni di dottrina e di giurisprudenza. Gli orientamenti della cassazione sul concorso tra illeciti penali e illeciti amministrativi, Le sanzioni amministrative, Quaderno n. 29 della SSM*, 2021, pp. 41 and 42.

⁷⁹ [Regio decreto No 262/1942 – Disposizioni sulla legge in generale](#) (Royal Decree No 262/1942 provisions on the law in general) of 16 March 1942 (GURI No 79, 4 April 1942).

⁸⁰ See, to that effect, Amenta, G., 'Prelleggi', *Digesto Civile*, XIV, 2016, p. 196.

⁸¹ [Legge No 689/1981 – Modifiche al sistema penale](#) (Law No 689/1981 amending the penal system) of 24 November 1981 (Ordinary supplement to GURI No 329 of 30 November 1981).

⁸² Corte suprema di cassazione (Court of Cassation), [judgment No 29411 of 28 December 2011](#).

57. However, the Corte Costituzionale (Constitutional Court) has recognised that the Italian legislature has the power to make express provision for the retroactivity of a new norm in the context of particular legislation or with respect to a particular matter – subject to compliance with the principle of what is reasonable in the light to the need to protect interests of a higher constitutional rank over the individual interest involved.⁸³ For example, Italian law provides for the retroactivity of more lenient provisions in respect of monetary⁸⁴ and fiscal offences.⁸⁵
58. In addition, the Corte suprema di cassazione (Supreme Court of Cassation) has held that where a criminal offence is converted to an administrative offence, the person who committed such an offence before that conversion took place can no longer be penalised, either on a criminal basis or on an administrative basis, after that conversion – owing to the application of the prohibition on imposing a criminal penalty for an act which, under a subsequent law, no longer constitutes a criminal offence, provided for in Article 2(2) of the Italian Penal Code, in conjunction with the prohibition on imposing an administrative penalty retroactively, provided for in Article 11 of the Legislative Decree of 1942 and Article 1(2) of Law 689/1981.⁸⁶
59. Furthermore, from 2010, the Corte costituzionale (Constitutional Court), referring to the *Engel* case-law,⁸⁷ has mitigated the exclusion by the Italian legislature of administrative penalties from the scope of the *lex*

⁸³ Corte costituzionale (Constitutional Court), judgment No 198 of 26 July 2022, [ECLI:IT:COST:2002:198](#).

⁸⁴ See Article 23bis of [Decreto del Presidente della Repubblica n. 148/1998](#), Approvazione del testo unico delle norme di legge in materia valutaria (Decree of the President of the Republic No 148/1998 approving the consolidated text of the laws on foreign currencies) of 31 March 1998 (GURI No 108 of 10 May 1988 – Ordinary supplement No 40).

⁸⁵ See Article 3 of [Decreto Legislativo n. 472](#), Disposizioni generali in materia di sanzioni amministrative per le violazioni di norme tributarie, a norma dell'articolo 3, comma 133, della [n. 662/1996] (Legislative Decree No 472 laying down general provisions on administrative penalties for infringements of the tax rules, in accordance with Article 3(133) of Law [No 662/1996]) of 18 December 1997 (GURI No 5 of 8 January 1998 – Ordinary supplement No 4); and also Article 46(1bis) of [Decreto Legislativo n. 112](#), Riordino del servizio nazionale della riscossione, in attuazione della delega prevista dalla legge [n. 337/1998] (Legislative Decree No 112 on the reorganisation of the national recovery service, in application of the delegation provided for by Law (No 337/1998)) of 13 April 1999 (GURI No 97 of 27 April 1999).

⁸⁶ Corte suprema di cassazione (Supreme Court of Cassation), judgments No 39842 of 26 September 2006, [ECLI:IT:CASS:2006:39842PEN](#), and No 12491 of 23 November 1992, [ECLI:IT:CASS:1992:12491CIV](#).

⁸⁷ See above, paragraph 7 and footnote 3.

mitior principle.⁸⁸ The Constitutional Court considered that, without prejudice to the Italian legislative principles, the principle of the retroactivity of the *lex mitior* provided for in Article 2 of the Penal Code is applicable to administrative penalties, provided that they are of a penal nature within the meaning of that case-law of the ECtHR.

60. In the Italian legal order, therefore, the *lex mitior* principle is now also applicable to administrative penalties, subject, however, to their belonging to the criminal field, within the meaning of the *Engel* case-law.

II. EXCEPTIONS TO AND MITIGATIONS OF THE *LEX MITIOR* PRINCIPLE

61. This second part presents a panorama of the main exceptions to the principle of the application of the *lex mitior* which have been observed in the different legal orders studied. In that regard, it should be noted, by way of a preliminary point, that while in some legal orders there was no indication that such exceptions exist, either in the legislation, or in the case-law or the literature, no conclusion can be drawn as to whether those exceptions apply or do not apply in those legal orders. It may be that the problem to which the exception in question relates has thus far simply not arisen in the legal order in question.

A. CONTINUATION BY THE LEGISLATURE OF THE PUNITIVE OBJECTIVE

62. This exception, which has been considered in the case-law in a number of Member States (**Germany, Bulgaria, Spain, France, Greece, Italy, the Netherlands and Poland**) reflects the case-law of the Court.⁸⁹ The courts of several legal orders consider that there is really no new more lenient law from which a person might benefit when the normative amendment does not have the effect of calling in question the unlawfulness of previous conduct, which must continue to be penalised

⁸⁸ Corte costituzionale (Constitutional Court), judgments No 196 of 26 May 2010, [ECLI:IT:COST:2009:196](#); No 193 of 6 July 2016, [ECLI:IT:COST:2016:193](#); No 63 of 20 February 2019, [ECLI:IT:COST:2019:63](#); and No 198 of 26 July 2022, [ECLI:IT:COST:2022:198](#).

⁸⁹ See, in particular, judgments of 11 March 2008, [Jager](#), C-420/06, EU:C:2008:152, paragraph 70; of 4 October 2012, [ED and F Man Alcohols](#), C-669/11, not published, EU:C:2012:618, paragraph 59; of 6 October 2016, [Paoletti and Others](#), C-218/15, EU:C:2016:748, paragraph 27; of 7 August 2018, [Clergeau and Others](#), C-115/17, EU:C:2018:651, paragraph 33; and of 24 July 2023, [Lin](#) (C-107/23 PPU, EU:C:2023:606).

under the earlier unfavourable rules, for reasons of efficiency in the enforcement of the law.

63. The situations to which that exception applies are varied. On the one hand, the case-law has recognised that such an exception was applicable when the objective of new legislation is unconnected with the punishment of an offence (1). On the other hand, the situations in question relate specifically to the amendment of an ancillary rule where the law prescribing the offence as such has not been amended (2) or to the modification of a purely factual situation (3).

1. AMENDMENT OF LEGISLATION FOR REASONS UNCONNECTED WITH THE PUNITIVE OBJECTIVE

64. Economic circumstances, political objectives or environmental constraints may lead the public authorities to regard legislation or a tax as inappropriate without calling in question the relevance of the associated penalties. By repealing legislation in its entirety or amending it more favourably, the public authorities do not adopt more lenient provisions: the penalties which accompanied the previous sanction cease to exist only as a consequence, not because of an intention to mitigate the punishment.⁹⁰
65. Having regard to such circumstances, the case-law in five States (**France, Greece, Italy, the Netherlands and Sweden**) has applied an exception to the *lex mitior* principle, while in two other States (**Germany and Bulgaria**) the case-law has expressly declined to apply that exception.
66. In the **Netherlands**, since a judgment of the Hoge Raad (Supreme Court),⁹¹ when the *lex mitior* concerns the classification of punishable offences, it will be applied only if it reflects a change of perception by the legislature regarding the punishable nature of the offence, the legislature's objective in that case being to cease to punish certain conduct because of a societal development. Thus, the Hoge Raad (Supreme Court) considered that the fact that the obligation to hold a permit to store flammable liquids and animals was replaced by an obligation to make a declaration with the aim of making the

⁹⁰ Legras, C., comments on Conseil d'État (Council of State), judgment of 16 July 2010, *Colomb*, [No 294239](#).

⁹¹ Hoge Raad (Supreme Court) of 12 July 2011, [ECLI:NL:HR:2011:BP6878](#).

enforcement of environmental regulations more efficient did not mean that the legislature had abandoned the objective of imposing criminal punishment. The new law could therefore not apply in that case.

67. That exception has also been identified in **Greece**, where the *lex mitior* must call in question the appropriateness and the necessity of the earlier penalty, owing to a fresh assessment by the legislature, in order to be able to apply retroactively.⁹²
68. In **France**, for the Conseil d'État (Council of State), the principle of the retroactivity of the *lex mitior* applies only if the new law is the consequence of the previous penalty being deemed unnecessary or excessive.⁹³ Thus, the abolition of a tax penalty which is the necessary consequence of the abolition of the tax to which the penalty was attached is not the consequence of the penalty having been deemed unnecessary or excessive. Consequently, the repeal of the penalty does not have the character of a new more lenient law.
69. In **Bulgaria**, on the other hand, it has been held⁹⁴ that, under a new law which abolishes an existing obligation which has not been complied with and which served as the basis of the establishment of an administrative offence and the imposition of an administrative penalty, the act committed by the offender no longer constitutes an administrative offence. The new law is therefore a more favourable law.
70. In **Germany**, moreover, in two judgments relating to the *lex mitior* principle enshrined in the German Penal Code,⁹⁵ delivered in 1886 and 1923, respectively, the former Supreme Court had adopted a position similar to that taken by the Netherlands Hoge Raad (Supreme Court) described above, in paragraph 66, and thus made the application of that principle subject to an additional unwritten condition, namely that the favourable legislative amendment had to reflect a change in the

⁹² ΣΤΕ (Council of State), apofasi tis 2 December 2013, No 4159/2009; apofasi tis 17 June 2013, No 2402/2016, and apofasi tis 19 February 2020, No 272/2020.

⁹³ Conseil d'État (Council of State), judgment of 16 July 2010, *Colomb*, [No 294239, Rec.](#)

⁹⁴ See, to that effect, Administrativen sad Plovdiv (Administrative Court, Plovdiv), judgment No 1947 of 8 August 2012, criminal administrative case No 1834/2012, and Administrativen sad Gabrovo (Administrative Court, Gabrovo), judgment No 220 of 25 October 2012, criminal administrative case No 198/2012.

⁹⁵ This principle could already be found in the German Penal Code in 1871, see also paragraph 40 above.

perception of the legislature.⁹⁶ None the less, in 1954, and therefore shortly after the establishment of the Federal Republic of Germany in 1949, the Supreme Court for civil and criminal matters, the Bundesgerichtshof, expressly dropped that additional condition, on the ground that it was not provided for by law.⁹⁷

2. AMENDMENT OF A NORM ANCILLARY TO THE LAW CREATING THE OFFENCE

71. There are cases in which an amendment favourable to the accused does not concern the law creating the offence that serves as the basis for the penalties, but a provision which attaches to that law and defines the substantive elements of the offence. The question therefore arises whether an amendment of the ancillary norm calls in question the very principle of the former punishment, since the principal text establishing the offence remains unaltered.
72. In such a situation, the case-law in one State (**France**) has applied an exception to the *lex mitior* principle, whereas the courts in four other States (**Germany, Spain, Italy** and **Poland**) have considered that that situation does not justify that exception.
73. Thus, in **France**, a decision of the Cour de cassation (Court of Cassation) which was first developed with respect to the offence of favouritism concerning public contracts,⁹⁸ before being extended to other

⁹⁶ Reichsgericht (Supreme Court from 1879 to 1945), judgments of 12 January 1886, 3309/85, and of 11 December 1923, IV 746/23.

⁹⁷ Bundesgerichtshof (Federal Court of Justice), judgment of 9 March 1954, 3 StR 12/54. The wording of the provision of the German Penal Code enshrining that principle and applicable in that 1954 case, was the same as that to be applied by the former German Supreme Court in its judgments of 1886 and 1923, cited above in footnote 96.

⁹⁸ Cour de Cassation (Court of Cassation), Criminal Division, judgments of 28 January 2004, *Louis X.*, [No 02-86.597](#), Bulletin criminel 2004, No 23, p. 103; of 7 April 2004, *M. Jean-Paul X.*, [No 03-84.191](#), Bulletin criminel 2004, No 93, p. 354; of 19 May 2004, *M. Jean-Claude X.*, [No 03-86.192](#), Bulletin criminel 2004, No 131, p. 499; of 1 June 2005, [No 04-87.123](#), not published; of 14 December 2005, *Bernard X.*, [No 05-83.898](#), Bulletin criminel 2005, No 333, p. 1147; and of 18 January 2006, *Olivier X.*, [No 05-84.369](#), not published.

offences,⁹⁹ considers, in essence, that the amendment of a regulatory provision adopted in order to apply a law creating an offence and which determines the factual circumstances that constitute the offence, is not retroactive provided that the legislative provision that constitutes the legal basis of the offence remains in force.

74. In **Germany, Spain, Italy** and **Poland**, on the other hand, the question of the application of the *lex mitior* principle in a situation such as that described in the preceding paragraphs – classified, in the German, Italian and Polish legal orders as a ‘norm in blank’ (namely, respectively, ‘Blankettnorm’, ‘norma in bianco’ and ‘norma blankietowa’) and in the Spanish legal order as an ‘offence in blank’ (namely, ‘infracción en blanco’) – has been the subject of express case-law that runs counter to the French case-law, since the *lex mitior* principle has been deemed, in principle, to be fully applicable to those situations.
75. It is interesting to note that in **Germany**, initially, in the first decades during which the provision of the German Penal Code enshrining the *lex mitior* principle was in force,¹⁰⁰ the former Supreme Court had defended the same position as that taken by the French Cour de cassation (Court of Cassation) and set out above, in paragraph 73, refusing to apply the *lex mitior* principle in a situation where only the supplementary norms contained in other legislative acts were amended, but the criminal provision itself remained unaltered.¹⁰¹ However, in 1964, the Bundesgerichtshof (Federal Court of Justice) expressly abandoned that position, taking the view that where the norm to which the criminal provision makes reference is amended, the *lex mitior* principle is also to apply.¹⁰² That court stated, as the reason for changing its case-law, that the provision making the reference becomes

⁹⁹ Thus concerning public houses (Cour de Cassation (Court of Cassation), Criminal Division, judgment of 15 April 2008, [No 07-86.909](#), not published), road traffic (Cour de Cassation (Court of Cassation), Criminal Division, judgment of 18 January 2006, [No 05-84.369](#), not published), urban planning (Cour de Cassation (Court of Cassation), Criminal Division, judgment of 16 June 2015, [No 14-83.798](#), not published); or Sunday rest (Cour de Cassation (Court of Cassation), Criminal Division, judgments of 16 March 2010, [No 09-82.198](#), Bulletin criminel 2010, No 52; of 7 January 2020, No 18-83.074, published in the bulletin, [ECLI:FR:CCASS:2020:CR02666](#); and of 10 March 2020, No 18-85.832, not published, [ECLI:FR:CCASS:2020:CR00178](#)).

¹⁰⁰ See also, in that regard, paragraph 40 above.

¹⁰¹ Reichsgericht (Supreme Court from 1879 to 1945), judgment of 28 February 1916, III 903/15.

¹⁰² Bundesgerichtshof (Federal Court of Justice), judgment of 8 January 1964, 2 StR 49/64.

a criminal norm only when it is read in conjunction with the provision to which it refers and in the absence of which it would be inoperative.

76. In **Spain**, the Tribunal Supremo (Supreme Court) has held,¹⁰³ in a case relating to a fine, provided for by national law, for breach of the rules on protected designations of origin, that it is necessary to take into account an Implementing Regulation of the European Commission approving an amendment of corresponding specifications,¹⁰⁴ according to which the applicant's behaviour was now permitted, and, consequently, to cancel the fines imposed under the national law. Thus, the Supreme Court confirms that the norm ancillary to the penalty – in this instance, the implementing regulation –, even though it is not criminal in nature, forms part of the definition of the conduct complained of and, consequently, the application of the principle of the retroactivity of the more lenient norm must be given full effect in such a situation.
77. In **Italy**, the Corte suprema di cassazione (Supreme Court of Cassation) has also considered that the rules relating both to the creation of the offence and to the penalty may be amended indirectly, as a result of the amendment of another, possibly a non-criminal, provision to which they refer.¹⁰⁵ That court explained that, in order for the *lex mitior* principle to apply in such cases, the amended provision must affect the criminal precept and it is not sufficient that it amends the factual situation which that precept takes into consideration.
78. Last, in **Poland**, in accordance with the settled case-law of the Sąd Najwyższy (Supreme Court), an amendment of a law must also be considered to be an amendment of the provisions of lower rank (for example regulations) that supplement the content of a criminal law that is 'in blank' in nature and, consequently, the rules of Article 4(1) of the Penal Code must apply to that situation. The expression 'different law' (Article 4(1) of the Penal Code) therefore means not only an amendment

¹⁰³ Judgment of the Tribunal Supremo (Supreme Court) [No 782/2023](#), of 12 June 2023.

¹⁰⁴ Namely, Commission Implementing Regulation (EU) 2020/1528 of 14 October 2020 approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications ('Pimientos del Piquillo de Lodosa' (PDO)) ([OJ 2020, L 349, p. 2](#)).

¹⁰⁵ Corte suprema di cassazione (Court of Cassation), judgment No 2451 of 27 September 2007, ECLI:IT:CASS:2008:2451PEN.

of the law in the strict sense, but also an amendment relating to provisions adopted by the competent authorities on the basis of an authorisation laid down by the law and within the limits of that authorisation.¹⁰⁶

3. AMENDMENT OF AN EXTERNAL FACTUAL SITUATION

79. In three States (**France, Italy** and **Sweden**), the case-law has considered that the amendment of an external factual situation does not constitute a situation in which the *lex mitior* principle should apply.
80. In a decision of 7 June 2017,¹⁰⁷ the Criminal Division of the **French** Cour de cassation (Court of Cassation) refused to apply retroactively the favourable effects of the accession of Romania to the European Union in 2007 to a company which had employed Romanian workers without prior authorisation during 2009 before the restrictions on the movement of Romanian workers were lifted on 1 January 2014. The Criminal Division stated, as the basis of its decision, that Romania's accession to the European Union is 'a situation of fact, unconnected with' the constituent elements of the offence of employing foreign workers without work permits.
81. Likewise, in **Italy**, the Corte suprema di cassazione (Supreme Court of Cassation)¹⁰⁸ held that a penalty imposed on a Romanian national for an offence committed by him before Romania acceded to the European Union, in his capacity as a third country national,¹⁰⁹ could not be considered to be retroactively repealed by the fact of Romania's accession to the Union.
82. Such a situation is also found in **Sweden**, where the *lex mitior* principle does not apply in a case where the new legislation is not stated to be based on the legislature's change of view of the punishable nature of

¹⁰⁶ Kulesza J., Kunicka-Michalska B., *Kodeks karny. Komentarz*, wyd. 6, red. Stefański R., Warsaw Varsovie 2023, Article 4.

¹⁰⁷ Cour de Cassation (Court of Cassation), Criminal Division, judgment of 7 June 2017, No 15-87.214, published in the bulletin, [ECLI:FR:CCASS:2017:CR01227](#).

¹⁰⁸ Corte suprema di cassazione, Sezioni Unite (Supreme Court of Cassation), judgment No 2451 of 27 September 2007, ECLI:IT:CASS:2008:2451PEN.

¹⁰⁹ [Decreto legislativo No 286/1998](#) – testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (Legislative Decree No 286/1998 – single text of the provisions on the regulation of immigration and the rules on the condition of foreign national) of 25 July 1998 (GURI No 191 of 18 August 1998 – Ordinary supplement No 139).

the offence,¹¹⁰ but constitutes, rather, a result, for example, of accession to an international agreement,¹¹¹ or a change in the underlying situation.¹¹²

B. TEMPORARY LAWS

83. A number of legal orders provide that the *lex mitior* principle is not to apply to temporary laws (**Germany**,¹¹³ **Spain**,¹¹⁴ **Italy**,¹¹⁵ the **Netherlands**,¹¹⁶ **Poland** and **Sweden**¹¹⁷). A temporary law is a law which will cease to be in force upon expiry of the period prescribed therein.
84. In those legal orders, the former laws continue to be applied, even though they have lapsed at the time when the penalty is adopted, which is tantamount to not taking account of a situation that is more favourable for the person concerned at the time when the penalty is adopted.
85. The exclusion of temporary laws from the scope of the *lex mitior* principle may be explained by the desire to retain the objective of criminal punishment and the deterrent effect of the criminal penalties thus envisaged. Those effects would be undermined if the application of the *lex mitior* principle with respect to them were recognised, since it would encourage offenders to delay the proceedings beyond the period prescribed for the law in order to rely on the law having been repealed.

¹¹⁰ Asp, P., Ulväng, M. and Jareborg, N., *Kriminalrättens grunder*, 2nd ed., Iustus, 2013, p. 206.

¹¹¹ Högsta domstolen (Supreme Court), judgment of 2 July 2004, [NJA 2004 s. 472](#).

¹¹² Högsta domstolen (Supreme Court), judgment of 21 October 1996, [NJA 1996 S. 613](#).

¹¹³ See Article 4(4) paragraph 4, of the OWiG, which states that 'A law that is intended to have binding force for only a specific period shall be applicable to offences committed during its period of validity even if it has ceased to be in force. This rule shall not be applicable where a law provides otherwise.'

¹¹⁴ This applies with regard to criminal law, where Article 2 of the Penal Code expressly provides that 'criminal offences committed while a temporary law is in force shall be tried in accordance with that law, in the absence of an express provision to the contrary'. Even though administrative law does not contain such a provision, an application by analogy cannot be precluded.

¹¹⁵ See Article 2(5) of the [codice penale](#) (Italian Penal Code).

¹¹⁶ See, inter alia, Raad van State (Council of State), decisions of 2 April 2008, [ECLI:NL:RVS:2008:BC8497](#); of 13 August 2008, [ECLI:NL:RVS:2008:BD9986](#); of 30 September 2009, [ECLI:NL:RVS:2009:BJ8935](#); of 19 August 2009, [ECLI:NL:RVS:2009:BJ5553](#); of 13 October 2010, [ECLI:NL:RVS:2010:BO0266](#); and of 29 June 2011, [ECLI:NL:RVS:2011:BQ9680](#).

¹¹⁷ See Article 5(2) of the Law (1964:163) introducing the Penal Code.

86. In spite of that justification, it should be noted that the French Cour de cassation (Court of Cassation) has ruled in the opposite sense, by expressly applying the *lex mitior* principle in the case of temporary laws which have expired at the time when judgment is given.¹¹⁸ Thus, in **France**, whether the more favourable law is temporary or not, it cannot be applied to offences committed while it was applicable and tried afterwards.

C. SPECIAL LAWS LAYING DOWN TRANSITIONAL MEASURES

87. A new law may contain transitional norms which expressly state how it must be applied to offences committed before it entered into force. In application of the *specialia generalibus derogant* rule, a number of legal orders accept that the new law may derogate from the *lex mitior* principle where that principle is enshrined in an ordinary law (**Germany, Poland** and **Sweden**). Where that principle has constitutional value or is inferred from other principles of a constitutional nature, a derogation by the legislature is possible in certain legal orders, but subject to certain conditions being met (**France, Greece** and **Italy**).
88. In **Poland**, since the *lex mitior* principle is enshrined only in an ordinary law with regard to criminal penalties and pecuniary administrative penalties, a special law may expressly derogate from that principle.
89. Likewise, in **Sweden**, where the *lex mitior* principle is expressly recognised by the law in criminal matters, a special legislative provision may provide to the contrary. It should be noted that in administrative matters, in so far as the *lex mitior* principle is not based on any written rule, the transitional provisions of a new law may provide that the older provisions are still to apply to offences committed before the new regulations entered into force.¹¹⁹
90. The same solution applies in **Greece**, in criminal law, where the *lex mitior* principle is provided for by a law, as the legislature can then adopt a law to the contrary. In administrative law, as that principle is merely a

¹¹⁸ See, with regard to the legislation on funerals, Cour de Cassation (Court of Cassation), Criminal Division, judgments of 22 January 1997, No [95-85.936](#), Bulletin criminel 1997, No 27, p. 63, and of 1 June 1999, No [98-83.255](#), not published, and No [98-84.184](#), not published.

¹¹⁹ See, for example, Kamarrätten i Sundsvall (Administrative Court of Appeal, Sundsvall), judgment of 9 May 2019 in case No 1008-18.

general principle of law, the legislature may expressly exclude it,¹²⁰ in view of the need to impose efficient and sufficiently deterrent penalties, for example in VAT matters,¹²¹ but its exclusion must be consistent with the constitutional principles of equality and proportionality that constitute its basis.¹²²

91. In **Italy**, the *lex mitior* principle, which has constitutional value in criminal law, may be the subject of a derogation by the legislature in that field, provided that the new law pursues an interest of constitutional rank.¹²³
92. In **France**, the Cour de cassation (Court of Cassation) has held that ‘a new law, which amends a provision creating a criminal offence or the penalties applicable to an offence, does not apply to offences committed before it entered into force and not definitively determined only where that law has not laid down express provisions to the contrary’.¹²⁴ A legal provision contrary to the *lex mitior* principle is thus possible, provided, however, that ‘the more severe previous punishment is inherent in the rules which the new law has replaced’.¹²⁵ In other words, that derogation must be justified in the light of the principle that penalties must be necessary, which is the basis of the *lex mitior* principle in French law. That possible neutralisation of the principle of retroactivity *in mitius* would be justified, in particular, in economic matters, where the technical regulations on which criminal law is based change rapidly, so that the systematic retroactive application of new more favourable provisions might undermine the effectiveness of the punishment.

¹²⁰ ΣτΕ (Council of State), *apofasi tis* 24 October 2018, No 2221/2018.

¹²¹ ΣτΕ (Council of State), *apofasi tis* 19 February 2020, No 272/2020, paragraph 9.

¹²² Μπουκουβάλα, Β., ‘Η αρχή της αναδρομικής εφαρμογής της ευνοϊκότερης κύρωσης στο πεδίο του φορολογικού δικαίου’, *Διδικ* 4/2020, p. 571. See ΣτΕ (Council of State), *apofasi tis* 4 February 2013, No 459/2013, and *apofasi tis* 29 June 2018, No 1438/2018.

¹²³ Corte costituzionale (Constitutional Court), judgment of 23 November 2006, No 393.

¹²⁴ Cour de Cassation (Court of Cassation), Criminal Division, judgment of 6 February 1997, [No 94-84.670](#), *Bulletin criminel* 1997, No 51, p. 166.

¹²⁵ Constitutional Council, decision of 3 December 2010, *M. Jean-Marc P. and Others*, [No 2010-74 QPC](#), *JORF* No 0281, 4 December 2010.

III. APPLICATION OF THE *LEX MITIOR* PRINCIPLE DURING THE DIFFERENT STAGES OF THE IMPOSITION, REVIEW AND ENFORCEMENT OF THE PENALTY

93. The developments in this third part are devoted to the question of the point at which a legislative amendment must intervene in order to trigger the application of the *lex mitior* principle – as regards both administrative penalties, whether or not they are of a penal nature, and criminal penalties in the strict sense.
94. This part deals with 13 of the 14 legal orders selected for the purposes of the note, namely **Germany, Bulgaria, Spain, France, Greece, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Sweden.**
95. Since in **Ireland** the *lex mitior* principle in the strict sense is not recognised,¹²⁶ the question of the point up to which a more lenient law may produce effects retroactively does not arise, by definition. Consequently, Irish law will not be dealt with in this part.
96. The procedures relating to administrative penalties are distinguished from those relating to criminal penalties, as a general rule, by three aspects: first, criminal penalties in the strict sense are adopted by a court of first instance, whereas administrative penalties are adopted by administrative authorities, with the court of first instance becoming involved only at the review stage.¹²⁷ Second, the procedural rules applicable to administrative penalties are generally those governing administrative procedure and administrative contentious matters, not

¹²⁶ See paragraphs 48 to 51 above.

¹²⁷ As regards criminal penalties, proceedings before a court are generally preceded by an investigation carried out by or under the supervision of the State Attorney's Department. However, the State Attorney's Department is traditionally considered to be part of the judiciary and not – unlike the administrative authority imposing a penalty – of the executive. Furthermore, that department does not, as a matter of principle, itself have the power to impose penalties and can bring the case only before the competent criminal court or tribunal which will then be responsible, where appropriate, for deciding on the penalty. In the case of administrative penalties, on the other hand, the administrative authority not only investigates the alleged offence, but, where it finds that the offence is made out, it also imposes the corresponding penalty on the offender.

those that apply to criminal penalties.¹²⁸ Third, in most States the judicial order responsible for reviewing administrative penalties is not the same as that with jurisdiction to determine criminal penalties.¹²⁹

97. In the light of the foregoing, it is appropriate to analyse in turn the consequences of the adoption of a more lenient law during the stage of the adoption and review of a criminal penalty (A.), then an administrative penalty (B.), before addressing the conclusions to be drawn from such an event where it occurs during the enforcement of the administrative or criminal penalty (C.).

A. APPLICATION OF THE *LEX MITIOR* IN THE CONTEXT OF THE ADOPTION AND REVIEW OF THE CRIMINAL PENALTY

98. All the States examined provide for at least two,¹³⁰ and sometimes three, levels of courts in criminal matters.¹³¹ The court of first instance is thus the one that adopts the penalty, while the higher courts review the penalty.
99. As regards the adoption of the criminal penalty, since the 13 legal orders examined recognise the existence of the *lex mitior* principle, the criminal court of first instance must by definition take such a law into account in order not to render that principle ineffective.
100. Where three levels of criminal courts exist, the court of second (and therefore penultimate) instance may, in the 13 legal orders studied, take into account a more lenient law adopted while the proceedings are pending before it.
101. Conversely, the situation is somewhat more contrasted when it comes to the taking into account, in similar circumstances, of a *lex mitior* by the

¹²⁸ The opposite applies, for example, in **Germany** and in **Portugal**, where, in the absence of a provision to the contrary, the provisions governing criminal procedure are intended, in essence, to apply *mutatis mutandis* to the procedure before the administrative authority leading to the adoption of an administrative fine.

¹²⁹ Where the opposite applies – see, for example, in **Germany** and in **Portugal** –, review of the fines imposed by the administrative authorities is not within the jurisdiction of the administrative court, but falls to the ordinary courts, which also have jurisdiction in criminal matters, at both first and second instance.

¹³⁰ A right to a review of a conviction is expressly required both by Article 2(1) of Protocol No 7 to the ECHR and by Article 14(5) of the ICCPR.

¹³¹ One or two degrees of higher courts may even exist, within the same legal order, depending on the criminal court that is competent at first instance, as is the case, for example, in **Germany**.

court of last instance – whether that court constitutes a second or a third level of jurisdiction.

102. Thus, in nine States (**Germany, Spain, France, Greece, Italy, Lithuania, the Netherlands, Slovakia and Sweden**), the court of last instance must take into account a law which was adopted only during that instance. In two States (**Poland and Slovenia**), on the other hand, it cannot be taken into account, while in two other States (**Bulgaria and Portugal**), it does not seem possible to infer a clear answer to that question from the existing legislation or case-law.

1. WHERE A MORE LENIENT LAW IS TAKEN INTO ACCOUNT IN COURTS OF
LAST INSTANCE

103. In the **German, Spanish, French, Greek, Italian, Lithuanian, Netherlands, Slovakian and Swedish** legal orders, a more lenient law may be taken into account by the criminal court of last instance where that law was adopted while the proceedings were pending before it.

104. In **Germany**, the Bundesgerichtshof (Federal Court of Justice) determines, at last instance, cases involving criminal penalties¹³² and in that context adjudicates on points of law alone. None the less, without prejudice to its jurisdiction being limited to points of law only, that court must, in principle, apply, of its own motion,¹³³ a more lenient law which has been adopted after the proceedings before the last court ruling on the facts were concluded. Under Article 2(3) of the Penal Code, the *lex mitior* principle covers all amendments adopted 'before the decision', that formulation being generally understood as including the decision delivered on an appeal on a point of law.¹³⁴

¹³² See Articles 333 and 337 of Strafprozessordnung (Code of Criminal Procedure), in the version published on 7 April 1987 (BGBl. 1987 I, p. 1074, 1319), as most recently amended by the Law of 30 July 2024 (BGBl. 2024 I, No 255), read in conjunction with Article 125(1) of the Gerichtsverfassungsgesetz (Law on the judicial organisation) in the version published on 9 May 1975 (BGBl. 1975 I, p. 1077), as amended, most recently, by the Law of 30 July 2024 (BGBl. 2024 I, No 255).

¹³³ See, to that effect, Erb, V., and Schäfer, J. (eds.), Münchener Kommentar zum StGB, Vol I, 5th ed., 2024, C.H. Beck, Munich, annotation 87 subparagraph 2 StGB.

¹³⁴ See, to that effect, Bundesgerichtshof, order of 25 July 2011, [1 Str 631/10](#); and also Kudlich, H., and von Heintschel-Heinegg, B. (eds.), Beck'scher Online-Kommentar zum Strafgesetzbuch, 62nd ed., 2024, C.H. Beck, Munich, annotation 8 subparagraph § 2 StGB.

105. However, according to the case-law of the Bundesgerichtshof (Federal Court of Justice), in order to be able to take advantage of a more lenient law at the stage of the appeal on a point of law, an applicant must challenge, in his or her application, an error affecting the substance of the law.¹³⁵ Consequently, if the applicant merely relies on procedural errors, the *lex mitior* principle will not apply.
106. In **Spain**, it follows from Article 2(2) of the Penal Code that the *lex mitior* principle is to apply, even if at the time when the more favourable law enters into force, the judicial decision is final and the person concerned is in the process of serving the sentence imposed by that decision. The Criminal Division of the Supreme Court has thus applied that principle not only when the new more lenient law enters into force in the course of the proceedings,¹³⁶ but also at a subsequent stage, namely when the judicial decision has become final, as a result of the mechanism of the appeal on a point of law.¹³⁷
107. In **France**, the Criminal Division of the Cour de cassation (Court of Cassation) has considered since 1872¹³⁸ that, provided that the offence has not been definitively disposed of, the new more lenient law is applicable, including where the criminal case is pending before the Cour de cassation (Court of Cassation). That solution is justified by the fact that the appeal has suspensory effect in criminal matters, the decision becoming final only at the conclusion of the proceedings in the appeal on a point of law.
108. In **Greece**, the criminal court must apply the most favourable law until a definitive decision has been delivered, pursuant to Article 2(1) of the Penal Code.¹³⁹ That includes the judgment delivered in the appeal. The

¹³⁵ Bundesgerichtshof (Federal Court of Justice), judgment of 26 February 1975, [2 StR 681/74](#).

¹³⁶ Judgment of the Tribunal Supremo, Sala Segunda (Supreme Court, Second Chamber), of 10 May 2023, No 326/2023 ([ECLI:ES:TS:2023:1963](#)).

¹³⁷ Judgment of the Tribunal Supremo, Sala Segunda (Supreme Court, Second Chamber), of 25 June 2024, No 351/2024 ([ECLI:ES:TS:2024:3629](#)).

¹³⁸ Cour de Cassation (Court of Cassation) (France), Criminal Division, judgments of 16 March and 11 May 1872, Bull. crim. Nos 68 and 113.

¹³⁹ ΟΛΑΠ (Πολι.) (Court of Cassation, Assembly, Criminal), apofasi tis 12 May 2021, No 4/2021, Πραξ/Λογ/ΠΔ 1/2021, pp. 87 to 98.

lex mitior adopted after the appeal has been lodged is therefore taken into consideration by the Court of Cassation, of its own motion,¹⁴⁰

109. In **Italy**, the intervention of a more favourable law must be taken into account until the decision of the Corte suprema di cassazione (Court of Cassation) adjudicating on a point of law since, in that legal order, an appeal on a point of law is an ordinary appeal.¹⁴¹ That rule applies even where the appeal is inadmissible¹⁴² – except where inadmissibility is the consequence of failure to comply with the time limit for lodging the appeal on a point of law.¹⁴³
110. However, the Corte suprema di cassazione (Supreme Court of Cassation) has also held that a more lenient law which has entered into force after the adoption of a decision on appeal setting aside the decision of the court below and remitting the case to that court for the sole purpose of determining the penalty, does not apply to the proceedings following remittal, since the guilty finding made in respect of the person concerned and the classification of the offences have already acquired the authority of *res judicata*.¹⁴⁴
111. In **Lithuania**, the requirement for the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) to take into account a more lenient law which came into force after the decision under appeal was adopted follows directly from the provision of the Lithuanian Penal Code¹⁴⁵ that enshrines the *lex mitior* principle, namely Article 3(2) of that code.
112. In the **Netherlands**, the Hoge Raad (Supreme Court) recognised in the 1960s that the *lex mitior* principle also applies to laws more favourable

¹⁴⁰ For a recent example, see ΑΠ (Που.) (Court of Cassation, Criminal Division), apofasi tis 16 February 2023, No 275/2023.

¹⁴¹ Corte suprema di cassazione (Supreme Court of Cassation), judgments No 46653 of 26 June 2015, ECLI:IT:CASS:2015:46653PEN, and No 27820 of 6 June 2017, ECLI:IT:CASS:2017:27820PEN.

¹⁴² Corte suprema di Cassazione, Sezioni Unite (Court of Cassation, Plenary Assembly), judgment No 46653 of 26 June 2015, ECLI:IT:CASS:2015:46653PEN.

¹⁴³ Corte suprema di cassazione (Supreme Court of Cassation), judgment No 27820 of 6 June 2017, ECLI:IT:CASS:2017:27820PEN.

¹⁴⁴ Corte suprema di Cassazione, Sezioni Unite (Court of Cassation, Plenary Assembly), judgment No 16208 of 27 March 2014, ECLI:IT:CASS:2014:16208PEN.

¹⁴⁵ Lietuvos Respublikos baudžiamasis kodeksas ([Penal Code](#)) of 26 September 2000, No VIII-1968 (Valstybės žinios, 2000, No 89-2741), entered into force on 1 May 2003.

to the accused, which came into being only after the proceedings before the court below were concluded.¹⁴⁶

113. In **Slovakia**, it is apparent from the case-law of the Najvyšší súd (Supreme Court) that in criminal law the *lex mitior* principle also covers a legislative amendment that intervenes while the proceedings are pending before it.¹⁴⁷
114. The position is similar in **Sweden**, where Article 5(2) of the Law introducing the Penal Code¹⁴⁸ provides, in essence, that a legislative amendment in favour of the person concerned must be taken into account up to the time when the judgment is delivered. That provision has been interpreted and applied as meaning that it requires the Högsta domstolen (Supreme Court) – which, moreover, without prejudice to its position at the head of the criminal courts, is not solely a court with jurisdiction to determine points of law, but a court adjudicating on law and on fact – to take account of a more lenient law which intervenes while the case is pending before it.¹⁴⁹

2. WHERE A MORE LENIENT LAW IS NOT TAKEN INTO ACCOUNT IN COURTS OF LAST INSTANCE

115. In the **Polish** and **Slovenian** legal orders, a more lenient law which has been adopted during the proceedings before the criminal court at last instance is not taken into account by that court.
116. In **Poland**, the case-law considers that, on an appeal in criminal matters, the Sąd Najwyższy (Supreme Court) cannot apply a *lex mitior* adopted after the decision under appeal was taken, as that remedy is limited to examining the grounds of appeal raised by the appellant, apart from any procedural defects which the Sąd Najwyższy (Supreme Court) may raise of its own motion. Accordingly, that court cannot take into account a breach of provisions other than those indicated by the appellant, or

¹⁴⁶ Hoge Raad (Supreme Court), judgments of 26 July 1962, NJ 1963, 12, ECLI:NL:HR:1962:3; of 24 July 1964, NJ 1965, 38, ECLI:NL:PHR:1964:AD8066; and of 6 May 1980, NJ 1980, 475, ECLI:NL:PHR:1980:AB7463.

¹⁴⁷ Najvyšší súd (Supreme Court), order of 15 January 2013, 2 Tdo 69/2012.

¹⁴⁸ See above, footnote 63.

¹⁴⁹ See, to that effect, Högsta domstolen (Supreme Court), judgments of 29 June 1977, NJA 1977 not B 36, and of 2 July 2004, NJA 2004 s. 472, and also Asp, P., Ulväng, M. and Jareborg, N., *Kriminalrättens grunder*, 2nd ed., Iustus, 2013, p. 203.

substitute itself for the appellant in choosing the grounds of appeal.¹⁵⁰ By definition, if the *lex mitior* intervenes after the appeal has been lodged, the appellant could not rely on it when lodging his or her appeal. Furthermore, when examining the lawfulness of a decision, the court hearing the appeal takes as a reference point the legal situation that existed when the court below delivered its decision.¹⁵¹ Consequently, the *lex mitior* principle provided for in Article 4(1) of the Penal Code applies only until the adoption of the decision under appeal before the Sąd Najwyższy (Supreme Court), except where a decision is quashed and remitted to the court below and a more lenient law has intervened after the case has been remitted.

117. In **Slovenia**, the application of the more favourable law is possible – according to the Vrhovno sodišče (Supreme Court)¹⁵² – only where that law entered into force before the Court of Appeal delivered its decision – a decision which, in Slovenian law, is considered to have acquired *res judicata*, without prejudice to an appeal on a point of law before the Vrhovno sodišče (Supreme Court),¹⁵³ as the review of legality (zahteva za varstvo zakonitosti) before the Vrhovno sodišče constitutes an extraordinary remedy in Slovenian law.¹⁵⁴

3. ABSENCE OF EXPLICIT LEGISLATION OR CASE-LAW

118. In the case of **Bulgaria** and **Portugal**, it does not seem possible to infer from the existing legislation or case-law a clear answer to the question whether the supreme court must take into account a *lex mitior* adopted after the decision of the lower court which the supreme court is requested to review.

119. In **Bulgaria**, Article 2(2) of the Penal Code¹⁵⁵ provides that where different laws follow one another before the conviction becomes final,

¹⁵⁰ Sąd Najwyższy (Supreme Court), judgment of 8 February 2017, [LPK 95/16](#).

¹⁵¹ Sąd Najwyższy (Supreme Court), judgment of 3 February 1999, [V KKN 338/97](#). See, to the same effect, Kulesza J., Kunicka-Michalska B., Kodeks karny. Komentarz, wyd. 6, red. Stefański R., Warsaw 2023, Article 4.

¹⁵² See, in particular, judgments of the Vrhovno sodišče (Supreme Court) of 18 September 2018 [No IV Ips 32/2018](#), paragraphs 4 and 7; of 9 July 2013 [IV Ips 60/2013](#), paragraph 7; of 19 January 2016 [IV Ips 83/2015](#), paragraph 6; and of 20 December 2016 [IV Ips 56/2016](#), paragraph 6.

¹⁵³ See, to that effect, in particular, Višje sodišče v Ljubljani (Court of Appeal, Ljubljana), order of 18 February 2015 No [II Cp 3411/2014](#).

¹⁵⁴ See, in particular, Article 169 of the Law on minor offences (footnote 8).

¹⁵⁵ See above, footnote 29.

the law that is most favourable to the offender is to apply. Since where the matter is referred to the Varhoven kasatsionen sad (Supreme Court of Cassation) a conviction does not become final until after the latter court has taken its decision, then presumably that court must take into account the *lex mitior* which was adopted while the proceedings were pending before it.

120. However, no case-law that would confirm the conclusion drawn in the preceding paragraph has been identified, and the example of Poland – where the court adjudicating at last instance is prevented from taking into account a more lenient law adopted while the proceedings were pending before it, even though a more lenient law adopted only when the penalty, which has become final, was already being served may operate to the advantage of the person convicted¹⁵⁶ – shows that such a conclusion is not obvious.
121. In **Bulgaria**, the Varhoven kasatsionen sad (Supreme Court of Cassation) has admittedly already set aside a decision of a Court of Appeal in a criminal matter on the basis of the *lex mitior* principle¹⁵⁷ However, in that particular case the more lenient law already existed when the case was still pending before the Apelativen sad (Court of Appeal).
122. As regards the position adopted by the administrative courts of that State in relation to administrative penalties, namely that a lenient law must be applied even though it was adopted only in the course of the proceedings at last instance,¹⁵⁸ it is not immediately obvious that it is capable of being transposed to criminal cases, given the structural differences between the administrative courts and the criminal courts and the distinct proceedings before those two legal orders.
123. In **Portugal**, Article 2(4) of the Penal Code provides that if the law in force when the offence is committed is subsequently amended, the most favourable law is to be applied, unless the offender has already been convicted by a decision that is final or has acquired the force of *res judicata* and already been enforced. Since it follows from those

¹⁵⁶ See above, paragraph 157 et seq.

¹⁵⁷ Varhoven kasatsionen sad (Supreme Court of Cassation), judgment No 87 of 26 September 2014, criminal case No 142/2014.

¹⁵⁸ On that case-law, see below, paragraph 132.

provisions that the *lex mitior* principle applies until the penalty has been enforced in full, it seems to follow that a more lenient law must necessarily also apply when it intervened at an earlier stage in the proceedings, including the appeal before the court adjudicating at last instance.

124. None the less, here too the same observation as that set out above, in paragraph 120, must be made: no case-law confirming the conclusion drawn in the two preceding paragraphs has been identified, and the example of **Poland** shows that such a conclusion is not obvious.

B. APPLICATION OF THE *LEX MITIOR* IN THE CONTEXT OF THE ADOPTION AND THE REVIEW OF AN ADMINISTRATIVE PENALTY

125. Administrative penalties are adopted, in principle, by the administrative authorities, while the court of first instance is involved only at the review stage (see above, paragraph 96). In that regard, it should be noted that all the States examined provide for at least two, and sometimes three, levels of jurisdiction.
126. In the context of the adoption of the penalty, it is logical and inherent in the *lex mitior* principle that the administrative authority should take such a law into account, as otherwise that principle would be ineffective.
127. In addition, as regards a more lenient law adopted in the course of the review proceedings, all the legal orders – except one – allow the first-instance court and, where there are three levels of jurisdiction, the court of second (and therefore penultimate) instance to take the *lex mitior* into account even where it was adopted only in the course of the proceedings.
128. Thus, the sole exception concerns **Poland**, where a more lenient law can be taken into account only where it was adopted before the proceedings were concluded by the administrative authorities, the benefit of any law adopted during the subsequent stage of the review proceedings thus being excluded.¹⁵⁹
129. As regards a *lex mitior* being taken into account by the court adjudicating at last instance, the situation seems to be contrasted within the other 12 States. Thus, in six States (**Germany, Bulgaria, Spain, France, Italy**¹⁶⁰ and **Lithuania**), it is expressly accepted that a more lenient law may be taken into by the court adjudicating at last instance even where that law was created only after the decision of the court below was adopted (1.). In a single State, **Slovenia**, such a law cannot be taken into account (2.), whereas for another five States (**Greece, the Netherlands, Portugal, Slovakia** and **Sweden**), it has not been possible to identify

¹⁵⁹ See Sala-Szczypiński, M., Administracyjne kary pieniężne czasu epidemii i zasada stosowania „ustawy względniejszej”, *Roczniki Administracji i Prawa* 2021/1, p. 147.

¹⁶⁰ With the reservation, however, that – as is apparent, above, from paragraphs 54 to 60 – that as **Italian** law now stands, the *lex mitior* principle is not applied to all administrative penalties, but, by way of exception to the rule that it is not to apply in that field, only to the administrative penalties prescribed for monetary and fiscal offences and to administrative penalties of a criminal nature within the meaning of the *Engel* case-law.

national legislation or case-law that would provide a clear answer to that question (3.).

1. WHERE A MORE LENIENT LAW IS TAKEN INTO ACCOUNT IN THE PROCEEDINGS AT LAST INSTANCE

130. In **Germany, Bulgaria, Spain, France, Italy** and **Lithuania**, the court adjudicating at last instance in relation to administrative penalties must take a more lenient law into account even if it was adopted only while the proceedings were pending before it.
131. In **Germany**, Article 4(3) of the OWiG ¹⁶¹ provides, for administrative penalties – in the same way as Article 2(3) of the Penal Code does for criminal penalties ¹⁶² – that the *lex mitior* principle is to apply to all amendments adopted ‘before the decision’, that expression being generally understood to include the decision delivered in an appeal on points of law only. ¹⁶³
132. In **Bulgaria**, the last instance for administrative penalties is neither of the two Supreme Courts: ¹⁶⁴ that function is carried out by the administrative courts. Those administrative courts have acknowledged, in their relevant case-law, that they must take a more lenient law into account even if it was adopted only while the proceedings were pending before them. ¹⁶⁵
133. In **Spain**, the principle of the retroactive application of the more lenient law in relation to administrative penalties derives from Article 9(3) of the Constitution and from Article 26(2) of Law 40/2015. Therefore the Contentious Administrative Matters Division of the Tribunal Supremo (Supreme Court), which is the highest court for administrative penalties,

¹⁶¹ See above, footnote 58.

¹⁶² See above, paragraph 104.

¹⁶³ See, to that effect, Mitsch, W. (ed.), *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten*, 5th ed., 2018, C.H. Beck, Munich, annotation 27 subparagraph 4 OWiG, and also Graf, J. (ed.), see footnote 59, annotation 24 subparagraph 4 OWiG.

¹⁶⁴ Namely, the Varhoven kasatsionen sad (Supreme Court of Cassation) and the Varhoven administrativen sad (Supreme Administrative Court).

¹⁶⁵ See *Administrativen sad Kardzhali* (Administrative Court, Kardjali), judgment of 13 February 2009, case No 79/2008; and *Administrativen sad Sofia* (Administrative Court, Sofia), judgment of 30 January 2012, Case No 1065/2011.

applies the most lenient law even where it entered into force while the proceedings were pending before that court.¹⁶⁶

134. In **France**, in spite of the force of *res judicata* that attaches to the judgment delivered by the Administrative Court of Appeal and the lack of suspensory effect of an appeal on a point of law in administrative matters, the Conseil d'État (Council of State) held in 2022, with regard to administrative penalties, that 'it is for the trial court, hearing a dispute relating to a penalty, to apply, even of its own motion, a new, more lenient punitive law which entered into force between the date on which the offence was committed and the date on which it adjudicates. The same applies to the court hearing an appeal on a point of law if the new law entered into force after the decision under appeal was adopted'.¹⁶⁷
135. In so far as the **Italian** legal order applies the *lex mitior* rule to administrative penalties,¹⁶⁸ the court adjudicating at last instance¹⁶⁹ must apply a more lenient law, whether it was adopted before or after the decision of the lower court which the court adjudicating at last instance is called upon to review.¹⁷⁰

¹⁶⁶ Tribunal Supremo, Sala Tercera (Supreme Court, Third Chamber), judgment of 23 September 2019, No 1219/2019 ([ECLI:ES:TS:2019:2889](#)).

¹⁶⁷ Conseil d'État (Council of State), judgment of 7 October 2022, *société KF3 Plus*, No 443476, Rec., [ECLI:FR:CESEC:2022:443476.20221007](#).

¹⁶⁸ Which is the case with respect to administrative penalties of a criminal nature within the meaning of the *Engel* case-law and where a law adopted in a special field expressly provides that that rule is to be applied to administrative penalties laid down in that field, as in the fiscal and monetary fields; see above, paragraphs 57 to 59.

¹⁶⁹ Which may be the Consiglio di Stato (Council of State) or the Corte suprema di Cassazione (Supreme Court of Cassation) depending on the field in which the administrative penalties in question apply.

¹⁷⁰ See Corte suprema di Cassazione (Supreme Court of Cassation): for 'punitive' administrative penalties, judgments No 46653 of 26 June 2015, ECLI:IT:CASS:2015:46653PEN, and No 27820 of 6 June 2017, ECLI:IT:CASS:2017:27820PEN; for penalties in monetary matters, judgments No 26309 of 16 December 2009, ECLI:IT:CASS:2009:26309CIV, and No 15705 of 3 July 2009, ECLI:IT:CASS:2009:15705CIV; and for tax penalties, judgments No 35385 of 1 December 2022, ECLI:IT:CASS:2022:35385CIV, and No 26178 of 18 October 2018, ECLI:IT:CASS:2018:26178CIV.

Furthermore, according to the Consiglio di Stato (Council of State), order No 3299 of 21 April 2021, ECLI:IT:CDS:2021:3299OCOL, the principles developed by the Corte suprema di Cassazione (Supreme Court of Cassation) on the application of the *lex mitior* to punitive administrative penalties should be applied in the same way by the administrative courts.

136. In **Lithuania**, the Law on contentious administrative proceedings ¹⁷¹ provides, in Article 4(5), that the proceedings must be conducted in accordance with the law in force at the current stage of the proceedings. It follows that the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) – which, without prejudice to its position at the head of the administrative courts, is an appellate court and as such may also reconsider the facts ¹⁷² – must apply the *lex mitior* to administrative penalties even though that law was adopted only after the proceedings before the apygardos administracinis teismas (Regional Administrative Court) had been concluded.

2. WHERE A MORE LENIENT LAW IS NOT TAKEN INTO ACCOUNT AT LAST INSTANCE

137. The point made in paragraph 117 for **Slovenia** regarding criminal law also applies for administrative penalties. The Vrhovno sodišče (Supreme Court) is also the court of last instance both in criminal matters and for administrative penalties. Thus, that court cannot take a more lenient law into account when it is adopted after the decision of the penultimate judicial instance was adopted. ¹⁷³

3. WHERE THERE IS NO EXPLICIT LEGISLATION OR CASE-LAW

138. For **Greece**, the **Netherlands**, **Portugal**, **Slovakia** and **Sweden**, it has not been possible to identify legislation or case-law that would permit a clear answer to the question whether the court adjudicating at last instance in administrative penalty matters may take into account a more lenient law adopted after the decision of the lower court was adopted.

139. Nor does it seem possible to transpose to administrative penalties the answer provided in the context of criminal penalties, having regard, inter alia, to the differences of a procedural nature referred to above, in paragraph 96.

¹⁷¹ Lietuvos Respublikos administracinių bylų teisenos įstatymas ([Law on contentious administrative matters](#)) of 14 January 1999, No VIII-1029 (Valstybės žinios, 1999, No 13-308), as amended.

¹⁷² On the other hand, an appeal on a point of law lies to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

¹⁷³ See the case-law cited above, footnote 152.

140. In **Greece**, the question whether the *lex mitior* principle applies to legislative amendments that have intervened at the stage of the appeal in cases concerning administrative penalties was answered only with respect to disciplinary penalties imposed on public officials, and that answer is in the affirmative.¹⁷⁴
141. Conversely, the answer to the question whether that principle applies generally to legislative amendments adopted at the appeal stage in cases relating to administrative penalties does not emerge unequivocally from a Greek law¹⁷⁵ or from the Greek case-law. According to some writers, it would be possible for the court adjudicating on an appeal on a point of law to apply the *lex mitior* in those circumstances in the absence of a fresh examination of the facts.¹⁷⁶ In that context, it should be made clear that, in the special context of tax and customs disputes, the Greek case-law has required that an individual seeking to benefit from a more lenient tax penalty must specifically rely on that principle, on the ground that the administrative courts are precluded from applying of their own motion Article 79(5) of the Code of Administrative Proceedings, which contains a specific prohibition to that effect for both of those types of dispute.¹⁷⁷
142. For the **Netherlands**, as regards proceedings relating to administrative penalties, no express Netherlands rule or Netherlands case-law that would permit an answer to the question whether the legislative amendment in favour of the person concerned adopted at the stage of

¹⁷⁴ Under Article 108(1) of the Civil Service Code, which refers to the Penal Code. See, in that regard, Α. Τάχος/Ι. Συμεωνίδης, Ερμηνεία Υπαλληλικού Κώδικα - ΕρμΥΚ, τόμ. 2, Εκδόσεις Σάκκουλα, Αθήνα-Θεσσαλονίκη, 3η έκδ., 2007, p. 1696.

¹⁷⁵ It is appropriate, however, to cite the example of a Greek law that expressly regulates that question for a specific situation. Law 4509/2017 amending the Code of Fiscal Procedure explicitly provided that the *lex mitior* principle was to apply to cases that were pending when the amendment at issue entered into force, including in 'pending cases' appeals pending before the Council of State.

¹⁷⁶ Δημητρακόπουλος, Ι. Γ., Διοικητικές κυρώσεις και θεμελιώδη δικαιώματα: Σύνταγμα, ΕΣΔΑ, Δίκαιο ΕΕ. Αθήνα: Νομική Βιβλιοθήκη, 2014, σελ. 115, Θ. Παπακυριάκου, Φορολογικό Ποινικό Δίκαιο, Εκδόσεις Σάκκουλα, Αθήνα Θεσσαλονίκη, 2005, § 9, pp. 397 to 399.

¹⁷⁷ ΣτΕ (Council of State), *apofasi tis* 29 June 2018, No 1438/2018. See, on that judgment, Π. Πανταζόπουλος, 'Παρατηρήσεις στην ΣτΕ 1438/2018 (7μ) - Η αναδρομική εφαρμογή της ευνοϊκότερης κύρωσης στο πεδίο των φορολογικών κυρώσεων', ΘΠΔΔ, 8-9/2018, pp. 747 to 751. See also ΣτΕ (Council of State), *apofasi tis* 24 October 2018, No 2221/2018; No 841/2019, and *apofasi tis* 19 February 2020, No 272/2020.

the proceedings before the court of fact should be taken into account has been identified.¹⁷⁸

143. In **Portugal**, the solution adopted in Article 3(3) of the RGCO¹⁷⁹ for minor offences not covered by the Penal Code is the same as that adopted in Article 2(4) of the Penal Code that applies to criminal offences in the strict sense. In fact, the RGCO provides that, if the law in force at the time when the offence is committed is subsequently amended, the most favourable law is to be applied, unless the offender has already been convicted by a decision that has become final or acquired the force of *res judicata* and has already been enforced. Here, too, in so far as it follows from those provisions that the *lex mitior* principle is to apply until the penalty has been enforced in full, it seems to follow that it must necessarily also apply to the earlier stages of the proceedings, including the appeal to the court adjudicating at last instance.
144. However, no case-law confirming the conclusion drawn in the preceding paragraph has been identified, and the example of **Poland** – where the court adjudicating at last instance is prevented from taking a more lenient law adopted during the proceedings before it into account, even though a more lenient law which was adopted only when the definitive penalty is already in the process of being enforced may operate to the advantage of the convicted person – shows that such a conclusion is not obvious.
145. In **Slovakia**, Article 195(d) of the Code of Administrative Justice¹⁸⁰ provides that, when reviewing an administrative decision, the Administrative Court is not bound by the scope and the grounds of the action of the administration so far as compliance with the principles of the application of the penalties laid down in the Penal Code – which

¹⁷⁸ There are, admittedly, two decisions of the Centrale Raad van Beroep (Higher Social Security and Civil Service Court) of 1 March 2000 ([ECLI:NL:CRVB:2000:AA6848](#)) and of 14 February 2001 ([ECLI:NL:CRVB:2001:AB0469](#)), in which that court expressly accepted that the *lex mitior* principle also applies where the legislative amendment intervened in the course of the proceedings pending before it. However, that court is a court of appeal and therefore not a court with jurisdiction to determine questions of law at last instance.

¹⁷⁹ See above, footnote 15.

¹⁸⁰ Zákon č. 162/2015 Z. z. Správny súdny poriadok (Law No 162/2015 Rec., establishing the Code of Administrative Justice) of 21 May 2015 (čiasťka No 53/2015 Z. z.).

include the *lex mitior* principle,¹⁸¹ which must therefore also be applied to the imposition of administrative penalties.

146. However, Article 454 of that Code provides that it is the task of the Court hearing an appeal on a point of law in administrative matters to determine whether the lower administrative court erred in law with regard to the situation existing at the time when it delivered the decision under appeal. The latter provision suggests that the *lex mitior* adopted after the delivery of the decision under appeal is not *a priori* applicable. None the less, there is no case-law expressly confirming that conclusion.
147. In **Sweden**, the predecessor of the Högsta förvaltningsdomstolen (Supreme Administrative Court), in its role as supreme administrative court, namely the Regeringsrätten, announced, in a judgment of 1988, that it follows from the general principles of administrative law that the provisions, both procedural and substantive, to be applied in administrative proceedings are those in force at the time when the case is examined.¹⁸² Moreover, in a number of judgments delivered in that area, that court has applied new legislation more favourable to the person concerned which entered into force after the lower courts had delivered their decisions or in the course of the proceedings before the supreme court.¹⁸³

C. APPLICATION OF THE MORE LENIENT LAW AT THE STAGE OF THE ENFORCEMENT OF THE PENALTY

148. In the **German, Spanish, French, Greek, Italian, Lithuanian, Polish** and **Portuguese** legal orders, the scope of the principle of the retroactivity of the more lenient law is particularly broad. In spite of the intervention of a decision imposing a penalty that has become final, those legal orders recognise the possibility of applying a more lenient

¹⁸¹ See Article 2(1) and (2) of the Zákon č. 300/2005 Z. z. [Trestný zákon](#) (Law No 300/2005 Rec., establishing the Penal Code) of 20 May 2005 (časťka No 129/2005 Z. z.).

¹⁸² Regeringsrätten (Supreme Administrative Court), judgment of 28 November 1988 RÅ 1988 ref. 132. The case concerned an application for review of a decision adopted by the Swedish Government concerning a project to extend the infrastructure. The principle of the retroactive application of the most favourable law was not at issue in the case.

¹⁸³ See Regeringsrätten (Supreme Administrative Court), judgments of 9 November 1976 RÅ 1976 ref. 142; of 14 April 1994, RÅ 1994 ref. 43; and of 16 November 2005, RÅ 2005 not. 142, RÅ 2009 not. 132.

law that was created only when the penalty was in the process of being enforced. In those legal orders the *lex mitior* principle is binding on the authorities responsible for enforcing such penalties.

149. In **Germany**, the Law introducing the Penal Code ¹⁸⁴ provides, in Article 313(1), that where a penalty was imposed by a decision that has acquired the force of *res judicata*, but, under a new law, the conduct in respect of which that penalty was imposed is no longer punishable, or subject to an administrative fine, the penalty in question will be remitted, provided that it has not yet been enforced. However, that provision refers only to criminal penalties where the offence has been abolished. It does not apply where the penalty has been reduced ¹⁸⁵ or to administrative penalties.
150. In **Spain**, the Penal Code expressly states that the more favourable law must be applied to criminal convictions imposed by a decision which has become final. ¹⁸⁶ The *lex mitior* is thus applied even where the penalty is in the process of being enforced, by means of an exceptional review procedure.
151. Likewise, in **France**, the second paragraph of Article 112-4 of the Penal Code provides that ‘the penalty shall not be further enforced when it was imposed in respect of an act which, under a law adopted after the judgment was delivered, no longer has the nature of a criminal offence’. That article covers the specific case of laws that decriminalise offences;

¹⁸⁴ [Einführungsgesetz zum Strafgesetzbuch](#) (Law introducing the Penal Code) of 2 March 1974 (BGBl. 1974 I, p. 469, and 1975 I, p. 1916), as most recently amended by the Law of 27 March 2024 (BGBl. 2024 I, No 109).

¹⁸⁵ A similar application of that provision to such a situation has just been proposed by Eisenberg, J, and Kempgens, K., ‘Gnadenantrag für Verurteilten nach § 30 BtMG und Antrag auf Neufestsetzung der Strafe gem. § 313 EGStGB gestellt’, <https://www.eksk.legal/de/aktuelles/gnadenantrag-fuer-verurteilten-nach-30-btmg-und-antrag-auf-neufestsetzung-der-strafe-gem-313-egstgb-gestellt/>.

¹⁸⁶ Article 2(2) of the Penal Code: ‘Criminal laws that favour the accused shall have retroactive effect, even if, at the time of their entry into force, a final conviction had been pronounced and the person concerned was serving a sentence [...]’.

in addition, the offence in question cannot be given a different penal classification.¹⁸⁷

152. In **Greece**, it follows from the case-law that, where the criminal offence has been repealed by the new law, the penalty imposed by a judgment which has become final is no longer enforced. On the other hand, according to the same case-law, if a new law, which has entered into force following a definitive conviction, introduces a lighter penalty, that has no impact in favour of the accused at the stage of the enforcement of the penalty, owing to the authority of *res judicata* attached to that decision.¹⁸⁸
153. The *lex mitior* is likewise also taken into account in **Italian** criminal law. If the new law repeals a provision creating an offence under which an individual has been convicted by a decision which has acquired the force of *res judicata*, the judge with jurisdiction in enforcement matters must cancel the judgment imposing the conviction and adopt all the consequent measures, in particular those linked with the termination of the enforcement of the penalty.¹⁸⁹ A new law which substitutes a fine for a custodial sentence will also affect custodial sentences which are being served, which will be converted.¹⁹⁰ Furthermore, in so far as the Italian legislation makes an express exception, for monetary or fiscal offences, to the rule that the *lex mitior* principle does not apply to administrative penalties,¹⁹¹ that legislation explicitly provides, in addition, that the balance of a pecuniary penalty is to be cancelled where a subsequent, more favourable law is adopted after the decision imposing that fine has become final.¹⁹²

¹⁸⁷ See, for example, concerning the abolition of the offence of misuse of a document signed in blank not entailing the application of Article 112-4 of the Penal Code in so far as the actions may be caught by the offence of forgery or breach of trust (Cour de Cassation (Court of Cassation), Criminal Division, judgments of 18 May 1994, [No 93-82.003](#), Bulletin criminel 1994, No 187, p. 429, and of 21 September 1994, [No 93-85.297](#), Bulletin criminel 1994, No 300, p. 730).

¹⁸⁸ ΟΛΑΠ (Πον.) (Court of Cassation, Assembly, Crim.), apofasi tis 12 May 2021, No 4/2021, ΠραξολογΠΔ 1/2021, pp. 87 to 98.

¹⁸⁹ See Article 673 of the [codice di procedura penale](#) (Code of Criminal Procedure).

¹⁹⁰ See Article 2(3) of the [codice penale](#) (Italian Penal Code), introduced by Article 14(1) of the [legge 24 febbraio 2006 No 85](#), Modifiche al codice penale in materia di reati di opinione (Law of 24 February 2006 No 85, Amendments to the Penal Code concerning thought crime) (GURI No 60, of 13 March 2006).

¹⁹¹ See above, paragraph 57 *in fine*.

¹⁹² See the provisions cited above in footnotes 84 and 85.

154. In **Lithuania**, the *lex mitior* principle also applies to laws which have been adopted after the decision imposing the penalty has become final, but before the penalty in question has been enforced in full.
155. As regards criminal penalties, the Penal Code expressly states that the adoption of a law providing that the commission of an act is no longer a criminal offence, mitigating the penalty or improving the legal situation of the offender is also to benefit persons already serving a penalty.¹⁹³
156. Likewise, as regards administrative penalties, the Code of administrative offences provides that a law which is adopted before a penalty has been enforced in full and which mitigates or eliminates liability for the administrative offence in question, or which otherwise improves the legal situation of the person on whom the penalty was imposed, is to have retroactive effect.¹⁹⁴
157. In **Poland**, as regards criminal offences, Article 4 of the Penal code, which, in its paragraph 1, enshrines the *lex mitior* principle in the criminal field, also lays down, in paragraphs 2 to 4, rules that allow the more favourable law to be taken into account at the stage of the enforcement of the penalty, leading, depending on the case, to a reduction in the amount or the duration of the penalty imposed, to its being converted into a less severe penalty or indeed to its abolition. Conversely, the Code of Administrative Procedure, which, in Article 189c, enshrines that principle for pecuniary administrative penalties,¹⁹⁵ contains no provisions similar to those laid down in Article 4(2) to (4) of the Penal Code.
158. Thus, it must be stated, in the first place, that in that State there is therefore a wide discrepancy between criminal offences and administrative offences so far as the more lenient law being taken into account is concerned. As may be seen above, in paragraph 128, for administrative offences, the application of the *lex mitior* principle is

¹⁹³ See Article 3(2) of the Lietuvos Respublikos baudžiamasis kodeksas (Penal Code) of 26 September 2000, No VIII-1968 (Valstybės žinios, 2000, No 89-2741), entered into force on 1 May 2003.

¹⁹⁴ See Article 3(2) of the Code of Administrative Offences (see footnote 40).

¹⁹⁵ See above, paragraph 37.

confined to legislative amendments adopted before the end of the pre-litigation administrative procedure.

159. In the second place, it should be noted, in the light of paragraph 116, from which it is apparent that the Polish court adjudicating on an appeal on a point of law cannot apply a more lenient law adopted when the case is already pending before it, that what is at first sight a surprising situation may arise, in which, when a more lenient law has been adopted only at that stage of the judicial proceedings, the appellant must expect that the appeal whereby he or she seeks, at the stage of the enforcement of the conviction that has been upheld by the court adjudicating on the appeal, to take advantage of that more lenient law will be dismissed.
160. In **Portugal**, the *lex mitior* principle applies until the penalty in question, whether criminal or administrative, has been enforced in full, as expressly stated in Article 2(4) of the Portuguese Penal Code and Article 3(2) of the RGCO, respectively.

CONCLUSION

161. In the first place, as regards the retroactive application of a more lenient law to administrative penalties, it should be stated that such a law is applied retroactively in the great majority of the States studied.
162. Although measures that may be classified as administrative penalties cover a very wide range of factual situations, it is clear from this research note that, with the exception of two States (**Ireland** and **Italy**), 12 other States (**Germany, Bulgaria, Spain, France, Greece, Lithuania, Pays-Bas, Poland, Portugal, Slovakia, Slovenia** and **Sweden**) apply the *lex mitior* principle to such measures, and there is nothing to indicate that its application is restricted to measures of a criminal nature within the meaning of the ECHR and the Charter.
163. That application is based on rules deriving from legislation or from case-law that target all administrative penalties or only some such penalties, without prior classification of those sanctions as belonging or not belonging to the criminal field. In other words, those 12 States apply the *lex mitior* principle to penalties imposed by an authority other than a criminal court, without consideration of whether those penalties are of a criminal nature in application of the criteria identified in the *Engel* case-law.

164. In addition, that principle seems to be widely adopted at legislative level. Thus, in **Bulgaria, Spain** and **Lithuania**, the application of the *lex mitior* principle to administrative penalties in the broad sense is recognised by law; in **Germany**, the **Netherlands** and **Poland**, a law recognises the application of the principle to pecuniary administrative penalties; in **Portugal, Slovakia** and **Slovenia**, a law expressly provides for its application in accordance with a constitutional provision that also expressly provides for the general existence of that principle. In **France** and **Greece**, the application of the *lex mitior* principle to administrative penalties, although not expressly provided for in a constitutional or legislative provision, is based on a judicial construction founded on other principles of constitutional value. Last, in **Sweden** there is no law or case-law that has recognised a general principle that the *lex mitior* is to apply to administrative penalties, but the Swedish courts apply such a principle by analogy with the existing rules applicable to criminal penalties.
165. In the second place, as regards material exceptions to and mitigations of the *lex mitior* principle, such exceptions and mitigations were identified in a number of legal orders. In that regard, it should be borne in mind that the absence, in the other legal orders, of legislation, case-law or literature dealing with the exception or mitigation in question means that it is impossible to draw a firm conclusion as to their application or non-application in the legal order in question. Their absence may simply be explained by the fact that thus far the problem addressed by an exception or mitigation has not yet arisen in that legal order.
166. That being so, it should be noted that a number of the Member States studied do not apply that principle when the new situation, that is more favourable for the person concerned, is the consequence of a change in the legislation that does not reflect a new point of view of the legislature which considered that the preceding legislation or regulations were inappropriate (**France, Greece, Italy, the Netherlands** and **Sweden**), whereas, in one State (**Germany**), the case-law has expressly refused to make the retroactive application of a more lenient law subject to that additional condition.
167. As regards the situation where the legislative amendment does not affect the actual provision establishing the penalty, but affects a different provision to which the first provision makes reference,

opposite approaches have been taken in the States studied. In such a situation, the **French** case-law does not permit the *lex mitior* principle to be applied, whereas the **German, Spanish, Italian** and **Polish** courts accept its application.

168. In addition to that exception, certain Member States consider that the *lex mitior* principle does not apply with respect to temporary laws, for reasons to do with the efficiency of the enforcement of those particular laws (**Germany, Spain, Italy**, the **Netherlands, Poland** and **Sweden**).
169. Furthermore, some legal orders expressly accept that the legislature may derogate from that principle, in so far as, in those legal orders, the principle does not have constitutional value (**Germany, Greece, Poland** and **Sweden**). In **France** and **Italy**, where the principle has constitutional value (only in the case of criminal penalties in **Italy**), the legislature may also derogate from that principle, on certain conditions.
170. As regards, in the third and last place, the question of the stage of the proceedings at which a more favourable law must intervene in order to be taken into account, it must be noted, with regard to criminal proceedings, that in most of the Member States such a law may be taken into account when it is adopted at a time when the proceedings are pending before the court of last instance (**Germany, Spain, France, Greece, Italy, Lithuania**, the **Netherlands, Slovakia** and **Sweden**). Only **Poland** and **Slovenia** do not allow the *lex mitior* to be taken into account by the supreme court, thus limiting the application of the *lex mitior* to the lower courts, while it seems to follow from the legislation in **Bulgaria** and **Portugal**, respectively, that such a law may be taken into account, although the legislation is unclear in that regard and there is no case-law confirming that conclusion.
171. As regards administrative proceedings, the solutions chosen cover all stages of the proceedings: from the adoption of the decision of the administrative authority imposing the penalty, until the enforcement in full of the penalty imposed, including the various stages of the judicial review of the administrative decision. Thus, only **Poland** limits the scope of that principle to the conclusion of the proceedings before the administrative authorities. All the other States give effect to the more lenient law adopted while the case is pending before the lower courts in the context of the review of the administrative decision imposing the penalty. Some States also recognise the application of the *lex mitior*

principle when the most favourable law is adopted after the decision of the penultimate court forming the subject matter of an appeal pending before the supreme court (**Germany, Bulgaria, Spain, France, Lithuania** and even **Italy**, in a case where, in the latter State, a more lenient law is applied with respect to administrative penalties ¹⁹⁶). In **Slovenia**, on the other hand, such an extension of the *lex mitior* principle at the stage of an appeal on a point of law is precluded. As for **Greece, the Netherlands, Portugal, Slovakia** and **Sweden**, there is no legislation or case-law that would provide a clear answer to the question whether a more favourable law, in administrative matters, which has intervened at the stage of an appeal at last instance before a supreme court must be taken into account by that court.

172. Last, some legal orders afford an even broader procedural scope to the *lex mitior* principle and allow the most favourable law to be taken into account even where no further appeal lies against the penalty, but where the penalty has not yet been enforced in full (**Germany, Spain, France, Greece, Italy, Poland** and **Portugal**, for criminal penalties; **Lithuania** and **Portugal** for administrative penalties).

[...]

¹⁹⁶ It will be recalled that, as regards administrative penalties, **Italy** applies the *lex mitior* principle only with respect to administrative penalties of a criminal nature within the meaning of the *Engel* case-law and where a law adopted in a particular field expressly provides that that rule is to apply to administrative penalties provided for in that field, as is the case in the fiscal and monetary fields; see above, paragraph 57.