Administrative Sanctions: Sanctioning Power of Public Administration

Introduction – administrative repression in national and supranational aspects

Nowadays, the non-criminal repressive sanctioning systems are growing wild in confused legislative surrondings without secure requirements of principle in many European countries. Serious attempts have been made in Hungarian and increasingly in international dimensions to clarify conceptually the growing sanctioning power of public administration, especially to work out the minimum requirements of substantive and procedural law for sanctions of punitive natures. This research considers the confusing, and at times contradictory, terminology used in European legislations and literature to describe administrative (non-criminal) penalties and the offence to which they respond.

In terms of several instruments of the Council of Europe and the European Union, administrative sanctions are more and more highlighted as real alternative solutions of criminal sanctions.[1] Recommendation No (91)1 of CE points out that European administrative authorities acquired considerable powers of sanction as a result of the growth of the administrative state as well as a result of a marked tendency towards decriminalisation. These types of sanctions are thought to be able to ensure appropriate deterrent and preventive effect in fight against some of dangerous phenomena treated traditionally by means of criminal law enforcement.[2] As to the background of the increasing importance of administrative penalties, criminal policy recently tends to transpose its problems resulted mostly in the enlargement of repression into the administrative punitive area that is based on a more uncertain and less elaborated theory than criminal law dogmatism. The creation of a system of pseudo-criminal sanctions of administrative nature may open the floor for penalties applied without proper constitutional guarantees such as culpability principle, in particular in the judicial practice of regulatory and minor offences.[3] One may realize some

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1 The Convention on the Protection of the European Communities' Financial Interests (97/C 191/01) requires Member States to lay down criminal penalties for the punishment of the conduct constituting fraud, but in cases of minor fraud Member States may provide for non-criminal penalties, mainly administrative penalties.

2 See Recommendation No. R (91) 1 of the Committee of Ministers to Member States, Council of Europe, Explanatory memorandum

3 See Mireille Delmas-Marty, Punir sans juger. De la répression administrative au droit administratif penal, (Economica 1992); Regulatory theorists also warn against the over-use of the criminal law in

unconstitutional aspects followed by displacing administrative penalties from the scope of culpability principle of criminal law in the process of extension of administrative repressive system.[4] The legislative technique of decriminalisation as a way of the removal of an offence from the criminal sphere corresponds to a very widespread trend in the European legal system, one of them has been encouraged by the Council of Europe. Social changes, new attitudes, technical and economic circumstances are leading the States to reassess the elements of offences and classify them as regulatory one. We are also concerned with the difficult and precarious task of drawing the borderline between the qualification by the national legal system, considering primarily the universal requirements of principles of substantive and procedural body of criminal law, enforced mainly through constitutional courts and the European Court of Human Rights (ECHR) in Europe. In relation to European states, it may be asked then whether, administrative penalty retains its punitive character and/or may still be included in the concept of criminal offence. At this point, the ECHR's view is that the rule of law infringed no change of substantive content it prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive. These alternative measures often presuppose a decision not institute formal criminal or judicial proceedings. Some forms of procedures, just like the analogous one of decriminalising offences so as to rid them of the stigma of a sentence or dejudicalising certain parts of the criminal law, belonging to the one as the same criminal policy whose aim is precisely to apply those types of treatment that fall outside the criminal law and hence go beyond the scope of substantive principles of criminal law. The Association International de Droit Pénal (AIDP) pointed out in its resolution of 1989 the tendency in which as to its scale administrative penal law has been approaching criminal sanctions. This improvement of administrative repression urges a broader application of principles of substantive criminal law in the same manner as due process principle applies in that domain. The national legislation and the jurisprudence shall also consider by analogy particularly the principle of culpability. It is useful to note that the relevant verdicts of the ECHR prescribes that legal forms such as criminal offences, non-punishable offences, contravention, public welfare offences are not of importance in relation to the compulsory enforcement of principles of

the regulatory area. There has been an exponential growth in the number of criminal offences such that the 'criminal law is devoid of any justificatory principle' and the notion of criminality is now debased (de facto 'criminalising' regulatory contraventions). Theorists urge a statement of principle on this issue which states that the distinction between criminal and non-criminal penalty law and procedure is significant and adds to the flexibility of regulatory law. Legislators should exercise caution about extending the criminal law into regulatory areas unless the conduct being proscribed clearly merits the moral and social censure and stigma that attaches to conduct regarded as criminal

4 About the German critics concerning the extension of administrative repression see Cordier, Frey, Matees in Viski László, Közlekedési büntetőjog [Criminal Law of Traffic offences] (KJK 1974) 199.; According to judgement He Kaw Teh v The Queen (1985) 157 CLR 523. in common law one of the reasons for the expansion of the administrative penalties regime in the sectorial administration is to increase the likelyhood of punishing offenders given the lower standard of proof and the fewer procedural protections available to the defendant in an administrative action.

fair process.[5] Rec.(91)1 of CE also establishes that it is desirable to contain the proliferation of administrative sanctions by submitting them to a set of principles.

In addition to the national systems, the administrative repressive power of the EU organs for the protection of Community's interests and EU law indicates new perspectives in European administrative penal law.[6] Recently, a special aspect of this topic has been raised in the field of EU and UN counterterrorist sanctioning regime incorporating counterterrorist blacklists of the UNSC. The UN and EU blacklisting regimes, in particular the travel restrictions, financial sanctions restrict a large number of fundamental human rights. Those sanctions are fairly seen as administrative-labeled sanctioning system which aims at discarding and excluding international as well as national criminal justice review. The reasons and justification for taking this counterterrorist (CT) sanction policy out of the criminal justice are due to the need for the efficiency, the urgency in enforcement of sanctions. Through administrative-labelling the international administrative-type special bodies qualify themselves as more efficient and more responsive vehicle to address terrorism, and the criminal justice system is seen as an old-fashioned, inefficient way to impose, enforce or control CT sanctions.

By creating pseudo-criminal sanctions, the efficiency problems of criminal regime are placed into a more uncertain sphere which opens the floor for sanctions applied without proper judicial guarantees and due process standards.[7]

1. The evolution of the system of administrative sanctions in the Hungarian legal system

The administrative sanction is the coercive measure or penalty imposed by administrative bodies (regulators) on anti-administrative behaviour, for example any behaviour disturbing the public order or the public administration.[8] Substantive administrative sanctions and other

5 See Bittó Márta, 'A magyar szabálysértési jog és az Emberi Jogok Európai Egyezménye' [The Hungarian Contravention Law and the ECHR] (1991) 32 Állam- és Jogtudomány 23., 155–174., 158.; Delmas-Marty (n 3); Mireille Delmas-Marty – C. Teitgen-Colly, 'Vers un droit administratif pénal?' in The system of administrative and penal sanctions in the Member States of the European Communities I. National Reports (ACSC-EEC-EAEC 1994).

6 See more in Kis Norbert, 'Szupranacionális közigazgatási szankciók az EU-ban' [Supranational Administrative Sanctions in the EU] in Kondorosi Ferenc, Ligeti Katalin (eds) Az európai büntetőjog kézikönyve [Handbook of The European Penal Law] (Magyar Közlöny Lap- és Könyvkiadó 2008) 373–398.

7 See more in Kis Norbert, 'How to Return the Supranational Administrative-type Counterterrorist Sanctions to the Criminal Justice System?' (2010) 1 Nouvelle Études Pénales /Proceedings of the AIDP regional Conference/ 107–119.; Kis Norbert, 'Financing of Terrorism' (2007) 78 International Review of Penal Law/Revue Internationale de Droit Pénal 157–178.

8 The basic concept and the activity of Hungarian public administration is analyzed in Kis Norbert – Cserny Ákos, 'The Government and Public Administration' in Csink Lóránt, Schanda Balázs, Varga Zs. András (eds), The basic law of Hungary: A First Commentary Dublin: (Clarus Press 2012) 135–156.;

type of administrative sanctions shall be examined distinctively. *Substantive sanction* is the penalty imposed on the violation of substantive law, through decision on the merit. *Other administrative sanctions* shall be marked off, as the sanctioning instruments of constraint such as enforcing measures applied during the procedure, on-the-spot disciplinary measures, or fines for delay in the procedure.[9]

Administrative sanctions are examined in this chapter, in the field of sanctions of administrative substantive law. *Administrative penal law* – a discipline of German origin (*Verwaltungsstrafrecht*) – comprises the evolution, the history of regulation and theory of *administrative sanctioning power* into a disciplinary framework.[10]

Sanctioning by public administration has evolved as a field *out of the repression by penal law and criminal jurisdiction. Administrative penal law is the set of norms determining the conditions of the application of repressive sanctions imposed in administrative procedure by administrative organs.* The expansion of administrative penal law (Verwaltungsstrafrecht, la repression administrative) has various explanations in terms of legal policy. Historically, the introduction of administrative repression against infringements was motivated *by decriminalisation as a means of relieving criminal jurisdiction.* However, the establishment of *speedier, more effective and more deterrent administrative sanctioning* system means parallel or alternative to penal law has become an even more determining reason.

According to the processual approach, administrative sanctioning power means the *'sanctioning jurisdiction' diverted from the judiciary way into the administrative competence.* The first instance of consideration can be the administrative authority, and the legal court will examine the case if the person involved does not agree with the resolution. The diverted legislation is laid down by positive law. There is a different model, according to which the law enforcer (administrative organ, prosecutor) takes the decision of diversion (e.g. in England[11], the so-called 'correctionalism' proposals were made in Hungary, too).

The system of administrative sanctions is *associated with the rules of administrative procedure*, however the procedural principles are based on the theses of the *'fair procedure'*

Patyi András, Varga Zs. András, Általános közigazgatási jog [General Administrative Law] (Dialóg Campus 2012) 351.

9 Kis Norbert, Nagy Mariann, Európai közigazgatási büntetőjog [European Administrative Penal Law] (HVG-Orac 2007) 8–10., 300.

10 Jacques Mourgeon, La répression administrative (LGDJ, 1966); Main research papers on administrative penal sanctions of Hungarian Law are as follows: Papp László, 'A közigazgatási büntetőbíráskodás problematikája' [Theory of administrative penal judiciary] (1992) 42 Magyar Közigazgatás 336.; Máthé Gábor, 'A közigazgatási büntetőjog elmélettörténetéhez' [On History and Theory of Administrative Penal Law] in Degré Alajos emlékkönyv [In Memoriam Degré Alajos] (Unió 1995) 149.; Geller J. Balázs, 'A "büntetés" fogalma az emberi jogok és alapvető szabadságok védelméről szóló Egyezmény 7. Cikkének 1. bekezdésében' [The concept of 'penalty' in ECHR Article 7 Paragraph 1] (1997) 44 Magyar Jog 105 – 107.; Nagy Marianna, A közigazgatási szankciók elmélete [Theory of Administrative Sanctions] (Osiris 2002); Kántás Péter, 'Adalékok a közigazgatás szankciórendszeréhez' [On Administrative Sanctions] (2003) 50 Belügyi Szemle 45–65.; Torma András, A közigazgatási szankció helye és szerepe az EU jogában [The role and place of Administrative Sanctions in EU law] (2005) 1 OLAF 153–177.

11 B. Macrory 'Making sanctions More Effective' /Macrory Review, Better Regulation Executive, Final report/ (Cabinet Office 2006) http://www.cabinetoffice.gov.uk/regulation/penalties

principle declared in the European Convention on Human Rights, and elaborated through the legal practice of the European Court of Human Rights. *Impeachment and sanctioning remain within the gravity of substantive legal principles of penal law.* Administrative penal law is on the borderline of administrative law and penal law, at the same time shows the *specifically mixed features of the above-mentioned legal branches.* This can be explained by the fact that there is no uniform and coherent system of principles and concepts of this legal discipline. The sanctioning system of public administration is expanding in many European countries, within a confused codification environment, in the lack of secure principal requirements.

The administrative penal power has evolved in Hungary in a dual system. A separate *Contravention* law (szabálysértés) was introduced and the category of so-called 'minor criminal offences' (kihágás) was abolished in 1955, which means an evolutionary borderline.

a) The prior period until 1955 in Hungary

The infringers of obligations, prohibitions and instructions defined by administrative regulations and the persons who contravene the conditions of permissions *had been sanctioned through the uniform sanctions of public law, e.g. the penal law.* The uniform sanctioning of administrative offences in this time was the lowest level of the trichotomy of penal law, the *minor criminal offences.* Independent from this, some *other sanctions of administrative law* can be found as well: restriction of rights, close-down of institutions, suspensions and revocation of permissions. The body of minor criminal offences had included different fact patterns: *'smaller offences'* of criminal nature and regulatory offences, e.g. *'civil disobedience'.* The idea of 'administrative penal law' was based on this dualism of minor offences, which had an impact on the legislation and the jurisprudence as well.[12]

Minor offences as forms of criminal law were defined by the act of law XL of 1897, and their litigation by the act XXVII of 1880. in a way that the so-called *administrative penal authorities* received certain competence besides the local (township) courts. The requirement of 'jurisdiction by courts' has been broken and the penal power of administration (administrative penal organs: the magistrate, the sheriff and the vice prefect) was introduced by this step. Besides the penal law of minor offences, also the first types of *administrative fines* have appeared which had been distinct from the criminal fines and had been applied in cases of *regulatory transgression (áthágás).*

In the last period of the history of minor criminal offences, the effect of the general part of the penal code (Act II of 1950) did not cover the specific part of the penal law any more. This was generally defined by the statutory rule nr. 35. in the year 1951. and the regulation of the Council of Ministers 59/1952. (KESz) which was created for its enforcement. The KESz had retained the *dualism of administrative and judiciary penal activities.* Besides the police, the Local Governement (Executive Committee of the Local Coouncil) has also received general competence. In the end, the competence of the police to consider minor offences has been terminated by the statutory rule nr. 16. in the year 1953., thus general

[12] Angyal Pál, A közigazgatási jogellenesség büntetőjogi értékelése [Criminal Law-based assessment of administrative offences] (MTA 1931).

competence was shared by the courts of law and the Executive Committees of the local Councils. The abolishment of minor offences law in 1955 was a significant step in the evolution of independent administrative sanctioning. The fact patterns of minor offences have been either upgraded to 'real crimes' or reclassified to offence through one single legislative act. *The dual system of administrative sanctioning has been preconditioned by the parallel evolution of minor offences and transgression.*

b) The period after 1955.

Act on Contravention law has been the uniformly codified field of administrative penal sanctioning from 1955 to 2012. The 'penal-like' character of contravention law can be explained by the fact that offences had been created partially by the 'decriminalised' minor offences fact patterns (statutory rule nr. 17 of the year 1955) after the introduction of contravention law (statutory rule nr. 16. of 1953). *Offences of criminal nature together with the ones of administrative (non-criminal) nature* were considered as the basic forms of regulatory offence, in this way the legislative formally complied with the principle of separation of jurisdiction and administration. According to the ideas and the written law of the time, the fact patterns of offence obviously constituted an independent *type of sanctions of administrative law.* As culpability (mens rea) – based form of responsibility, it used to impose fines on the infringers of the law. Right from the beginning, various links to the penal law characteristic to the former minor offences law have featured the new legal institution as well. The detention, introduced in 1959 as a penalty independently imposable for certain fact patterns by the police was determining in the 'penal-like' system of contravention law.[13]

The first coherent Act of contravention law (Act I of 1968) and the Government Decree 17/1968 (IV.24.) on certain offences have included the whole legal material into a unified system: its general provisions, rules of procedure and enforcement as well as its specific provisions allowed the enforcement of contraventionlaw for decades. However, the codification of contravention law *could not meet the expectation of becoming the general sanction of administrative law.* Not all types of fines could be incorporated into the act, *supervisory fines and other restrictive sanctions continued to exist.* The *supervisory sectoral fines* imposed in case of infringements by administrative supervisory organs remained more effective in the eyes of the law enforcers due to their more flexible set of legal principles. Especially in the field of environmental protection, more and more 'non-contraventional' types of fines have been introduced from the 1970's. These fines were applied gladly by the individual sectors, as on the one hand they were 'strict-liability' based therefore not even the negligence of the perpetrator had to be proven, and on the other hand, their amount linearly increased with recurrence. Besides that, the income from these fines went to separate state funds, thus the sectors themselves could dispose of them. Contravention law was gradually loosing its relevance in

[13] Máthé Gábor, 'Verwaltungsstrafrecht oder Nebenstrafrecht?' in Mezey Barna (ed), Strafrechtsgeschichte an der Grenze des nächsten Jahrtausendes (Gondolat 2003) 122–150.; Nagy (n 10).

the 1980's and simultaneously, the legislature *introduced more and more sectoral fines out of contravention law.*

The renewal of contravention law was enforced by the Hungarian accession to the European Convention on 'the Protection of Human Rights and Fundamental Freedoms'. From this, the assurance of *judicial review of the contravention procedure* has emerged as a basic requirement. Also in this connection, the Constitutional Court called on the Parliament in its resolution 63/1997 (XII. 12.) to pass the necessary legislation. The result was the Act LXIX of 1999 act of law on contraventions which is not in effect any more.

The dualist way of development is characterised by the fact that contravention law was supposed to give a unified framework to all sectoral administrative sanctions. However, the idea of unified protection of administration has failed, as administrative sanctions out of contravention law have evolved in an even wider range. The sectoral administrative legislation has 'diverted' the repressive system of instruments of protecting the administration from the contravention codification and has created a separate system of sanctions in each sector. The basic reasons of *the double track of administrative repression* have been the following:

- The idea of 'minor criminal law' compared the system of sanctions of the contravention law to that of the criminal law, thus it did not allow the system become more severe and differentiated, while the sectoral legislation has done so by going beyond all theoretical dilemmas.
- The contravention liability having a 'penal-like' (*mens rea*) system of conditions has proved to be too tight and rigid for administrative repression.
- The principles of contravention law were not flexible enough to directly put across sectoral specificities.
- The forms and guarantees of procedure were not in line with administrative routine and pragmatism.

The new Act on Contravention Law (Act II of 2012) was adopted in 2012 and entered into force in September 2013. The fundamental changes of new legislation were as follows:

- the scope of the contravention law are limited to criminal-type minor offences,
- nulla poena sine lege and criminal law 'necessity-test' are to apply in contravention law,
- minor administrative offences are transferred to administrative law to be sanctioned,
- the authority of public administration remained on all contravention, except contraventions to be sanctioned by imprisonment.

In fact, the dual structure of sanctions of administrative law enforcement has been reinforced by the new legislation of contravention law, however, the overlaps of two mechanisms have seriously decreased.

The dual structure of administrative sanctioning

2. Theoretical basics of administrative sanctioning

The theoretical questions of administrative sanctioning concern the differences between judicial penal power (Justizstrafrecht) and administrative penal power, as well as their relations. The history of theory was determined by the fact that the contravention law and after 1955 contravention law was considered as the main field of administrative penal sanctioning. As a consequence, theory was less concerned with non-contravention-systems of administrative fining (sanctioning) and the relations to them. Focusing on its principal requirements and the demarcation from criminal law, e.g. the placement of minor offences within the legal system, *the problems of administrative penal power have appeared only in regard to the contravention law, and not in the whole range of administrative sanctions.*

This approach justifies administrative repression being diverted from the criminal jurisdiction and focuses dominantly on the qualitative and quantitative differences between contravention law and penal law.

aa) *The qualitative difference-theories* try to define an independent framework of administrative penal power, however it is difficult to find theoretically sufficient distinctive features between the nature of criminal wrong and that of administrative infringement, as it is a question of judgement: what makes an act of offence criminal? The boundaries are relative and unclear in their principle basis. The pioneer theorists of administrative penal law have tried to find *specialties in the legal nature of contravention from which they expected 'legal principles of administrative penal law' distinctive from criminal law.* They believed that while the mission of criminal law is the protection of law and order (*Rechtsordnung*), the contravention 'only' protects the *community welfare objectives* (*Wohlfahrt*) and the administrative order (*Verwaltungsordnung*). The ideas featuring the early period of the evolution of administrative penal law highlight as a difference the merely formal illegality of administrative offence (*Verwaltungswidrigkeit*) – a notion of German origin. J. *Goldschmidt* regarded the administrative offence as *mere disobedience, morally neutral offence*. According to *Wolf*, the administrative penal law is administrative law in the material sense, and *only formally penal*. The ideas based on moral distinction of the nature and the rules of these two fields of law have also slowly gone under. According to the currently mainstream idea, *there is no qualitative difference between acts violating criminal law and administrative offences in respect to the legal subjects and interests to be protected (interests).*[14]

ab) It is a more widely accepted idea that the *gravity of harm and risk on society*, e.g. the quantitative criterion is the determinant *in the distinction* of an act violating criminal law or an administrative offence. The theory of gradual difference is widely accepted in the comparison of criminal law and administrative offences. However, the gradual

[14] James Goldschmidt, Das Verwaltungstrafrecht (Heymann 1902).

difference between criminal sanctions and administrative substantive sanctions is not justified in the whole spectrum of administrative penal law. Criminal law and administrative repression are more and more parallel and complementer policy tools. Fines of some sectorial regulations (competition law, commercial law) are often much heavier than financial penalities of criminal law imposed on the same offence.

ac) Certain of ideas call for the redirection of administrative penal law to criminal law (*criminalization theory*). Not in its whole, as within administrative penal law the administrative penal power is refused only in case of criminal infringements. Criminalization could be interpreted for the full spectrum of administrative penal law: in this case, repression could be possible only by criminal law through the judicial way. The moderated version of this theory aims to solve the dilemmas of contravention law by criminalising the petty offences endangering the public order, thus urging the restoration of criminal trichotomy (recriminalisation). One can assume that researchs only comparing the contravention law with criminal law could not answer all the questions of the complex and extended sanctioning system of administration. It examines only a segment of the expanding administrative sanctioning system, within this, only focuses on the distinction from criminal law as the main set of legal principles.

b) The European Convention on Human rights has basically marked out the new prospects of the theory based on the fair trial standards. This idea makes administrative penal law free from the dogmatic thesis according to which 'penal sanctioning is equal to criminal jurisdiction' and states that administration can also practice sanctioning power within the frames of fair trial principal guarantees. The thesis of this approach is that *the conceptual and principal frames of penal power shall be defined by the features (aim and level) of the sanction that can be imposed, not by the legal categorization of the offence.* It shall be decided on the basis of *the sanction-test* whether to apply the system of the criminal field, independent from the classification of legal branches (e.g. in the administration as well). The ECHR has anchored in the Öztürk v. Germany case (ECHR, *Öztürk v. Germany judgement* of 21 February 1984, Series A no 73) by introducing the sanction-test under what conditions can the legislation take the sanctioning out of the principal domain of criminal law. The guarantees of the 6th and 7th Articles of the European Convention on Human Rights are also to be considered under the principal domain. According to the judicial practice of the European Court of Human Rights the application of criminal and administrative penalties has uniform requirements regarding the rules of penal procedure. The European Convention on Human Rights has made the *'criminal character' of the case dependent on the legal nature of the case, the aim and the level of the sanction* and independent from the legal classification. Based on this *triple criterion, administrative sanctions can mainly be regarded as ones of 'criminal character' in the interpretation of the ECHR as well.* The ECHR has poorly elaborated this test for the principles of substantive penal law, p.ex. subjective criminal liability (see 7th Article of the Convention).[15]

[15] The uncertainty of differentiation between administrative or criminal qualification is proved in the theory of administrative law as well as in the judicial practice of the ECHR. The ECHR recognizes that domestic legislation has free option to qualify an offence as administrative one, but by this act the enforcement of due process is not ruled out in the proceedings of the given offence. Having regard to substantive

All repressive (penal) sanctions theoretically belong to the same principal domain, independent from their classification into legal branches (criminal, labour, administrative). Penalty has such an inherent system of requirements in content which prevails as the unchanged matter of penalty independent from the nature of the offence. Ensuring the necessary substantive and procedural guarantees, administration can ultimately receive penal power for offences of any character and gravity – this is verified also by our written law in effect. All this is confirmed by 'the difference theories' as well in such an extent that they also could not provide adequate distinctive features of qualitative or quantitative character for differentiating the principal safeguarding system of criminal law and administrative penal law (or rather the quantitative distinction only concerned contravention law).[16]

3. European models of administrative sanctioning

The Member States of the European Union can be classified into three main groups in respect to administrative sanctioning.[17]

a) The first group consists of those states in which *all types of administrative offences and their sanctioning are mainly subject to an act of law providing unified system of substantive and procedural rules*. For instance, *Germany, Italy, Austria, Bulgaria and Portugal* belong to this group. Within the group, some countries can be identified that only the smaller part of administrative penal power is regulated by the unified substantive and procedural code as the 'contravention-like' form of offence. The Czech, Slovak and the Hungarian systems can be listed here. There is regulated 'administrative penal law' in the German system, while in Hungary only contraventions are coherently codified which is only a narrow section of the real penal power of administration. The so-called OWiG (Gesetz über Ordnungswiedrugkeiten, Act of Law on Infringements) gives a framework in the *German system* to the group qualified to be infringements (Ordnungswiedrigkeit) including all types of administrative offences and sanctions. The German regulation provides standards to follow not only for Hungarian administrative penal law, but it is more often mentioned as the model of unified regulation of administrative sanctions in other European countries

principles, in particular to the requirement of culpability it would also be necessary to clarify in a similar manner to the practice of Art. 6 to what extent the offences and sanctions have fallen out of the principles of substantive criminal law in the process of decriminalisation, in other term to what extent the administrative penal law may be independent from the constitutional criteria of criminal responsibility.

16 The resolution of the 14th International Congress of AIDP (1989) also stated that administrative label, efficiency and proactive reasoning can not justify the lack of fair trial standards: administrative-type retributive sanctions require application of the basic principles of criminal law and of due process. Special emphasis was put on the defendants' right to be informed of the charges and evidence brought against him, the right to be heard, including the right to present evidence and the recourse to the judiciary and to adversary proceedings should be possible.

17 National systems have been increasingly affected by the EU-level administrative sanction policy. National implementation of EU interests and EU law shall meet the requirement of effective and deterrent toolkit.

(England, Netherlands). Thus, the German model is likely to become in time the pattern for administrative penal policy for the European countries. A coherent and comprehensive substantive and procedural regulation (Verwaltungsstrafgesetz, VStG 1991) can be found in the *Austrian system* as well, which may be a model also for Hungarian administration.[18]

b) The second group comprises the countries which *apply the penal power of administration, however administrative sanctioning has no codified basis and a coherent system, for example Belgium, Spain, Greece, France and Holland.*

There is a legal regime in *France* as well which is defined as administrative penal law and is similar to our contravention law, but it is none of the competence of administrative bodies. Trichotomy is continuous in France, and the slightly dangerous offences threatening the norms of social coexistence are considered by the courts as contraventions. Therefore the penal power of administration covers only those sanctions which serve the enforcement of a substantive regulation and which are applied by administrative bodies.[19]

c) The third group is constituted by those countries, which *are exploring the penal power of administration named 'civil sanctions'*. In this model, the traditionally exclusive means of sanctioning regulatory offences are the penal law and penal procedure. Offences of minor gravity, non-criminal character are considered as regulatory offences. In the English legal system 2005 was the year when those revolutionary changes were launched which aimed to introduce the extensive and regulated system of regulatory penalties.

In 2005, Philip Hampton published his report '*Reducing Administrative Burdens*', which identified a practical obstacle to delivering a proportionate and effective system of regulatory enforcement: there was inflexibility in an enforcement regime that restricted regulators to processes of criminal prosecution. Several papers proposed many sanctioning options for consideration including administrative sanctions, venues for hearing regulatory cases, as well as alternative sanctions to be used by the judiciary such as reputation related sanctions or corporate rehabilitation, and the role for restorative justice. The Macrory review suggested that the criminal law is used too readily in regulatory situations and recommended that the Government review the drafting and formulation of criminal offences relating to regulatory compliance, with a view to considering whether some offences should be decriminalised.[20]

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[18] Delmas-Marty – Teitgen-Colly (n 5); Kis-Nagy (n 9) 149–180.

[19] The system of administrative and penal sanctions… (n 5) 179.; Mourgeon (n 10); Étienne Picard, La notion de police administrative (LGDJ 1984); Rapport de la commission du rapport et des études du Conseil d' État, du 8 mars 1984; J. de Bresson, Inflation des lois pénales et législation ou réglementations techniques (RSC 1985) 241.; Kis-Nagy (n 9) 190–210.

[20] B. Macrory recommended to designing the appropriate sanctioning regimes for regulatory non-compliance, and that the regulators should regard to the following six Penalties Principles
1. Aim to change the behaviour of the offender;
2. Aim to eliminate any financial gain or benefit from non-compliance;
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
6. Aim to deter future non-compliance

d) The supra-national level of administrative penal law *is the EU Sanction Policy that is protecting the community interests of the EU and the community law.* The European Union needs such a system of legal protection which can provide the community policy and the law of the EU serving it with adequate safeguards against infringements. A part of these is so-called supranational legal interests, which does not automatically become the part of the domain protected by national laws (criminal law or administrative repression). The concept of supranational legal interests means the community values to be protected which are specifically related to the law and community interests of the European Union, and go beyond the sphere of interest of a given Member State. Such a supranational legal interest is the budget, the subsidies and the transparency of the administration of the Union for instance. The sectoral EU legislation mainly becomes – directly or through transformation – the part of national law (e.g. in the fields of agriculture, competition, occupational safety, etc.), however, the protection of these can also be subject to community-level action.[21]

4. The concept and aims of administrative sanctions in the Hungarian law

The literature of the discipline classifies administrative sanctions into two groups: *enforcement measures and penalties. Enforcement measures* targeting for the restoration of a certain legal state have the aim to *realise rights and obligations in the future, with a preventive mean.* Contrary to that, *penalty is a sanction imposed for an unlawful act committed in the past aiming for a proportionate repression.* Among these sanctions there are action-type sanctions of mixed character which show the features of both types of enforcement. Administrative sanctions show a colourful picture in written law according to their aim, sort and level.

4.1. Administrative repression

The penalty (repressive sanction) is the enforcement of liability for a violation of law through a proportional sanction. The fundamental instrument of administrative repression is the administrative fine. *Repressive sanction has a concept going beyond the legal*

The Regulatory Enforcement and Sanctions Act 2008 created an extended, more flexible and modern sanctioning toolkit that aims to be better able to meet the needs of regulators. The reforms were designed to bring consistency into the sanctioning toolkits across the system.
See Macrory (n 11).

21 See more in Ch. Harding, European Community Investigations and Sanctions (Leicester University 1992); European Commission Report: The System of Administrative and Penal Sanctions in the Member States of the European Communities I. National Reports (ACSC-EEC-EAEC 1994); Kis (n 6) 373–398.; Kis Norbert – Máthé Gábor, European Administrative Penal Law (BCE 2004).

branches. It is not exclusively connected to criminal law. The penal monopoly of criminal law ceased to exist in legal systems with the evolution of administrative penal law. Conceptually, repression is not a purpose of the penalty. Penalty has its purpose in itself: in the public declaration of legal integrity, in the retribution without any regard to the purpose. Penalty is not necessarily connected to target tracking or adequacy-for-purpose, as its application may be imperative, just and reasonable even if it is not effective or does not fulfil any purposes. The principle saying that offence deserves penalty can prevail without target tracking, effectiveness and efficiency (resolution Nr. 23/1990. (X. 31.) of the Hungarian Constitutional Court).

The sanction brings about the effect of individual and general prevention *(prevention through repression)* besides its repressive e.g. penal purpose. Repression and prevention do not exclude each other. This is verified in the criminal law that is *the specific and general preventive purpose of penalty as proportional retribution is expressed by the Penal Code.*

Repressive sanction is to be categorized as penalty. Regarding the primary legal feature of fine, it is a penalty. However, domestic regulation does not designate administrative fines as penalties – in order to avoid doctrinal disputes with criminal law. Even criminal law regards 'fines' applicable on legal persons as measures rather than penalties. Contrary to that, fine is a penalty under the Act on Contravention and in our view administrative fines shall be considered likewise.

Council Regulation No 2988/95 on the protection of the European Communities financial interests marks of community administrative penalty from preventive measure. Measures are the obligation to pay or repay, the loss of the security provided and the failure or revocation of receipt of an advance (Article 4). Contrary to the measure, c*ommunity administrative penalty is based on the condition of liability* (intentionally or by negligence); under this category the following penalties are enlisted: payment of an administrative fine, total or partial removal of an advantage granted by Community rules, exclusion from or withdrawal of the advantage and other penalties of a purely economic type (Article 5.). Measures (e.g. partial or total restriction of operating entitlement, restriction of rights connected to assets, restriction of preferences or advances, etc.) are also applicable on the basis of violition committed in the past; and they do not lose their penal nature even if they involve performance constraint.

The main problem of Hungarian regulation: it does not lie in the lack of formal terminology of administrative penal sanction either as a penalty or as a measure. Obviously, in case of an adequate regulation the liability and procedural condition could be harmonised in a coherent way to the category of penalty or that of measure: according to its inherent features penalty requires subjective liability and increased legislative (principle of legality) and procedural safeguards; while measures can hold on to the practice of objective liability and less strict procedural safeguards in proportion to their security-reparative character.[22]

[22] Kis Norbert, A bűnösségi elv hanyatlása a büntetőjogban [The decline of the principle of culpability in penal law] (Unió-Gondolat 2004) 192–219.

4.2. The preventive purpose of the administrative sanction

The conjunctive purpose deriving from the preventive effect of the sanctions of penal type: *individual and general prevention. Fine primarily carries repression*, it enforces the penal demand of the State, but it also has a preventive effect. *A substantial part of domestic sanctions regarded as measures has primarily a preventive purpose at the same time retaining its penal character.* These are also imposed because of and as an answer for acts of violation committed in the past; however their effect and purpose mainly aim to prevent the future reiteration of the violation. Such sanctions are the measures that temporarily or permanently restrict the practice of the given right.

Measures of penal type can also be found in substantive criminal law; e.g. disqualification from driving or professional activity (which are expressly regarded by the Criminal Code as penalties); in contravention law: disqualification from driving as a measure of penal type. The penal character of the measures is intensified by the fact that the subject of the sanction usually perceives it as a punishment. The repressive character is also confirmed by the extent of the detriment caused by the given measure (e.g. revocation of an allowance). Terminology is inconsistent, but it is essential that the repressive-preventive character of the fine and the preventive purpose of the repressive measure be acknowledged.

4.3. Reparation, restoration

Beyond the purposes of penalties and enforcement measures, reparative measures and measures of restoration can be placed within the frames of distinct systems of safeguards and principles. *The aim of reparation is to ensure the restoration of the original situation. Legal integrity aims at resettling the lawful status after the violation of law.* The measure aiming at the enforcement of reparation can prevail with limited procedural safeguards, without the establishment of liability (the return of the objects involved in the contraventionor seizure for the benefit of the state). Reparative-restorative administrative sanctioning is getting preferred in the development of European national and EU administrative sanctioning policy. This development has such a background in legal policy that the perpetrator pays the multiple 'price' of the violation to the violated sector, with the aim of reparation. If this 'price' is high beyond the damage caused, it is not reparation any more but penalty regarding its legal nature.

5. The administrative fine

5.1. Defining elements

The administrative (substantive law) fine is the general type of administrative penal sanctions. It should be distinguished from fines imposed for procedural failures (defaults). Fine is the *personalised sanction* related to the violating person. If it is not paid by the infringer or 'passed on' to other person by the public administration, the repressive function of the

fine is not able to occur. Repression by fine should not only have an individual preventive effect on the infringer, but also prevents them from future violations. The other theoretic purpose of penal doctrine, *general prevention*, shall also be applied. The general preventive effect, raising the legal awareness of other persons but the infringer, can apply through the consistent and rigorous fine-setting practice. *Fine combined with compensation function* is getting increasingly common in legislation (e.g. environmental industry, forest protection fine). In fact, public administration does not claim for damages according to civic liability, hence the reparative function is set hidden in the level of the fine. A precise calculation formula is included into the fine set in the law, which incorporates the damage caused. However, precise regulation of fine calculation is a rare exception in Hungarian law.[23]

5.2. The extent of fine

It can be stipulated 'numbers game' concerning the regulation of administrative fine-setting in Hungary. Regarding the extent of fine there cannot be found one regulation similar to another one either numerically or methodologically in the domestic fine system. The concept of administrative fine is different in every sector; moreover, there are even different fine policies within the sectors. The regulation of possible extent of sanction is a matter of *legal certainty*. Obviously there is a *wide discretion on setting of fine*, however, circumstances of the extent of sanction shall be regulated. In Hungary the usual regulatory method of administrative legislation sets the frameworks of fine scale (lower and higher end of the scale or only the minimum) and the calculation of the fine to be paid is the subject of legislator's discretion after considering the circumstances of the case concerned. Authorities are usually entrusted with the assessment of the gravity of violation, the aggravating and mitigating circumstances occurring during the setting of fine levels; it is less common (e.g. construction fine) that these factors are taken into consideration by the legislature. Regulation, regarding the extent of the fine, shows and also determines to what extent the fine is considered absolute, dominant or just supplementary in the given sector. This idea of the legislature does not necessarily apply to law enforcement, since the cumulative application of administrative fine and other penal measures as well as contravention sanctions is left to the discretion of the authorities.

5.3. Principle of proportional fine

General application of *principle of proportional sanction* is still missing from the Hungarian regulation. The sanction proportional to the gravity of violation is the fundamental principle of penal doctrines. Disproportional punishment is unjust and unfair. Criminal and contravention law declare that the punishment imposed should be consistent with the

[23] Models of fine-setting and calculation in Hungarian law is overviewed in Kis-Nagy (n 9) 89–100.; It is worth making comparison with that UK law models of fixed and variable monetary penalties that are analyzed in Macrory (n 11) 57–60.

gravity of the act. Therefore disproportional punishment also constitutes *unlawfulness.*[24] Legal regulation not applying the principle of proportionality *is contrary to the rule of law principle (legal certainty).* The Hungarian Constitutional Court dealt with the principle of proportional punishment in view of constitutionality of criminal law (Decision 14/2002 (III. 20.) Constitutional Court). According to the Court (1.4) 'from constitutional point of view the function of imposing penalties by normative regulations is to allow the imposition of penalty to the perpetrator in consistent with proportionality and the circumstances of guilty [...] Legal restriction by the penalty – concerning its level – shall be in accordance with the principles of proportionality and necessity as well as ultimat goal of criminal law'. (1214/B/1990. AB Decision, ABH 1995. 571., 576.) [...] *The legislature regulating the administrative sanctions shall be held to account for these constitutional requirements.*

In the context of rule of law principle Hungarian Constitutional Court has underlined in many occasions that 'One of the fundamental requirements of the rule of law is that the public authorities operate in an organizational structure and procedure defined by the law and *operate transparently and predictably within the limits* of the law.' [56/1991. (XI. 8.) AB Decision, ABH 1991. 454.] *The absolutely indefinite administrative penal system does not provide a predictable and foreseeable procedure either to law enforcers or to legal entities.* The lack of legal *uniformity* in fine-setting practice is closely related to the problem of legal uncertainty. Freedom of discretion assuring individualisation shall be applied by law enforcement, although this cannot lead to absolute indefiniteness and enforcer deviations.

Proportionality shall be observed at two levels: legislative individualisation and law enforcement individualisation (individualisation: individualised sanction imposed on the infringer, objective aspect, for the act, subjective aspect).

- *Legislative individualisation* means that the item of fine set by the law shall be proportional to the abstract material gravity of the punishable act. The requirement of proportionality can be achieved by setting fine levels and regulating the imposition circumstances. These requirements are fulfilled poorly by the domestic legal regulation.
- *Law enforcement individualisation* means that the authority, within the limits of the law, sets the exact level of the fine considering the exact material gravity of the act and respecting the purpose of individual and general prevention. Law enforcement proportionality is being violated, if the authority practice imposes fine irrespective of these conditions. The law enforcer's decision reasoning on fine-setting would be an important proof of law enforcement proportionality; however, it is hardly taken seriously by the authorities. It is partially because the law constituting the fine is also poor on fine-setting. Legislature is also responsible for securing the individualisation of law enforcement, which can be enhanced by the legal regulation of proportionality and imposition circumstances.

[24] The principle of proportionality is also required by the Council of Europe Recommendation on Administrative Sanctions (No. Rec (91)1) and the Council of the EU Regulation No. 2988/95 on administrative sanctions).

5.4. Regulation on the extent of fine in Hungary

There are several regulation models:

1) *Relatively definite system* is when the lower and higher end of the fine scale is set.
2) *Absolutely definite system* is when there is a detailed calculation formula on defining the level of
3) *Absolutely indefinite system* is when the higher end of the scale is not set.
4) *Complex regulation system* of fine-setting when the regulations mentioned under 1)-3) points include *fine-setting criteria.*
5) *Relatively definite complex system* (points 1. and 4.) could be considered ideal and a regulation to be uniformly followed, which supports the recognition of proportionality even by the detailed regulation on imposition circumstances. The crucial aspect of the Hungarian administrative sanction system is that the starting point of fine-setting for both the legislation and law enforcement is 'the highest fine possible' and not the concept of necessary and proportional fine. Proportionality is neither applied in legal regulations, which causes problems to the entire legal sanction system, since *indefinite administrative sanction may be much heavier than criminal penalties for the same offence.*

The application of a*bsolutely definite system* is getting more common too. The regulation offers objective criteria on imposition and calculation to law enforcer. This scheme eliminates or minimizes law enforcement discretion on fine-setting. Elimination of law enforcement discretion (individualisation) is not a constitutional issue. According to the *AB 498/D/2000.* Decision of the Hungarian Constitutional Court the legislature is not obliged to grant discretion power to the law enforcer in exercising administrative competence.

General problem on the proportionality of administrative penal system is: *regarding the rules on fine-setting, it does not provide differentiation between natural and legal persons.* Fines to impose on natural persons by law enforcement shall obviously be based on circumstances different from that of legal persons. The preventive effect of the framework could be sufficient to a natural person, but insufficient to a corporation; while there are measures that could be necessary against a corporation, but could be disproportional and unfair to a natural person. There are rare exceptions like public procurement or insurance fines which have various, adjusted items to different entities.

5.5. The aggravating and mitigating factors of fine-setting

Aggravating and mitigating circumstances, entities and objects covered by fine-setting regulations would significantly improve proportionality and legal uniformity. These are rarely, using inconsistent listings, defined in domestic legislation. Legislative failure is aimed to be unified by *the internal guidelines and policies of the authorities* on fine-setting practice. However this *soft-law* cannot sufficiently guarantee legal certainty and predictable law enforcement. Circumstances like nature and extent of damage and danger caused, number of people concerned in the violation, repetitive nature of the violation, sector specific details of these aspects etc. should be considered as objective circumstances in fine-setting individu-

alization. In some areas imposition criteria can be considered 'developed', like fine-setting practice of the Hungarian Competition Authority (Notice No. 2/2003).

Subjective fine-setting circumstances shall be examined according to the different entities of fine. In case of a natural person the financial status, family circumstances, the degree of subjective liability (deliberate perpetration, grossly or slightly negligent perpetration) should be examined. In order to apply special prevention sufficiently individualisation, according to circumstances of entities, shall be given much room during fine-setting. In case of business entities or persons (e.g. private entrepreneur) the financial status determines primarily the amount of fine which is enough to achieve the repressive effect. However, even the objective proportionality related to gravity of the violation must not be lost sight of. Pursuant to the concept opposing the fine-setting method according to the individual circumstances of the subject, only the objective circumstances of the case, by measuring infringers in different situations to same standards, shall be taken into account in fine-setting.[25]

6. Administrative sanctioning measures

There is an other type of administrative sanction besides penalties: *substantive sanctioning measures.* The two instruments of administrative repression, applied by the EU legislation as well, are administrative penalty and preventive measure. Distinction between measures and penalty sanctions is recognized both by criminal law and contravention law.

The *target system* of measures is *of mixed nature.* Primarily penal purpose, primarily preventive purpose, reparative purpose and legal protection purpose measures will be distinguished.

Unlike fine penalties measures

- apply more differentiated legal sanctions,
- are more specified and individualised sanctions,
- can be imposed, mostly, on purely objective basis (based on the fact of violation).

The common characteristics of penal and preventive measures are also imposed because of and as an answer for acts of violation of law, however, their aim and effect is (also) to prevent future reiteration of the violation. The penal character of the measures is intensified by the fact that the subject of the sanction usually perceives it as a punishment. The repressive character is also confirmed by the extent of the detriment caused by a given measure (e.g. revocation of an allowance). Regulation usually offers the law enforcement the possibility to apply measures along with fines. Even in the absence of the explicit delegating provision: measures may be applied cumulatively together with fines and other measures. Measures are mostly considered strict liability (so-called: objective) sanctions by the Hungarian

[25] In the UK system of Variable Monetary Administrative Penalties regulators are required to develop and publicise a method for calculating the penalty for regulatory non-compliance. Macrory showed examples of aggravating and mitigating factors which regulators could take into account when determining the appropriate level of Variable Monetary Administrative Penalty in Macrory (n 11) 50.

regulation. The administrative sanction system offers a wider range of sectoral measures that have very little in common to generalize.

7. Personal element of the administrative sanction: 'Who is to blame for administrative offence by sanction?'

7.1. Natural persons

The subject of the administrative penal sanction is a natural person or an organization that shall be imposed by legal sanction in order to achieve the penal purpose. Principle of *rule of law* requires making legal entities aware if sanctions as legal consequence of their administrative offence can be imposed on them. Predictable and uniform law enforcement demands to make the authority clear on who and on what they can impose administrative penal sanction exclusively or in parallel (with more). Theoretical evidences concerning the subject of sanction are also postulated by other fields of law, although applied the least in provisions establishing administrative sanctions. Fundamental civic and corporate rights, besides legal certainty, are put in danger if it is not clear who was intended to be sanctioned by the legislature. *Administrative penal sanction can only be imposed on persons accountable for the violation of law. The accountability for violation establishes the legal liability for violation: this is an objective criteria of liability.* The legal liability, the accountability established, is sanctioned. Person(s) liable for the violation ant the subjects of administrative penal sanctions shall be same. The liability for the violation can be established by the accountability criteria. *If the criteria of liability are not applied in the accountability of the person commiting the violation, the violation of human dignity has to be concluded.* In European constitutional legal practice legal restriction caused by the repressive sanction shall be *necessary and proportional* to the subject of the sanction. These two criteria cannot be applied if the accountability of violation to the given person is not based on clear and fair conditions.

Accountability of violation shall be based *on objective and (possibly) subjective criteria.* These shall establish the blameworthiness and imputability of the violation by the given person of a corporation. Repressive legal sanction could affect many other persons indirectly through the person of the sanction (e.g. the penalized legal person is forced to cut wages); the victims of these indirect sanctions are not considered as subject of the sanction. *The person to be imposed by the administrative sanction shall be defined by the law*; this is the criteria of legal certainty. *The negative key issue of administrative sanctions: criteria of attribution of the offence, e.g. who and based on what critera shall be accountable.*

If the legislation provides exact answers to the questions above: it is called the *legal attribution of the violation.* It can be assumed that the administrative sanction is imposed on the person commiting the administrative offence. The common definition of perpetrator does not exactly clarify the subjects covered by the sanction; its legal definition is based on the subjective and objective criteria of accountablitiy. This is the same system in criminal and contravention law too; not only those considered perpetrator establishing the fact patterns, but others are also accountable (e.g. accomplices, legal persons, leading officer

of a business). However, sanctions extending the definition of perpetrator require definite legislative criteria. The subjects covered by the puntitive sanction shall be defined by the legislation. *It is a guarantee requirement, that the legislation shall exactly clarify who shall (imperative) or may (facultative) be imposed by sanction.* The result of poor differentiating of persons to be sanctioned is that the Hungarian administrative legislation usually *does not make distinction between the sanction criteria of natural and legal persons.* The fine-setting factors and objectives are also not differentiated according to the subject of the sanction, and highly underregulated as well.[26]

7.2. Special liability of leaders

The absence of regulation on *attribution of liability and sanctions to leading officials of organizations* results in uncertain legal practice in both administrative and contravention law.[27] *Accountability provisions* on natural persons *should clarify the possible sanctioning criteria of leading officials for administrative offences committed in organization (leading official accountability).* In Hungarian regulation persons defined as leading official are often described as persons to be accountable for the offence committed within the organization: vicarious liability (e.g. public procurement and insurance supervisory fines). The criteria of liability needs to be regulated in these cases as well, since neither this type of regulation can authorise an absolute liability of leading officials.

In our view, the model should be the due diligence criteria of leading officials' accountability:

- ensuring compliance with the obligation infringed was under the controlling or directing responsibility of the leading official,
- failed to comply with their controlling, directing or supervisory obligations due diligence,
- compliance with controlling, directing or supervisory obligations due diligence would have anticipated or prevented the violation of law.

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[26] Strict liability and vicarious-approach based attribution principles related to Hungarian regulatory sanctions are broadly analyzed in Kis (n 23) 143–216. and Kis-Nagy (n 9) 66–73. A comparative study can be found in Kis-Máthé (n 22) 76–130., that is based on the following studies: A. Légal, 'La responsabilité pénale du fait d' autrui' in Mélanges Jean Brethe de la Gressaye (Bière 1967) 477.; N. Catala, La responsabilité pénale du fait de l' entreprise, (Masson 1977); A. Ashworth, 'The value of strict liability' (1969) 2 Crim. L. R. 5–18.; G. Richardson, 'Strict Liability for Regulatory Crime' (1987) 19 Crim. L. R. 294–306.; M.Delmas-Marty (n 3); Mireille Delmas-Marty – J.A.E. Vervaele, The Implementation of the Corpus Iuris in the Member States (Intersentia 2000) 256.

[27] Special liability of leaders in Hungarian law is analyzed in Kis (n 23) 176–184.; and Kis-Nagy (n 9) 38–50. A comparative study can be found in Kis-Máthé (n 22) 76–130., that is based on the following studies: Robert Legros: La responsabilité pénale des dirigeants de sociétés et le droit pénal general (RDPC 1963); B. Fisse, 'Vicarious Responsibility for the Contractors' (1968) 1 Crim. L. R. 536.; P. R. Glazebrook, Situational Liability in Reshaping the Criminal Law (Stevens 1978); Droit Pénal des Affaires Tom.I. (1990) P. U. F.; C. Wells: 'Culture, Risk and Criminal Liability' (1993) 25 Crim. L. R. 551.

7. 3. Administrative sanctions of corporations

Corporate administrative penal liability is at the center of regulatory shortcomings regarding the subject of the sanction for many reasons. Legal practice as well as legal literature is leading towards (increasingly strict) sanctioning of legal persons. *In the absence of regulated accountability citeria legal persons are often to be held liable for any employees' infringements (absolute liability).* This *legal uncertainty* on the one hand, endangers safe operation of business operators and, on the other hand, constitutes a negative factor of business competitivness. Although the approximation of the economy's legal environment to EU standards is an important element of EU membership, today it is most unlikely that there would be uniform liability criteria for administrative sanctioning of legal persons. This is why in European and Hungarian legislation the *regulation, transparency and legality* of this area is getting increasing importance.[28]

Development of corporate administrative penal liability (sanctioning) share similar charachteristics with the majoirity of European legal systems. One of the features they have in common is that sanctioning criteria and scope has no regulated, legal form. *Council of Europe Recommendation* (R.91./1.) declaring legality of administrative sanctions underlines the following for a reason: 'Legality is not limited to natural persons as protection of constitutional rights apply to all legal entites, including both natural and legal persons.'Analogy between the criteria of corporate criminal and corporate administrative penal liability is a widespread opinion, e.g. *the application of corporate criminal accountability doctrines for corporate administrative penal sanctioning.* Harmonization process reflected in integration documents of the Council of Europe and the EU indicates the increase of a new paradigma which considers administrative sanctions as a real alternative to criminal law. Emphasis is on the requirement, regardless the specification of legal branches, to *set a well-functioning repressive and preventive sanctioning mechanism.* EU documents *offer and require detailed liability regulations regarding repression against corporations as well.*

In our view, *basic questions of corporate administrative penal liability to be clarified regarding accountability in Hungarian legislation are as follows*

a) What kind of legal persons are subject to liability: public institutions, government bodies?
b) Regulatory type model of corporate liability: vicarious (indirect) or direct liability?

[28] Corporate liability for regulatory offences in Hungarian law is analyzed in Kis (n 23) 220–325.; and Kis-Nagy (n 9) 38–50. A comparative study can be found in Kis – Máthé (n 22) 114–119., that is based on the following studies: G. Couturier, 'Répartition des responsabilités entre personnes morales et personnes phisiques' (1993) 6 Revue des Sociétés 308–313.; Wells (n 28) 552; J. Pradel, Droit Pénal Comparé (Dalloz 1995) 383–386.; G. Heine (ed), Overview in Environmental Protection – Potentials and Limits of Criminal Justice (Freibourg 1997) 45.; Robert Roth, 'Responsabilité pénale de l' entreprise: modeles de réflexion' (1997) 61 Revue de Science Crim. 357–381.; H. Alvart, 'Establishing a Basis for criminal Responsability of collective Entities' in A. Eser – G.Heine – B.Huber (eds), Criminal responsability of Legal and Collective Entities (Iuscrim 1998) 145.

c) General characteristics of violations of law to account for?
d) Does the action required to be committed in the interest of the legal person?
e) Does the action required to be included to the activities of the legal person?
f) Does the action required to fall under the responsibility of the perpetrator natural person?
g) Is committing an act of negligence also included to accountability?
h) Does the action require to be related to organizational failure or errors or omissions of the leading official are enough?
i) What is the definition of organizational failure?
j) Is 'breach of duty' a general condition?
k) Is proving diligence of leading official a cause of exemption?
l) Does the leading official, who breached duty required to be held responsible for in parallel?
m) Is the parallel sanctioning of offender employee and legal person possible for the same violation of law?

General criteria, not only liability and accountability, but *sanction-setting criteria*, of corporate administrative penal sanctions, *should be regulated so as to secure transparent set of conditions*. This effort recalls a decade of unsuccessful endeavour to substantively unify, theoretically elaborate and codify administrative sanctions. Hungarian contravention law is unable to integrate all instruments of administrative repression; this is the reason, but not the only one, why it is (and will) *not able to solve the regulatory problems of corporate administrative repression*. Concerns are neither dogmatic nor constitutional. Introduction of corporate criminal law in Hungary (Act CIV of 2001) proved that non-individual sanction system can be separated from individual liability. However, the sectoral scope of contravention law has weakened within the administrative sanction system, dozens of sectoral penal mechanism, which are the source of problems, does not fall within the scope of contravention law which makes the contravention law not suitable for integrating corporate administrative repression. *A uniform regulaton including administrative sanctions of corporates shall be adopted within the general legal framework of the act on administrative penalties and measures.*

8. Culpability criteria of administrative sanctions

Administrative sanction implies the liability of the subject of sanction for the violation of law. There are two reasons why liability criteria of administrative sanctions have become a controversial issue in Hungarian law. First, the prevailing attitude in sanctions is that administrative sanction is a so-called strict liability sanction which can be imposed regardless liability investigation, based on the fact of the violation, in order to constrain regulatory compliance. Secondly, the legislative approach, which *puts the liability (positive and negative) criteria beyond the regulation*, has flourished in the legislation of administrative sanctions even without the theoretical critics.

8.1. In terms of liability classification of legal sanctions to be imposed on natural persons strict liability sanctions can be distinguished from subjective liability sanctions. Liability criteria and classification.

Strict (objective) liability means that the fact of offence constitutes the imposition of the sanction on the addressee of the obligation. Sanction is not conditional upon the person's mens rea (guilty mind) or their accountability for conduct. The fact of violation (question of fact) establishes the sanction regardless further examination of liability.

Subjective liability means that offender's culpability, negligence or intention are required to be sanctioned. Hungarian regulation mostly sets incoherent and variant subjective liability criteria:

- positive liability criteria: accountability and negligence formulas
- negative liability criteria (causes for exemption).

Two forms of liability have *mixed rules* that *regulate (objective) causes excluding liability (e.g. force majeure, Statue of Limitations): these are not-purely objective sanctions.*

According to the widespread practice of authorities the administrative fines and measures are strict liability sanctions. (Moreover, objective nature of the sanction is sometimes unlawfully interpreted by domestic practice of authorities. E.g. construction fine can also be imposed on persons who are not accountable for the violation of law, not only on the builder, but on the future, bona fide buyer of the real estate. The main principle of strict liability concept is that subjective liability (culpability, negligence) is *rarely and inconsequently condition* of the administrative sanctioning of a natural person in positive law.

a) *Objective liability sanction* is when the fact of offence is incontestably established: administrative fines and penalties are applied e.g. in the following areas: *person* and property protection, fire safety, health protection, construction, heritage protection, fish farming and fish protection.
b) *Strict liability sanction: e.g.* the regulation of *wastewater fine* contains special causes excluding unlawfulness so it cannot be considered purely objective. *Sewage emission fine* contains force majeure causes for exemption (excluding liability).
c) Subjective liability sanction: accountability is the condition of liability in the following administrative fines: *animal health, agricultural land and soil protection* and *forest management.* Due diligence liability mechanism is applied exceptionally for *tax penalty* and *capital market supervision fine.*

8.2. Strict liability in administrative sanctions

The spread of strict liability in administrative repression cannot be only explained by spontaneity and anomalies of sectorial legislation. Strict liability has *historical, theoretical and legal policy explanations.*

a) *The concept based on the legal nature of administrative offence.* The explanation supporting strict sanctions is that the administrative punishment is a sanction *not resulting in moral blame and stigmatization,* not assuming moral judgement or disapprobation; it is just 'a reaction to violation of law by penalty'. Sanctions

without moral content can be imposed for morally indifferent violations. No ethical judgement imposed on the sanctioned's act or negligence is required for sanctions not transmitting moral disapprobation; sanction is an automatic reaction to violation. Liability is 'bearing the consequences of judgement on the conduct', using the above written and the formal logic the theory of sanction without liability can even be fitted to the system of administrative sanctions too. Theories built on the moral boundaries of the different nature and laws of the two legal fields have failed due to the lack of quality difference between legal interests protected by the criminal law or administrative law.

b) *The concept referring to the minor gravity of violation of law* claims that administrative offences pose less harm on society than crimes. Minor hazard posed on society means leniency (softer treatment), fewer considerable legal consequences. The fundamental problem is that this concept is *unable to coherently justify that administrative offence presents less threat than criminal offence.* The administrative offences have often higher gravity then its criminal law paralell; these are particularly manifested in the administrative measures, which often cause graver legal consequences than criminal sanctions for the same offence.

c) *Concepts explaining strict liability by referring to the non-repressive purpose of the administrative sanction.* The repressive nature of administrative sanctions would require the real investigation of liability, which are not compatible with strict liability. Thus, concepts denying the repressive nature of administrative sanctions underline the law enforcement function of the sanction. Instead of repression (retribution, punishment), the enforcement of law-abiding behaviour is regarded by this approach as the feature of administrative sanctions.

Coming to the critical conclusion, objective sanctions cannot be effective and repressive without liability basis. Preventive impact can only affect people who are guilty of violating the law. Consequently, principle of fairness and reasonable penal policy *require law enforcement to apply the criteria of culpability regarding natural persons in repressive sanctions.* Regarding contraventions, a form of administrative penal sanctions, Constitutional Court defined *subjective liability criteria* in No. 63/1997 Decision. Contravention law does not differ from administrative offence sanctioning in terms of nature, type and the purpose of the sanction. *Therefore, constitutional requirements of violations (presumption of innocence, principle of attributability, exclusion of strict liability) shall also be implemented in other areas of administrative penal sanctions.*[29] According to the 2.b point of the resolution on administrative sanctions issued by AIDP (International Association of Penal Law) administrative penal liability of natural persons should be based on personal fault (intent or negligence). Similarly, liability criteria are also set in *Council of the European Union Regulation No. 2988/95 on administrative sanctions* for administrative penalties (intention or negligence). *Spread of the culpability sanction practice could lead administrative*

[29] Resolution 63/1997 of Hungarian Constitutional Court abolished the vicarious liability of directors (Art 6 al 2. of Act on Contraventions 1968) for the contravention committed by his employee without requirement of personal fault or ommission of director. HCC states that personal punishability (by penalty under Act of Contraventions) needs culpability (intention or negligence).

sanctioning back to its original purpose: effectiveness, preventive and repressive effect. Objective sanctions applying purely objectiv liability are unfair. *In terms of legislation a uniform and comprehensive regulation on administrative penal liability would be desirable.* Falling that, discretion of law enforcement shall rule complemented by the suggested positive and negative liability formulas of liability individualization.

9. The complexity of administrative repression in the legal system

The place of administrative repression in the legal system is basically determined by *its relation to the penal sanctions of other legal branches.* The common historical origin of administrative penal sanctions is the criminal law, which relation to the administrative penal power and their joint relations to other, like violation and civil (e.g. Company Registry), penal sanctions result in the complex repressive system. *Questions of constitutionality, legal principles and effectiveness are raised in relation to this complex sanction mechanism. Parallel repression* also exists in Hungarian legal system; the rationality of the sanction can be assessed by its purpose, nature and gravity.

The parallel between legal branches within one legal system is defined as the horizontal dimension of parallel repression. *The parallel between the national and supranational (European Union) dimension of repression is the vertical dimension* of parallel repression.[30]

Both horizontal and vertical dimensions of parallel repression can be distinguished in two forms of cumulation:

- *homogenous cumulation* in a sense that administrative penal sanctions of different sectors are accumulated,
- *heterogeneous cumulation* in a sense that penal sanctions of different legal fields (criminal law, contravention law, administrative law) are accumulated.

The cumulation of punitive (repressive) sanctions can be divided into three clusters in respect to administrative sanction:

a) Punitive (repressive) sanctions, especially fines (penalty), are applied to the same violation of law parallel in several legal fields: in criminal law, in contravention law and in administrative law (*heterogeneous cumulation*) /9.1./.
b) Parallels can also be found within the system of administrative penal sanctions. E.g. different sectorial substantive penalties on the same violation of law, based on the same fact patterns can be applied in cumulation (*homogenous substantive cumulation*: administrative penal sanctions of different sectors are accumulated) /9.2./.
c) Same sectorial administrative sanction can be imposed repeatedly for the same violation of law (*homogenous procedural cumulation:* same sanction of same sector is accumulated) /9.3./.

[30] The model options of sanction cumulations has been worked out in Kis-Nagy (n 9) 120–135.

9.1. The heterogeneous cumulation

The accumulation of sanctions of different sectors raises concerns about prejudice to the fundamental right not to be punished twice for the same act. Doctrine call this the *'Ne bis in idem'* principle.[31] The right include the criminal proceedings and punishments in the narrow sense. It is applied as a constitutional requirement only to double criminal punishments for the same act (no. 42/1993. Hungarian Constitutional Court Decision). The prohibition of double punishment beyond criminal law is based on the fundamental right of *right to human dignity*, but moreover it is considered as a requirement of rational legal policy.

Parallel application of *administrative penalties and criminal sanctions* for the same act of the same person is neither debated nor prohibited by law. This is still regarded as problematic, since one could hardly convince why administrative offence investigated in criminal proceeding should be evaluated twice, investigated in an administrative proceeding as well, and why a natural person should be fined by an administrative sanction too. Take the criminal and administrative duplication of tax fraud, for instance, from Criminal Code, which is a double (!) criminal and administrative repression.

The ideal solution would be that administrative fines shall not be imposed on natural persons for criminal offences, if already punished for a criminal offence by criminal sanction. However, the parallel application of administrative and criminal penal sanctions is not prohibited by domestic law.

The Act CIV of 2001 establishing the criminal liability of legal persons has become an issue in Hungarian law: *the parallel administrative and criminal sanctioning of legal persons for the same case.* There is no obstacle to the parallel administrative and criminal sanctioning of legal persons in positive law. It would be a pure solution in theory if administrative fines could not be imposed on legal persons for administrative offences, if they were already fined for a criminal offence by criminal sanction. The concept standing in its way considers the criminal fine imposed on a legal person not as a punitive (repressive), but a reparative sanction (crime law repairs, administrative law punishes!). This paradoxical legal policy is partly demonstrated by the fact that the maximum fine to be imposed on corporates is higher for administrative offence than for crimes. The prosecutor's significant expediency and Article 18 paragraph 1 point c) of Act CIV of 2001 stating that court does not apply measures, if they cause unfair disadvantages to the legal person enable to eliminate the double sanctioning of córporates.

Prohibition of double sanctioning has to be held to account during *the parallel application of administrative and contravention penalties.* Administrative fine and contravention penalty imposed on the same natural person for the same act are administrative penal sanctions have the same purpose and legal nature. Administrative substantive and contravention sanctions (fines)

- both aim to repress the violation proportionally caused in the past and thus, prevent future violations;
- both aim to protect administrative operation through official sanctioning.

[31] This aspect of 'ne bis in idem' principle is scrutinized in Kis Norbert – Gellér Balázs – Polt Péter, National report on the principle of Ne bis in idem (2004) 75 International Review of Penal Law/ Revue Internationale de Droit Pénal 989–1007.

Double administrative sanctioning for the same act is *not an absolute prohibition.*

As stated in Article 3 of Council of Europe Recommendation R. 91./1 on administrative sanctions:*'A person may not be administratively penalised twice for the same act, on the basis of the same rule of law or of rules protecting the same social interest. When the same act gives rise to action by two or more administrative authorities, on the basis of rules of law protecting distinct social interest, each of those authorities shall take into account any sanction previously imposed for the same act.'*

According to the guidance of the Recommendation if the double administrative sanctioning is based on different rules of law protecting different sectorial interests, all authorities should respect the principle that penalties must be proportional. Contravention law and administrative substantive law are applied in parallel to ensure sectorial interest; therefore, concerns regarding the prejudice to limited prohibition of double sanctioning are fairly raised.

The issue of heterogeneous cumulation in Hungarian regulation have the following formulas: most frequently 'silent' regulation; rarely permissive regulation; rarely prohibitive regulation.

9.2. The homogenous substantive cumulation

The concerns of double sanctioning are less affected by *homogenous substantive cumulation* (public administration may impose different administrative sanctions in parallel with the same offence basis of sectorial and social aspects). This is when double administrative sanctioning is permitted by the Council of Europe Recommendation: a person may be administratively penalised twice for the same act, if it is based on different rules of law or of rules protecting different social interests (e.g. accumulation of consumer protection fine and health protection fine or quality protection fine). Fair law enforcement and respect for human dignity require all acting authorities to take into account the sanctions imposed for the same act by other authorities.

Homogenous substantive cumulation differs from parallel administrative law – contravention law sanctioning. Although sanctions are accumulated in the homogenous area of public administration, sectorial interests protected by the sanction are different. Homogenous substantive cumulation is common for example in the accumulation of:

- consumer protection fine and health protection fine or quality protection fine,
- competition supervision fine and procurement fine or consumer protection fine,
- fine for unequal opportunities and other (e.g. labour law) fines.

Only few provisions exclude homogenous substantive cumulation (e.g. consumer protection fine can only be imposed if, based on the same act, no other authority did before). Provisions permitting homogenous substantive cumulation are also rare (e.g. waste management fine, environment protection fine, health protection fine)

9.3. The homogenous procedural cumulation

Regulation regarding the relation between prohibition of double sanctioning and *homogenous procedural cumulation* often lays down that same sectorial administrative penal

sanctions can be imposed again (!) for the same violation of law. Multiple sanctioning could only be justified if the situation constituting a violation of law still exists after it was penalised. When the perpetrator is aware of the procedural legal guarantees and of the previous sanction of his unlawful conduct, it is not regarded as the double sanctioning of the same infringer, but as the sanctioning of the infringer retaining the unlawful conduct. Imposing multiple sanctions is not permitted if perpetrator is not aware of the first sanction of his unlawful conduct, thus has not been able to recognize the unlawful situation.

In view of the above written double sanctioning presupposes that the perpetrator is aware of the procedure sanctioning his unlawful conduct (period of grace). '*In absentia*' sanctioning (e.g. on the spot disciplinary measures), which is the most sensitive issues, can violate the concept on prohibition of double sanctioning by retaining unlawful situation unless perpetrator is aware (or was aware) of the proceedings on characterisation and sanction of his unlawful conduct and the unlawful situation is retained. Consequently, fine cannot be imposed immediately again, 'grace period' has to be awaited before repeating sanction.

9.4. The parallel between European Union administrative sanctions and national penal sanctions

The issue of the prohibition of double sanctioning also concerns the parallel application of national administrative penal sanctions and EU administrative sanctions for the same conduct.[32]

Administrative sanctions shall be applied for the purpose of protecting the European Communities' law and interests (so called *irregularities*). *Irregularity* means any violation of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accuring from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure (Article 1, paragraph 2 of Council (EC, EURATOM) Regulation No. 2988/95). Provisions on irregular conduct and related administrative measures and sanctions are implemented in sectorial sources of EU law (e.g. administrative measures applied in common agricultural policy). Sectorial Community regulations, expanding their material scope, form Community administrative penalties, which are set out by the preamble of the Regulation defining the general principles and rules community administrative sanctions.

The ways these Community sanctions are enforced are the following:

- Community sanctions are imposed by *EU* institution (supranational direct enforcement) e.g. EU Commission, Council of the EU;
- Community sanctions are imposed by *member state authorities* (indirect enforcement);
- protection of Community interest is provided directly by sanctions of national legislation within national competence (direct enforcement).

[32] The paralell mechanisms of national and EU-level penal sanctioning is overviewed in Kis (n 6) 373–398.

The prohibition of double sanctioning may occur in the following options:
Option 1) Parallel application of
a) Community administrative sanction imposed by EU institution and
b) National administrative penal sanction, based on Hungarian law and imposed by Hungarian authority,
for the same act.

Option 2) Parallel application of
a) Community administrative sanction imposed by Hungarian authority and
b) National administrative penal sanction, based on Hungarian law and imposed by Hungarian authority,
for the same act.

Option 3) Parallel application of
a) national sanction for the violation of Community interest and
b) sectorial sanction based on Hungarian law,
for the same act.

Option 4) Parallel application of
a) Community administrative sanction imposed by EU institution and
b) criminal sanction imposed by Hungarian Court,
for the same act.

Regarding options 1)–3): The EU Council (EC, EURATOM) Regulation No. 2988/95 (on administrative sanctions) does not explicitly prohibit double (Community and national) administrative sanctioning. Double administrative sanctioning for the same act is *not an absolute prohibition*. Concluding the Article 3 of Council of Europe Recommendation R. 91./1, Community administrative sanctions and national administrative sanctions protect different legal objects. The first protects the EU's financial interests and ensures the proper application of Community law, the national administrative sanction safeguards the rules of regulations and procedures. As the protected legal domain of the double sanctioning is different, sanctions can be imposed in parallel. According to the EC Recommendation all authorities shall take into account any sanction previously imposed for the same act (principle of proportional punishment).

Regarding option 4): According to the preamble of the Regulation (EC, Euratom) No 2988/95 the duality of EU administrative sanctions and national criminal sanctions, imposed on the same person for the same act, is considered to be resolved based on the principle of fairness.

Our conclusion is that Community administrative sanctions, national administrative and criminal sanctions can be applied in a parallel system. However, the principle of fair and proportional recognition of the other penal sanction imposed earlier for the same act shall be taken into account.

Closing remarks

Recently, public admininstrations have an increasing repressive power at national-level, at EU level as well as in international dimensions (UN bodies). Our study provides frames for a comprehensive sanction policy and urges legality in terms of administrative repression. With this objective we have made *de lege ferenda* proposal on a *Framework (Model) Code on Administrative Offences and Punitive Sanctions* securing guiding legal principles for administrative repression. Hopefully the model code will be taken in consideration by policy-makers, legislator and regulators in Hungary, and a reforming process based on the dialogue of academics and regulators similarly to the Hampton-Macrory reforms of UK law enforcement will be initiated in the near future. Our study has given an overview on the administrative penal power in Hungary that has evolved in a dual system since 1955. The dualist way of development has been characterised by the fact that contravention law was supposed to give a unified framework to all sectoral administrative sanctions. However, the idea of unified protection of administration has failed, as administrative sanctions out of contravention law have evolved in an much wider range. The sectoral administrative sanctioning legislation has 'diverted' the repressive system of instruments of protecting the administration from the contravention codification and has created a separate system of sanctions in each sector. No codified framework has been developed that could provide the sanctioning system of the different administrative branches with a common principal and regulatory framework. The main reasons for this were that sectoral regulations of administrative offences and sanctions have not been under coherent guiding legal principles on the one hand, one the other hand legislation has had no intention of passing an act of law in the midst of sectoral heterogeneity to regulate the common rules of sanctioning in line with the requirements of legal certainty. The new Act on Contravention Law (2012. évi II. törvény) narrowed the scope of the contravention law to criminal-type minor offences, thus a clear set of criminal law principles was extended to contraventions. However sectoral regulatory environment of administrative sanctions has remained uncertain and several legality concerns still exist. Altought, there are different legal models in respect to administrative sanctioning in Europe, legislative systems should undertake to provide a minimum framework guaranteeing legal uniformity and certainty to law enforcement regarding e.g. distinction between the sanction criteria of natural and legal persons, principle of proportional sanction, level of sanction, criteria of liability and accountability, in particular corporate administrative penal liability. Obviously there is a wide discretion on setting of fine, however, circumstances of the extent of sanction should have a more sophisticated regulation. The cumulation between criminal, contraventional and administrative repression (the horizontal dimension of parallel repression) should be guided by clear sanction policy and set of legal principles. The parallel between the national and supranational (European Union) level of repression as the vertical dimension of parallel repression also requires policy approach and a regulated guidance.

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