Administrative Sanctioning and Companies: How Protected Are They under the ECHR?

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1. Introduction

Administrative sanctions abound in a modern legal system. From speeding tickets to exorbitant fines for antitrust, market regulation or data protection breaches – their regulatory range is truly broad and implications – not always easy to estimate. These type of sanctions are especially prevalent within the corporate context due to their flexible, variegated and less costly nature as well as the fact that their imposition is accompanied by less rigorous procedural safeguards. However, less procedural protection may quickly turn administrative sanctioning into arbitrary practices of punishment that may even send entire businesses out of existence. Can one seek relief in fundamental rights and prevent this dangerous tendency from materializing, considering the fact that companies are also subject to such rights safe for a few exceptions which are inimical to natural persons?[1]

Against this background, this article seeks to look more deeply into the reasons why administrative sanctions are currently so widely applied, including a comparative outlook, and how the European Court of Human Rights (henceforth 'ECtHR') perceives and treats their imposition within the corporate context. More precisely, the objective of this article is to identify which Convention guarantees that are considered to be 'ironclad' for sanctioned legal persons, as well as to discuss cases, when the ECtHR is demonstrating a more lenient approach and gives less protection for companies when compared to natural persons.

[1] Such as prohibition of torture, see more in M. Emberland, *The Human Rights of Companies*, Oxford University Press 2006.

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2. Administrative Sanctions and their 'Benefits' in the Corporate Context

Even though administrative sanctions have an ages-long history, their rise to popularity happened in the post-war Europe, when public administration assumed more and more novel functions and the push for decriminalization as well as other societal shifts took place. One particular factor could be singled out as having strongly affected the shift towards the use of administrative sanctions from criminal measures, namely – the rise of automobilism and the high-volume of penalties in this domain. In the 70s, they comprised even up to 90 percent of the fines issued in some countries.[2] Confronted with these high numbers, the legislators also came to grips with the fact that courts may not be the most effective organs to deal with these type of sanctions.[3] Instead, the executive bodies were entrusted with this task and there was a drift away from the notion that the infliction of punishment – broadly understood – is quintessentially a judicial function,[4] thus, making the road traffic regulation one of the first subjects of depenalization born out of the need for effectiveness.[5] The tax domain quickly followed suit (albeit with a few limitations) in starting to use a panoply of administrative sanctions, given its task to secure "a functioning State and thus a functioning society".[6] Another rather 'mundane' but important factor influencing the diffusion of administrative sanctions was the fact that an increasing number of offenders

2 *Öztürk v. Germany* (8544/79) judgment of 21 February 1984, para. 40. See for a further approval to transfer the prosecution and punishment of minor offences to administrative authorities in *Baischer v. Austria* (32381/96) judgment of 20 December 2001, para. 23; *Malige v. France* (27812/95) judgment of 23 September 1998, para. 45.

3 Michael Adler, A New Leviathan: Benefit Sanctions in the Twenty-first Century, 43 Journal of Law and Society 2, 2016 p. 196.

4 Karen Yeung, Karen Better regulation, administrative sanctions and constitutional values, 33 Legal Studies 2, 2013 p. 325.

5 Lucio Rubini, *Sanctionary Administrative Law in Practice: Administrative Sanctions in Road Traffic Matters, in Les problèmes juridiques et pratiques posés par la différence entre le droit criminel et le droit administratif pénal (Revue internationale de droit penal)*, 1988 p. 507.

6 *A and B v. Norway* (24130/11 and 29758/11) judgment of 15 November 2016 ECtHR [GC], para. 144. See for the ECtHR's 'conceptual blessing' in this domain cases of *Bendenoun v. France* (12547/86) judgment of 24 February 1994, para. 47 as well as *Janosevic v. Sweden* (34619/97) judgment of 23 July 2002; *Västberga Taxi Aktiebolag and Vulic v. Sweden* (36985/97) judgment 23 July 2002, etc. See, however, for a general debate regarding the (non-)applicability of the ECHR to tax matters in *Ferrazzini v. Italy* (44759/98) judgment of 12 July 2001 as forming 'hard-core of public-authority prerogatives'.

earned enough to be able to pay a fine (thus, the need to turn to imprisonment as a classical type of punishment has diminished).[7]

This shift kept on evolving and nowadays one can even talk about 'privatisation' of administrative sanctions in domains inundated with 'mundane' offences, meaning that the State gladly 'outsources' and effectuates sanctioning even further, when circumstances allow. Effectiveness aside, administrative sanctions have proven themselves to be attractive means of punishment within the corporate context for a variety of other reasons. Firstly, because their imposition is subject to more relaxed standards if compared to the criminal procedure, even if lines do get blurry. It is one thing to sit and wait until the prosecuting authority has adduced evidence of guilt 'beyond reasonable doubt', then to proactively defend one's rights and demonstrate flaws in the accusations made.[8] Since the procedural bar is usually set lower for administrative punishment, the possibilities how to penalize a company seem almost endless as well. More precisely, administrative sanctions may be extremely targeted, i.e. strike at the very profit-making function that the businesses are driven by. For instance, within a highly-regulated industry, a regulator may revoke a licence and thereby spell the end of a particular business. Alternatively, a ban to pay dividends for the shareholders may be imposed that would not kill the business *per se* but greatly disincentive that particular company and promptly bring it back to the desired state of compliance.

Furthermore, the so-called 'naming and shaming' sanctions, i.e. sanctions that the regulator publicize on their websites or elsewhere, present a telling example as well. In business domains which are based on good reputation and trust (such as the financial sector), tarnishing is likely to hurt a company even more than a one-off monetary penalty. Or, if imposed together with monetary fines, these reputational type of sanctions amplify the damage done to the company. Not surprisingly, this type of sanction has been often described as a 'loose cannon' because the extent of damage it may cause can hardly be estimated.[9] Finally, administrative sanctions may offer additional

7 Adler (note 3) p. 197.

8 Antoine Bailleux, The fiftieth shade of grey. Competition law, "criministrative law" and "fairly fair trials" in Francesca Galli and Anne Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014 pp. 146–147.

9 Andreas Ransiek, *Unternehmensstrafrecht: Strafrecht, Verfassungsrecht, Regelungsalternativen*, C.F. Müller: Heidelberg 1996 pp. 400 et seq.

enforcement options for on-going breaches as well as force companies into 'administrative cooperation' by the so-called 'periodic penalty payments', which are basically recurring payments based on company's turnover and are imposed until the offence ceases. Alarmingly, they are starting to become popular in EU law, especially in financial and digital markets law as well as in specialized areas, such as aviation law.[10]

3. "Corporations Cannot Go to Jail": Understanding the Relationship of Administrative Sanctions and Corporations a bit deeper

In the previous section, it was claimed that administrative sanctions are perceived to be an effective and flexible means of punishment. However, there is another important factor that has greatly contributed to their popularity within the corporate context, i.e. the lack of corporate criminal liability in certain legal systems. The lack of criminal liability applicable to corporations has forced such Member States to use administrative sanctions as a surrogate means for punishment and *in extremis* introduce very severe measures applicable towards legal entities through the backdoor (since the public pressure required these entities capable of wielding enormous economic power to be punished somehow, even in absence of criminal liability).

The paragon of this resistance to introduce corporate criminal liability is the German legal system, as it follows the constitutional notion of personal guilt, meaning that legal persons have no moral agency and, thus, can neither be blameworthy nor realize the moral implications of punishment (*societas delinquere non potest*). The German example is remarkable in that Germany continues to resist the introduction of this type of liability for legal persons even though the great majority of European systems had introduced it.[11] Instead, it relies on the system of administrative offences ('*Ordnungswidrigkeiten*'), which allows the imposition of fines ranging from 5 Million euro for

[10] See, e.g., Art. 98 of Proposal 2023/0210(COD) for a Regulation of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) 1093/2010 of 28 June 2023 allowing to impose a periodic penalty of 3% of the average daily turnover of legal persons until "compliance is restored".

[11] See discussions around this notion in Martin Böse, Corporate Criminal Liability in Mark Pieth and Radha Ivory (eds.), *Corporate Criminal Liability: Emergence, Convergence and Risk* (2011), p. 230; Thomas Weigend Societas delinquere non potest?: A German Perspective, 6 Journal of International Criminal Justice 5, 2008, pp. 927–945 (p. 931).

negligent transgressions to 10 Million euro for intentional transgressions as a basic principle.[12] However, even this statutory ceiling can be trespassed, if the illicit profit that stems from the wrongdoing for corporations is higher. This is especially relevant in competition law, in which, e.g., consumer organizations, can retrieve a compensation for their losses caused by anticompetitive behavior. This possibility makes administrative sanctions even more attuned to the economic impact of various corporations nowadays.[13]

The Italian legal system is similar to the German one in that it also has a constitutional provision stipulating that criminal liability is personal as well as should have a re-educational purpose towards the persons convicted.[14] However, Italy chose not to integrate a newly-devised corporate liability within the already existing tools for administrative sanctioning but has adopted a special legislation, i.e. the Legislative Decree No. 231 of 8 June 2001 ('Decree No. 231').[15] This special legislation is preventive in its very nature and makes the instalment of *ante delictum* compliance programs a means for corporations to exonerate themselves from liability altogether – something which has been inspired by the American model and the proliferation of these programs there.[16] At the same time, it is also capable of fulfilling the constitutional requirement that a sentence must re-educate by bringing legal entities back into compliance with law. These programs should pierce the mere façade and express the company's resolution to implement suitable mechanisms to prevent the risk of crime through establishing effective control mechanisms in targeted areas of business activity.[17] Similar to the logic found within the German legal system, an 'economic calculus' is also integrated into the Italian design of corporate sanctioning: for example, confiscation is always ordered of the price or the profit of the crime, except for the part that may be returned to the damaged party (Article 19 [1] of Decree No. 231).

12 § 30 sect. 2 sentence 1 of the German Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten*, OWiG) as amended on 12 July 2024.

13 § 10 of the German Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) of 3 July 2004.

14 Article 27 of the Constitution of the Italian Republic of 22 December 1947.

15 Legislative Decree No. 231 of 8 June 2001 of the President of the Italian Republic.

16 US Sarbanes-Oxley Act of 30 July 2002 of the US Congress is meant here. For a comment on its influence on the Italian model see Fabrizio Cugia di Sant'Orsola and Silvia Giampaolo, Liability of Entities in Italy: Was It Not Societas Delinquere Non Potest?, 2 New Journal of European Criminal Law 1, 2011 pp. 60–61.

17 See more in Rosa Anna Ruggiero, Cracking Down on Corporate Crime in Italy, 15 Washington University Global Studies Law Review 3, 2016 pp. 415–418.

Apart from these two national models relying on administrative sanctions in lieu of criminal liability for corporates, a specific situation regarding the same topic arose also within the framework of the EU law. Here, before the entry of the Lisbon Treaty, administrative sanctions used to be perceived as surrogates due to the lack of criminal law competence as well as in pursuance of specific policy goals of the EU. Criminal law competence was not an easy thing to achieve as it was reflective of the (hurdles of the) legal integration of the Union and the various visions thereof advocated by multiple stakeholders and it continues to be subject to various limitations. Despite this, the EU legal system needed functional deterrents to fend off infringements in a range of policies.[18] The proverbial cradle of these punitive measures was competition law, where the need for effective penalties and fines became acute early on. Administrative sanctions proved themselves to be especially well suited for this legal field: not only could they efficiently and without unnecessary delay be imposed on corporations, which were the recipients of the sanctions, evading the debate whether legal entities could be liable in criminal terms or not, but also flexible in that it allowed to link the size of a penalty with the turnover of a particular company.

Administrative procedure was furthermore more suitable to this domain inundated with the need for complex economic assessments. Due to the dearth of an imprisonment option for corporations and the significant economic interests at stake, administrative fines tended to reach extraordinary heights as the Commission has been nothing but increasing them over the years in order to sufficiently deter infringements. Other significant domains in which administrative sanctions have been successfully invoked have been common agricultural policy,[19] fishery policy, environmental policy, air transportation law,[20] EC financial interests' protection as well as guarding the four freedoms of the Union.[21] The importance of punitive administrative sanctions, thus, has grown over the years and resulted in a parallel use together

[18] Markus Kärner, Punitive Administrative Sanctions After the Treaty of Lisbon: Does Administrative Really Mean Administrative?, European Criminal Law Review 2, 2021 p. 157.

[19] See the paramount importance of agricultural law in shaping general administrative law of the EU in Martin Böse, *Strafen und Sanktionen im Europäischen Gemeinschaftsrecht*, Heymann 1996 pp. 138 et seq.

[20] Böse (note 17) p. 180.

[21] Anne Weyembergh and Nicolas Joncheray, Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture that Needs to be Addressed, 7 New Journal of European Criminal Law 2, 2016 p. 200.

with criminal law measures within some domains even after the criminal law competence was finally introduced by the Lisbon Treaty. That, for its part, creates a friction with the *non bis in idem* principle and may well lead to the 'punitive excess', but that falls outside the remit of this article.[22]

4. The ECtHR's (Autonomous) Notion of Administrative Sanctions

Having outlined the rise to popularity and the multiple advantages that administrative sanctions are able to offer – from a government's perspective – within the corporate context, it is now time to cast a look at how precisely the ECtHR perceives them. This is crucial, as only sanctions falling under the 'criminal charge' in accordance with Article 6 ECHR are able to attract the Convention's protection. The well-known *Engel* test developed in 1976 stipulates three criteria essential for attributing the 'criminal charge' as embedded in Article 6 ECHR to a punitive measure: (i) the national classification of a particular measure which can be of indicative value only; (ii) the very nature of the offence; and (iii) the nature and the degree of severity of the penalty that the person concerned risks incurring. These criteria are in principle alternative and, as it was made clear in the subsequent case law of the ECtHR, the second and third criteria are not necessarily cumulative.

These criteria had powerful resonance in the subsequent case law of ECtHR, but have changed over time. The first alteration came already in the milestone case of *Öztürk v. Germany* of 1984. The ECtHR modified the second Engel criterion and shifted the analysis from the nature of the offence (the socio-ethical relevance of the charges) to the nature and the aim of applicable sanctions. It highlighted that sanctions have to be both 'punitive and deterrent' in order to attract the guarantees of Article 6 ECHR – the twin purpose that pretty much defines the conception of a relevant sanction in the case law of the ECtHR. This largely matches the (punitive) notion of an administrative sanction embedded in European Council's Recommendation No. R (91) 1 on administrative sanctions as "a penalty on persons imposed by means of an administrative act on account of conduct contrary to the applicable rules, be it a fine or any punitive measure, whether pecuniary

[22] The current stance of the ECtHR is that complementary use of administrative and criminal penalties is allowed as long as it addresses different aspects of the same social misconduct, is foreseeable and proportionate for the sanctioned entity, see more in *A and B* case (note 6).

or not …". In addition, the ECtHR included the 'general scope' of these sanctions into the assessment, i.e. the requirement for a rule to be directed to the public at large. This requirement serves to exclude the 'disciplinary sanctions' addressed to a limited number of persons, such as public servants or military personnel, from the remit of Article 6 ECHR guarantees as they are considered to be in a special relationship of obligation and subordination with the State.

The ECtHR has elicited the meaning of the 'punitive and deterrent' nature of a sanction in a litany of post-*Öztürk* cases, however, usually on an *ad hoc* basis. In order to ascertain whether 'punitive and deterrent' aims can be confirmed, one needs to closely study the rationale of a particular sanction as well as its intended effects. The ECtHR has made it clear that it is not enough for a sanction to follow a remedial aim only in order to fall under the 'criminal charge' requirement. For example, in the *Bendenoun* case the ECtHR highlighted that the tax surcharges at issue were not intended as a "pecuniary compensation for damage but essentially as a punishment to deter reoffending" and, hence, went on to assess their compatibility with the ECHR.[23] This can be determined by establishing, for example, that the damage made by an offence was multiplied several times or that the fine simply does not correspond to the actual damage made. The *Steininger* case echoed this line of reasoning by stating that there has to be an additional layer of detriment to a sanction beyond a pecuniary goal directed towards recuperating for the damage caused by the offence or compensating the administration for the additional work provided, as it happened in this case concerning agricultural marketing surcharges that were up to double of the original charge.[24] In addition, it is not enough for a sanction to exclusively follow a preventive purpose or a combination of preventive and remedial aims to trigger the full guarantees of the ECHR.[25] In other words, punitive undertones have to exist and cause detriment to the one sanctioned.

[23] *Bendenoun v. France* (12547/86) judgment of 24 February 1994, para. 47.

[24] *Steininger v. Austria* (21539/07) judgment of 17 April 2012, para. 37. See also *Mort v. the United Kingdom* (44564/98) decision of 6 September 2001 in which it was established that the penalty at issue went "beyond considerations of debt enforcement".

[25] *Lauko v. Slovakia* (26138/95) judgment of 2 September 1998, para. 52.

5. Indispensable Guarantees and (Procedural) Concessions

Once a sanction qualifies as 'punitive and deterrent' and the existence of a 'criminal charge' in accordance with Article 6 ECtHR can be determined, an access to the Convention guarantees may be unlocked. The ECtHR has demonstrated in its case law that there is a minimum core of the so-called 'ironclad' guarantees that it is ready to apply to administrative sanctions regardless of whether they have been imposed on a legal or a natural person. Usually, this 'minimum core' coincides with the 'very basic', unbending and explicit requirements of a 'fair trial' under Article 6 (1) ECHR or with the ones falling under the rubric of 'good governance'. These categories transcend criminal-administrative law division and are expected to be applied in whatever 'semantics' they come. More precisely, the access to a judicial review,[26] which is not confined to reviewing lawfulness only,[27] as well as the duty to give reasons[28] or the reasonable time requirement[29] can be claimed to be such non-derogable guarantees vigilantly protected by the ECtHR and applied within administrative sanctioning to both legal and natural persons.

5.1 How 'Silent' can Corporations remain about their Transgressions?

When it comes to other guarantees usually considered to be closer to 'pure' criminal law and its 'rigorous' procedural standards, the view gets a bit more blurred. Firstly, the (full) application of the right to remain silent and presumption of innocence (Article 6 [2] ECHR) poses a dilemma. The right to remain silent, is a 'personal' right guided by the dual-rationale of respecting the free agency and dignity of the individual as well as the quest to establish the 'objective truth' when it comes to breaches of law. Thus, its scope of

[26] See, e.g., *Paykar Yev Haghtanak Ltd v. Armenia* (21638/03) judgment of 20 December 2007, in which the ECtHR acknowledged that financial difficulties experienced by a private small-scale trading company and it inability to pay court fee should not negate applicant's right to access judicial body.

[27] *Menarini Diagnostics S.R.L. v. Italy* (43509/08) judgment of 27 September 2011, para. 57–67.

[28] See, e.g., *Baltic Master Ltd. v. Lithuania* (55092/16) judgment of 16 April 2019.

[29] *Västberga Taxi Aktiebolag and Vulic* case (note 6), in which proceedings dragged for more than 7 years leading the applicant company to become bankrupt. See *Impar LtD. v. Lithuania* (13102/04) judgment of 5 January 2010 for another example of protracted proceedings.

application to 'artificial entities' inevitably shrinks. This is so because even before opening up or getting a license to operate these entities are confronted with multiple administrative requirements and duties to provide various documents. The more regulated the domain, the higher the load. Thus, companies ought to consider these lawful requirements as a 'price for doing business' and may expect that further documentation concerning their operation will be required. In this regard, it is false to claim that every request made by public authorities to serve information in connection to a possible violation of law necessarily breaches the *nemo tenetur* principle. Quite the opposite: many operations are expected to answer factual questions and provide documents. What is inacceptable, however, is to coerce legal entities to explicitly disclose their transgressions.[30]

The ECtHR case law in this regard remains somewhat underdeveloped. There are only a few cases, in which this question was tackled, one of them being the case of *Peterson Sarpsborg AS and Others*.[31] Here inspections occasioned by tip-offs about unlawful collaboration over prices were conducted by the relevant price authorities under the Norwegian Prices Act and Regulations Enforcement Act at the premises of the applicant companies, and statements were taken from the managing directors of the companies and from other employees. They had supplied the required information under penalty of the law, and the price authorities reported three applicant companies to the Oslo police as a result of these inspections. This eventuated in charges being filed against the applicant companies for having violated the prohibition on competitive restraint through various forms of price arrangements. In this connection, the companies complained that these statements were subsequently used during the criminal proceedings, thus breaching the privilege against self-incrimination.

The ECtHR, however, noted that the domestic courts had ruled that the disputed statements could not be used as documentary evidence in the criminal proceedings but only, if necessary, in order to confront a witness or the accused with this statement while giving oral evidence in court. As the factual circumstances have revealed, none of the applicants were actually confronted with their statements made to the price authorities in the present case. Consequently, no appearance of a violation could be disclosed and the ECtHR deemed the complaint inadmissible. At the same time, this decision

[30] See more on the logic of this distinction in Ransiek (note 9) pp. 357–361.

[31] *Peterson Sarpsborg AS and Others v. Norway* (25944/94) decision of 27 November 1996.

shows that the ECtHR is willing to examine complaints alleging breaches of the privilege against self-incrimination by legal persons. In fact, there is nothing in the wording of the relevant provisions militating in favour of a reverse conclusion.

5.2 'Fishing Expeditions' and the Right to Remain Silent

As has already been mentioned, companies are expected to cooperate more with the public authorities than are natural persons. However, an interesting question in this regard is where to draw the line. In the current discourse, so-called 'fishing expeditions' are gaining more and more attention. 'Fishing expeditions' refer to a situation, when administrative authorities launch a full-on investigation, in order to obtain information, on which an incriminatory case could potentially be built.[32] Usually, these inspections happen unannounced and at the premises of the company, with the administration scraping for every potential bit of evidence of unlawful behavior.

The ECtHR was confronted with this question in the case of *Bernh Larsen Holding AS and Others*,[33] in which the applicant company complained that Article 8 ECHR was breached by an over-invasive inspection of the tax authorities into its computer server. This action, aside from compromising sensitive personal data of the employees of the applicant company, clearly had a potential to undermine the right to silence of the company. The ECtHR did not shy away from dealing with the merits of this complaint in a comprehensive manner, and found the interference to be proportionate to the aim sought in the particular case. There had been effective and adequate safeguards against abuse in place, such as the presence of a representative of the applicant company during the tax authorities' review, and the possibility to seal the documents until the complaint regarding their use has been decided by a court. In other words, procedural safeguards balanced out the potential impairment of the right to remain silent in this particular case. However, only time will conclusively tell to what extent the ECtHR is ready to protect this right with regard to legal persons. As has been implied earlier,

[32] See more on this phenomenon and its 'invasive' potential in Marta Michałek, Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe, 7 Yearbook of Antitrust and Regulatory Studies 10, 2014 pp. 130–157.

[33] *Bernh Larsen Holding AS and Others v. Norway* (24117/08) judgment of 14 March 2013. See also in a similar vein, *Wieser and Bicos Beteiligungen GmbH v. Austria* (74336/01) judgment of 16 October 2017.

the right to remain silent is not unqualified and, secondly, the fact that the measure is aimed at legal persons means that a wider margin of appreciation could be applied than that concerning the situation of an individual.[34]

6. Controversy within the Substantive Dimension of Sanctioning

The previous parts have mostly touched upon the procedural side of sanctioning, however, one may also wonder if the ECtHR had elaborated on the actual 'substance' of administrative sanctions. In this regard, the principles of legality and proportionality take center stage. Regarding the latter, however, there has been only a few cases, where the ECtHR has actually assessed the size of the penalties (unless they are glaringly over the top, of course). For example, a fine for and a confiscation of the entire sum of undeclared cash was deemed to constitute a disproportionate reaction of the State to the infringed customs regulations and the aims that they sought.[35] The ECtHR is reticent on the proportionality front because it is up for the Member States to choose the most suitable methods for punishment as well as the detriment they are willing to attribute to transgressive behavior. In other words, Member States – quite in line with the subsidiarity principle – have a margin of appreciation here as they are perceived to be in a better position to determine what works in their respective societies in terms of sanctioning as well as the gravity of particular administrative breaches.

When it comes to the principle of legality, the situation seems to be more clear as the ECtHR actively checks whether it has been upheld, whilst imposing administrative sanctions.[36] More precisely, taking Article 7 ECHR as a basis, the ECtHR requires a proper legal basis for any intervention by public authorities, thus aiming to prevent arbitrary infringements of the rights of the legal subject. This also means that the administration should not be 'self-empowered' to punish at its convenience but should always have democratic legitimacy, usually expressed by a legislative act.

[34] *Bernh Larsen Holding AS and Others* case (note 31), para. 159.

[35] See, e.g., *Ismayilov v. Russia* (30352/03) judgment of 6 November 2008, para. 45, *Tanasov v. Romania* (65910/09) 31 October 2017, para. 28 and *El Ozair v. Romania* (41845/12) judgment of 22 October 2019, para. 26.

[36] See more in Agnė Andrijauskaitė, The Principle of Legality and Administrative Punishment under the ECHR: A Fused Protection, 4 Review of European Administrative Law 13, 2021 pp. 33–51.

6.1 Regulatory Quality of Administrative Punishment

The current understanding of legality at the ECtHR goes beyond having to establish a proper legal basis, also requiring regulatory quality. Regulatory quality, among other things, implies foreseeability, accessibility and precision of the legal provisions on which a punitive measure is based. Importantly, all these traits ought to sufficiently enable a legal subject to ascertain in advance whether or not her behaviour is lawful as well as calculate the 'costs' of any potential transgression. In other words, legal subjects should know in advance which actions that will expose them to the risk of sanctions by the governmental apparatus.[37] While the accessibility requirement is usually not hard to satisfy as it demands some official publication of a relevant legal provision, and the ECtHR seldom establishes violations thereof,[38] the foreseeability requirement (also sometimes referred to as 'fair notice') presents more challenges and is highly context-dependent, i.e. contingent upon a particular regulatory field. More precisely, the foreseeability requirement depends on the regulatory content and complexity, the number, status and expertise of those to whom it is addressed, etc. In highly technical, entrepreneurial or other risky spheres, such as, for example, taxation or telecommunications law, the case law of the ECtHR invites applicants to take 'special care' in assessing the risks that their professional activity entails.[39]

In other words, a varied approach taken by the ECtHR is easily discernable: it is shielding the natural persons from overly broad legal formulations yet expects companies or professionals acting in regulated industries to take 'special care' in assessing the risks that their professional activities pose. For example, in the case of *Navalny v. Russia*,[40] an overly broad formulation penalizing any kind of unwanted behavior of political activists, including just finding oneself amidst an impromptu group of people, was not accepted by the ECtHR. Whereas in another case involving Greek financial markets professionals,[41] the legal definition of 'market manipulation' penalizing 'any kind of publication or dissemination of inaccurate or misleading information

37 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press 2004 p. 119.

38 Mikhel Timmerman, *Legality in Europe: On the principle nullum crimen, nulla poena sine lege in EU law and under the ECHR*, Intersentia 2018 pp. 86 et seq.

39 See, e.g., *Groppera Radio AG and Others v. Switzerland* (10890/84) judgment of 28 March 1990 (Plenary) at [68] for telecommunications law and *Valico S.r.l. v. Italy* (70074/01) decision of 21 March 2006 for construction law.

40 *Navalnyy v. Russia* (29580/12 et al.) judgment of 15 November 2018 [GC].

41 *Georgouleas and Nestoras v. Greece* (44612/13 and 45831/13) judgment of 28 May 2020.

regarding securities' was deemed to be acceptable as it was near impossible for the legislator to anticipate all of the 'creative' forms of market manipulation. In other words, the bar for professionals in a specialized market was set to be much higher than for the legal subjects manifesting their individual and, for lack of a better word, 'volatile' rights.

On the one hand, the Court is correct in claiming that companies or professionals in regulated industries usually have more resources and knowledge to exercise better caution, when it comes to regulatory requirements. This is, however, not always the case. In the already mentioned case of *Paykar Yev Haghtanak Ltd*,[42] in which a private small-scale trading company had failed to pay a court fee and gain access to justice. At the same time, even if companies wield large resources, the regulatory load is simply higher for them, thus overly broad definitions or loose interpretation of them may unjustifiably confuse even *bone fide* businesses. And this should not be the case, because usually healthy businesses decide in advance on what kind of risk that they are willing to take by setting the so-called 'risk appetite' for themselves. Although the concept of 'risk appetite' is more elaborate, it echoes the very same logic that an individual who is assessing whether her future behavior might be lawful or not invokes. Any additional risk coming from the regulator due to vague concepts or convoluted wordings[43] may easily undermine this pre-determined 'risk appetite'. In fact, even a reverse claim could be made that the higher the stakes and impact, the more regulatory clarity is to be expected.[44]

6.2 Size Matters: The Imposition of Fines with no Upper Ceiling

Another question that is especially pressing for businesses is the practice of imposing fines with no upper statutory ceiling. There were a few cases, where such fines with no upper statutory ceiling were presented to the ECtHR: one concerning Swedish tax law,[45] and another one concerning fines imposed

[42] *Paykar Yev Haghtanak Ltd* case (note 24).

[43] In fact, (over)regulation encapsulated in convoluted wordings may well achieve the very same detrimental effect of not having a legal basis at all by not allowing the individual or a company to ascertain the contours of their lawful behaviour.

[44] At least, this idea is found in some national legal systems, see, e.g., German constitutional case law recognizing that 'the degree of precision relating to the imposition of sanctions should correlate with the size of the penalty', see Decision No. BvR 2559/08 of the *Bundesverfassungsgericht* of 23 June 2010.

[45] *Janosevic* case (note 6).

in Iceland for contempt of the court,[46] however, due to procedural issues the merits of this question was not tackled. Various commentators have expressed regret that the ECtHR has missed a good opportunity to examine this issue under Article 7 ECHR.[47] Needless to say, these open-ended fines cause friction with *lex certa* principle, i.e. the requirement to lay down the (foreseeable) scale of pecuniary sanctions in advance.[48] They might also lead to incredible amounts that enterprises will have to pay, for example in competition law. In addition, a potential of unequal treatment may be created. At the same time, if economic profit derived from committing an administrative offence is actually higer than the fine limits stipulated by law in advance, then justice is undermined from another angle, meaning that the State is deprived of efficient means of punishment.

Therefore, the law should stipulate upper limits of sanctions, however, if, in fact, a direct profit coming from an administrative offence exceeds these limits, then a disclaimer that the State reserves the right to go beyond prescribed penalties would be in line with the rule of law principle. As has been discussed above, the 'economic calculus' is a factor that certain national legal systems integrate into their design of sanctions. Thus, it could also be a convincing argument for the ECtHR to 'endorse' this compromise that allows the reconciliation of both the foreseeability requirement as part of the legality principle and the pressing need for the State to sanction in an effective and deterrent manner. However, only the future will tell what kind of approach the ECtHR will be willing to take regarding this prickly question.

7. Conclusion

It is safe to claim that administrative sanctions will not lose their relevance any time soon. They may evolve and take up new forms as the efficiency needs will become more and more pronounced in contemporary legal systems. For legal persons that can not always be subjected to criminal law,

[46] *Jónsson and Ragnar Halldór Hall v. Iceland* (68273/14 and 68271/14) judgment 22 December 2020 [GC].

[47] See more in Agnė Andrijauskaitė, The Case of Gestur Jónsson and Ragnar Halldór Hall v Iceland: Between Two Paradigms of Punishment, Strasbourg Observers 2021, available at: https://strasbourgobservers.com/2021/02/19/the-case-of-gestur-jonsson-and-ragnar-halldor-hall-v-iceland-between-two-paradigms-of-punishment/.

[48] See Explanatory Memorandum of European Council's Recommendation No. R (91) 1 on administrative sanctions in Council of Europe (ed.), *The administration and you*, Council of Europe Publishing 1996, pp. 455–466.

this may eventuate in even more coercion coming from the public hand. In highly-regulated industries, additional challenges arise in that regulatory load and complexity are ever-growing, making it hard even for *bona fide* businesses to catch up. Thus, it is of utmost importance to determine what the acceptable limits of public coercion are – in whatever form the sanctions come – as well as to what extent the procedural guarantees may be diluted with regard to administrative sanctioning in comparison with criminal procedure. To answer these questions, an open conversation that takes fundamental rights into account should be fostered.

Up to this point, the ECtHR has provided no differential treatment for legal persons in comparison to natural persons regarding the very basic and unbending requirements of a 'fair trial' that also match with 'core' ideas underpinning the concept of good administration. However, when it comes to guarantees that lie closer to the criminal law paradigm, such as the right to remain silent, different 'shades' start to appear and the ECtHR expects a higer degree of collaboration or awareness coming from companies. It remains subject to discussion whether these higher expectations can always be justified as they may disguise arbitrary practices of administrative authorities, especially in the paradigm where regulations keep on growing and regulatory quality is not impeccable either. Additionally, not all companies possess the necessary resources to be able to respond to the plea of taking 'special care' – something that the ECtHR has been consistently urging professionals and companies to do. Here assessment of the 'individual' circumstances in which a company finds itself, and the full scale of real-life implications that a sanction brings about on the particular business, should prevail.