

FERENC SÁNTHA*

Criminal sanctions against legal persons and their limitations due to the *ne bis in idem* principle**

ABSTRACT: This study examines the system of criminal sanctions applicable to legal persons. The introduction and first part of the paper briefly outlines some general questions and the systematization of sanctions. The sections that follow respectively introduce and discuss various types of corporate criminal sanctions. Thereafter, the principles of sanctioning are examined. The final section is devoted to examining the limitations of sanctions due to the *ne bis in idem* principle.

KEYWORDS: Criminal sanctions against legal persons, corporate criminal sanctions, *ne bis in idem*.

1. Introduction

‘No soul to be damned and no body to be kicked’.¹ This classic statement of the Lord Chancellor of England, quoted many times thanks to John Coffee’s famous essay², had, until the early 1990s, significant influence on the corporate criminal sanction system. This influence was mainly evident in the fact that almost all exclusively criminal sanctions were considered appropriate on the ground that the majority of criminal legal consequences (e.g. imprisonment, community service, probation) specifically targeted individuals with intent to affect them.

However, recent decades have witnessed significant changes leading to the introduction of a broad range of sanctions in the criminal law of most

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¹ ‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?’ Edward Thurlow, 1st Baron Thurlow (1731-1806).

² Coffee, 1981.

countries.³ The idea behind the introduction of these new sanctions was that they should not only represent a reaction to crime already committed, but also result in the formation and establishment of new sanction terms based on proactive purposes.⁴ In other words, these sanctions are intended to prevent or minimize law-violating behaviour as much as possible. Another important objective of organizational sanctions is to prevent people from making profit or acquiring advantages through criminal activities.⁵

This study examines the system of criminal sanctions applicable to legal persons. In the first section, the study briefly outlines the systematization of sanctions. The sections that follow respectively introduce and discuss various types of corporate criminal sanctions. Thereafter, the principles of sanctioning are examined. The final section examines the limitation of sanctions due to the *ne bis in idem* principle.

2. Place of corporate sanctions in the criminal sanction system

The systematization of sanctions offers many solutions. Obviously, the question of place of corporate sanction cannot be examined separately from other elements of the criminal liability system, dogmatic standpoints of the act (*actus reus*), the perpetrator of the crime, and culpability of the perpetrator. Integrating corporate criminal sanctions into the criminal punishment system is not problematic in legal or academic models that

³ International legal sources also offer a wide range of sanctions. See, e.g. Recommendation (88) 18 of the Committee of Ministers of the Council of Europe to Members States concerning Liability of Enterprises having Legal Personality for Offences committed in the Exercise of their Activities (1988), which contains a comprehensive list of sanctions: warning; reprimand; re-cognisance; a decision declaratory of responsibility but no sanction; fine or other pecuniary sanction; confiscation of property used for commission of the offence or representing the gains derived from the illegal activity; prohibition of certain activities, in particular exclusion from doing business with public authorities; exclusion from fiscal advantages and subsidies; prohibition on advertising goods or services; annulment of licences; removal of managers; appointment of provisional caretaker management by judicial authority; closure of enterprise; winding-up of enterprise; compensation and/or restitution to victim; restoration of former state; publication of decision imposing sanction or measure.

⁴ Heine, 1999.

⁵ See the explanation of the related Hungarian Act (Act CIV 2001 on Criminal Measures Applicable to Legal Persons) which points out that the aims of criminal measures applicable to legal entities are the effective prevention of violation of criminal law related to the operation of the legal entity and curtailment of the profit and financial advantage obtained through commission of crime.

dogmatically accept the existence of independent corporate culpability. For example, Klaus Tiedemann's concept of corporate guilt is based on the belief that lack of organization and supervision is the main reason for corporate crime.⁶ Similarly, the Brent Fisse and John Braithwaite⁷ and Pamela Bucy⁸ concepts are based on the belief that corporation policy is based on special separated organizational guilt.

The Hungarian criminal sanction system is traditionally dualistic, meaning that it allows for using punishment and other methods to deter crime. However, punishment can be used only when culpability of the perpetrator is declared. For the use of other methods, it is sufficient to establish that an unlawful act has been committed. As punishments are traditionally used only when an indispensable condition of culpability has been satisfied, they clearly cannot be used against legal persons under Hungary law.

If corporate culpability is not accepted, there are two possible solutions: (1) regulate the organizational sanctions using rules corresponding to the (traditional) measures of the Criminal Code, and (2) formulate a third new type of penal sanctions. This latter option was chosen by the Spanish criminal law, which labelled these sanctions as 'accessory consequences'.⁹

The Hungarian legislature chose the first option because Article 63 of their Criminal Code corresponded with the criminal measures in Hungarian law under 'measures applicable to legal persons', referring to Act CIV 2001, in the footnotes. However, the legal consequences of this for corporations are different from those of Hungary's traditional sanctions for individuals, and it should be considered a new type of criminal sanction. This should be considered a new type not only because the legislature placed the relevant provisions in a separate act, but also because of the following two additional characteristics:

1. The aim of corporate sanctions is to promote an attitude of compliance among organizations, that is, to influence the law-abiding behaviour of natural persons with legal rights. From the perspective of effectiveness, corporate criminal sanctions are not useful in fighting corporate criminality when their consequences are less effective than

⁶ Böse, 2011.

⁷ Fisse and Braithwaite, 1988.

⁸ Bucy, 1991.

⁹ Bacigalupo, 1999.

administrative or civil sanctions.

2. The potential effect of using corporate sanctions is specific; it decreases or destroys the organization's reputation. The stigma of conviction due to corporate criminal sanctions may be significant enough to incentivise 'corporate criminals' to change their irresponsible behaviour.

Corporate criminal sanctions can be categorized in different ways. This study examines the first group that includes legal consequences entailing financial loss.

3. Sanctions resulting in financial loss

3.1. Confiscation of property

Confiscation could be the most widely applied consequence of corporate criminality. The aim of sanctioning this consequence is to undo the 'fruit' gained or income acquired illegally by a legal person.

Under the Hungarian Criminal Code, confiscation of property can be imposed as a 'traditional measure' on natural persons and legal entities. Confiscation of property must be ordered if the commission of a crime against one person enriched the other person. If the 'other person' enriched is an economic entity (such as a business organization), confiscation must be ordered against the entity. Transfer of ownership or dissolution of the economic entity would not prevent the application of this sanction. However, note that the term 'economic operator' has a narrower definition than 'legal person' in Act CIV 2001.

Hungarian criminal courts sanction confiscation of property against all assets, advantages, and profits gained from a criminal act or expenditures incurred to commit the crime, without reducing the 'expenditures of the criminal act'. In other words, courts adopt the so-called gross principle: the confiscated property constitutes the actual enrichment of the perpetrator as well as the property invested to enable perpetration.¹⁰

3.2. Compensation and restitution

These reparative legal consequences are regulated by the Council of Europe, which recommended them as criminal or quasi-criminal sanctions. The explanatory memorandum of the recommendation considers these sanctions quite significant because they provide the victims a good chance to obtain

¹⁰ Hollán, 2008.

compensation for their damages through criminal proceedings.¹¹ Moreover, companies and other legal persons are better able to pay compensation than individual offenders.¹² However, one must note the difficulty in defining the specific traits of ‘criminal compensation’ as compensation is a common practice in civil law as well. However, applying ‘criminal compensation’ on a wider scale can prove difficult because crimes committed in the framework of a legal person may not have victims but come within the purview of corporate criminality. In Hungarian law, compensation for damages is a legal consequence regulated by civil law, but in some jurisdictions, such as the US jurisdiction, corporate sanctions may include punitive (multiple) damages, with civil sanctions more punitive than criminal sanctions and the clear lines between civil and criminal sanctions disappearing.

3.3. Loss of certain benefits or advantages

This sanction, under French and Dutch criminal law, for example, may include a variety of specific legal consequences such as loss of tax benefits or exclusion from budget support. This is not necessarily a ‘light’ sanction because loss of subvention can lead to forcible closure of the legal person status when this status decisively depends on external budgetary support. The Hungarian Act CIV 2001 placed this type of sanction under the heading ‘restriction of legal person’s activities.

3.4. Criminal fine

Fine is a basic type of sanction applicable to legal entities under most legal systems, including the Hungarian legal system. As for calculation of fine, two approaches are adopted. First, the upper limit of the fine is obtained through a predefined multiplication of the maximum possible fine for natural persons. Heine referred to this multiplier as totalisator.¹³ Second, the general minimum and maximum fine are defined by law.

¹¹ Liability of Enterprises for Offences. Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on October 1988 and explanatory memorandum, Strasbourg, 1990. According to the explanatory memorandum, ‘compensation of victims was considered a particularly appropriate sanction as it would relieve persons having suffered damage of the necessity of pursuing their claims in a separate procedure’.

¹² James Gobert – Maurice Punch, *Rethinking Corporate Crime (Law in Context)*, Butterworths, 2003, p. 222.

¹³ For example, in France the maximum fine applicable to a legal person is five times the

An appropriate and fair fine can be calculated by carefully considering the sentencing factors and avoiding both the highest and lowest extremes. The first approach may affect the financial standing of the legal person, even inducing insolvency, winding-up, and other serious consequences, including affecting for the legal person's employees and customers. The literature refers to this as 'spillover effect'¹⁴ or 'deterrence trap'¹⁵. However, a low fine may be inappropriate because this could minimize the seriousness of the crime and undermine the deterrent effect of the sanction and even induce the legal person to 'feel' it worth committing a crime from an economic point of view. As Gobert pointed out, 'if it is cheaper for a company to commit an offence and pay the fine than to operate its business in lawful manner, why would a rational company choose to obey the law?'.

Some alternative approaches can make corporate fines more rightful. For example, equity fine can be applied for share companies. Instead of imposing high fines payable in cash, the court orders the company to issue a predefined number of shares to the state's victim compensation fund. As opposed to the immediate payment of fines, this model will not paralyze the activities of the company or prompt commercial and service companies to adopt defensive mechanisms such as transferring their losses due to high fines to their customers by raising the prices of goods or services. Moreover, another potential impact of high fines is that 'more corporate control over managers would be likely to result'.¹⁶ For another example, some European countries consider the minimum-maximum system along with turnover of the corporation. In Poland, the fine ranges from one thousand to five million Polish zlotys, but this should not exceed 3% of the legal person's revenue earned during the financial year the crime was committed.

In Hungary, the minimum fine is defined absolutely: 500 000 HUF (approximately € 1 700). This minimum is set very low because Hungary has many small family-based enterprises with limited ability to pay huge amounts. The maximum is fixed at three times the financial advantage resulting from the offence. Act CIV 2001 explains the significance of the tripled amount: the fine is imposed not only to withdraw the illegally gained amount from the legal person, but also to prevent future crimes through deterrence. Nevertheless, a fixed maximum fine is desirable because a

fine applicable to individuals.

¹⁴ Harding, 1996.

¹⁵ Coffee, 1981.

¹⁶ Schlegel, 1990.

relatively uncertain fine violates the principle of legality.

4. Sanctions limiting the legal person's actions and operation

4.1. Winding-up

Winding-up means capital punishment for legal persons, the most severe sanction to safeguard the society. Dissolving smaller organizations having only a few members is less problematic. The situation is different for bigger companies, whose dissolution could adversely affect their shareholders (owners), numerous employees, and the consumers purchasing goods and services from the company. This domino effect of winding-up calls for caution while imposing this sanction. Another problem with this is that nothing prevents the members from reestablishing their company after winding-up and picking up activities from where they left¹⁷. However, this strategy can be impeded by appropriately imposing criminal or civil sanctions on the members of the company along with winding-up proceedings and thus rendering reestablishment of the legal person impossible.

Hungary has mandatory and discretionary forms of winding-up. In mandatory winding-up, a criminal court winds up the legal entity if it is running an illegal economic activity, if it was established for the purpose of covering up a criminal act, or if its activities serve the purpose of covering up a criminal act. In discretionary winding-up, the court can wind up a legal entity even if it is running a legal economic activity. This form of winding-up is based on the court's discretionary powers. The Act notes certain exceptions when winding-up cannot be imposed; for example, when the legal person has strategic importance from the perspective of national public utility or national economy.

4.2. Restriction or prohibition of certain activities

In many countries, criminal courts can impose preventive sanctions. These include prevention of exclusion from subsidies; withdrawal of licenses; exclusion from public tenders or concession contracts; and prohibition from producing certain goods, contracting, advertising, or removal of managers. This sanction is less drastic than winding-up. It imposes restrictions on business activities in various forms. Thus, the application of this sanction is limited to entities engaged in economic activity.

¹⁷ Lederman, 1985.

Hungarian law allows criminal courts to prohibit a legal person from carrying out certain activities. This prohibition may last from one to three years; the duration must be defined in years. During the prohibition period, the legal entity shall not collect deposits based on public invitation, participate in public procurement procedures, or receive funding from central or local government budgets, or from the EU.

4.3. Placing the legal person under supervision

This sanction allows for a legal person to be placed under professional supervision if its activities need to be monitored to ensure lawful operation. According to Schünemann, this is an ideal sanction for organizations because it is both effective and cautious enough to avoid triggering reactive avoidance by legal persons. The court appoints a supervisor to head the legal entity for a limited period. This supervisor can have access to all documents of the legal person, attend meetings of its organs, and ask any employee or officer for information, and reports to the court. Thus, this sanction eliminates the causes that led to the criminal act by influencing the operation of the legal entity through supervision and control. It is therefore like a probation supervision regulated as criminal measure against natural offenders in Hungarian criminal law.

5. Other corporate criminal sanctions

The third group of sanctions includes relatively lighter legal consequences of a cautionary nature, or a combination of other sanctions which cannot be classified into the previous two categories.

5.1. Corporate warning

Warning is the mildest sanction regulated by the Recommendation and, as the name implies, merely declares the commission of crime, establishing the responsibility of the organization, and has no other negative consequences. Consequently, it is applied only when the offence is minor. By sanctioning warning, the court or prosecutor expresses disapproval and orders the legal person to avoid committing further crime.

5.2. Publication of judgement

Publication of judgement is an obligation imposed on a legal person committing the crime to publish, incurring all expenses, an article in a daily

newspaper or economic magazine, or, in our modern times, on the Internet, providing all details of the crime committed, the sanctions imposed on the legal person and its managers, and the legal person's efforts to prevent further crime.¹⁸ Publicity can have negative consequences for the legal person, such as loss of income or prestige. According to a US survey, corporate managers do not believe that legislation can stop crime. However, they do believe that publicity has a considerable deterrent effect¹⁹. Moreover, publication of judgement, as an ideal corporate sanction, can be more effective than the other 'traditional' court sanctions under criminal law, and is recognized as one of the best responses to corporate criminality.²⁰

5.2. Corporate probation and community service

Corporate probation primarily aims to reorganize the legal person and prevent recidivism, rather than imposing heavy fines. Probation makes it obligatory to comply with certain conditions imposed by the court for a certain period. These conditions may include the following:

- Restitution/payment of damages,
- Publication of judgement,
- Reformation of the organization's decision-making system and internal structure in general, and introduction of specific control and security procedures,
- Regular reporting, and appointment of committees or officials with preventive capacity,
- Appointment of consultant to help in examining the situation leading to the crime and making appropriate recommendations for prevention. For example, a US court required a company to participate in a special programme to stop oil spills.²¹

The work specified in a court's community service order is carried out by the legal person through its employees. This sanction against a legal person has the same aim as that for natural persons, namely, reparation for harm caused by the offence and participation in a 'project' beneficial to society. For example, in the US, a bakery was ordered to supply bread to

¹⁸ Sántha and Dobrocsi, 2011.

¹⁹ Clinard and Yeager, 1980.

²⁰ Sántha and Dobrocsi, 2011.

²¹ Stessens, 1994.

homeless persons for a certain period²² and a chemical company was ordered to repair the environmental damages it had caused.²³

6. Sanctioning principles

As with the criminal law for natural persons, the circumstances and principles to be considered for imposing corporate criminal sanctions need to be defined. This can be done explicitly based on law or court guidelines. The first case above can be explained by the Finnish Penal Code. Chapter IX of the Code lists the criteria to be considered when imposing corporate fine.²⁴ The other case implemented US law. The relevant circumstances are set out in Chapter 8 of the US Sentencing Guidelines (Sentencing of Organizations).²⁵

²² United States v. Danilow Pastry Co., Inc., 563 F. Supp. 1159 (S.D.N.Y. 1983) [Online]. Available at: <https://law.justia.com/cases/federal/district-courts/FSupp/563/1159/1591274> (Accessed: 4 May 2025).

²³ United States v. Allied Chemical & Dye Corporation, 42 F. Supp. 425 (S.D.N.Y. 1941). [Online]. Available at: <https://law.justia.com/cases/federal/district-courts/FSupp/42/425/1609606/> (Accessed: 4 May 2025).

²⁴ These circumstances are the following:

- nature and extent of corporate neglect and participation of the management in the offence;
- status of the offender as member of body of the corporation;
- seriousness of the offence committed in operation of the corporation and the extent of criminal activity;
- other consequences of the offence to the corporation;
- measures of the corporation to prevent new offences, prevent or remedy the effects of the offence, or further the investigation of the neglect or offence; - when a member of the management of the corporation is sentenced to a punishment, the size of the corporation and share of the corporation held by the offender, as well as personal liability of the offender based on commitment of the corporation.

²⁵ According to the Guidelines, the general principles for imposing corporate criminal sanctions are the following:

- the court must, whenever practicable, order the organization to remedy any harm caused by the offense;
- if the organization operated primarily for a criminal purpose or by criminal means, the fine should be set sufficiently high to divest the organization of all its assets;
- the fine range for any other organization should be based on the seriousness of the offense and culpability of the organization. The four factors that increase the ultimate punishment of an organization are (i) involvement in or tolerance of criminal activity, (ii) prior history of the organization, (iii) violation of an order, and (iv) obstruction of justice. Two factors that mitigate the ultimate punishment of an organization are (i) existence of an effective

In Hungary, the court practice is to elaborate on the relevant factors, following Opinion No. 56 of the Penal Board of the Hungarian Supreme Court.²⁶ This Opinion defines the aggravating and mitigating factors applicable to natural person perpetrators.

These factors include the following:

- Nature and objective weight of the crime committed,
- Financial standing or results and size of the legal person,
- Status of perpetrator in the legal entity or organization,
- Action taken by the legal person to prevent or remedy the damaging consequences of the criminal act,
- Action taken by the legal person to report the crime and cooperate with authorities,
- Analysis to find whether the legal person had a plan or programme to prevent the criminal act,
- 'Record' of the legal person, namely, whether there was a sanction imposed previously.²⁷

7. Closing remarks: the *ne bis in idem* principle as limitation of corporate criminal sanction

Finally, I discuss the *ne bis in idem* principle as a limitation of corporate criminal sanction. This principle implies that no one can be prosecuted, tried, or convicted twice for the same criminal act. All national legislations of EU member states adopt this principle. Many member states, including Hungary, enshrine this principle as a constitutional right based on the general principles of EU law under Art. 6 of the Treaty on European Union.²⁸ The principle covers several aspects.²⁹ However, this study

compliance and ethics programme and (ii) self-reporting, cooperation, or acceptance of responsibility.

- probation is an appropriate sentence for an organizational defendant when it has to ensure that another sanction will be fully implemented or that the organization will take steps to reduce the likelihood of future criminal conduct. [Online]. Available at: <https://www.usssc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf> (Accessed: 20 April 2023).

²⁶ BkV. 56.

²⁷ Sántha, 2002.

²⁸ Tzouma, 2014.

²⁹ For example, the principle may also be breached if the holding company is chargeable for violation of organizational and supervisory duties regarding the subsidiary and the total

considers only the relationship between the (tax) fine imposed under tax administration and the criminal fine applicable against a legal person under criminal law in Hungary. In a budget-fraud case, for example, Hungarian legislation allows for imposing a fine against legal persons under criminal law along with a tax fine under tax administration for the same criminal act.

As regards interpretation of the *ne bis in idem* principle, Hungarian Constitutional Court Decision No. 18/2022 (VIII. 1.) is significant. Considering the prohibition of double sanctioning, the court examined the Engel criteria developed in the ECtHR case law. The Engel criteria required application of the following three tests for the case under scrutiny after legal classification of the offence under domestic law: (I) Did the ECtHR examine whether the unlawful act committed constituted a criminal offence under the state's national law? Note that this criterion has only relative value. A negative answer would not in itself preclude 'criminal' character because the ECtHR considers the qualification under national law only a starting point.³⁰ Furthermore, if the illegal act in question does not constitute a criminal offence under national law, did the ECtHR take into account (II) the nature of the offence committed and (III) the nature and severity of the sanctions envisaged or applied? It is not necessary to satisfy both these latter criteria because the criminal nature of an act can be established from the existence of any one of the two criteria. To assess these criteria, the following factors need to be considered: (1) whether the legislation providing for application of the fine covered all citizens in general, (2) whether the fine intended to prevent further infringement or serve as monetary compensation, (3) whether the fine was based on a general rule meant for deterrence and punishment, and (4) whether the fine can be considered significant. If these criteria are satisfied, the ECtHR practice is to consider both administrative sanctions and sanctions for infringement (administrative criminal sanctions) as 'criminal' sanction. As the Hungarian tax fine is basically fixed at 50% of the tax revenue loss (it can be as high as 200%) and aims to deter and punish rather than compensate, it can be considered a sanction of criminal nature. Consequently, this fine will constitute a clear violation of the *ne bis in idem* principle if the court applies it in a criminal proceeding against a legal

sales of the group is relevant for sentencing both companies (Rübenstahl and Brauns, 2015).

³⁰ Szomora, 2022.

person after tax penalty has already been imposed.³¹

Finally, the Supreme Court developed a special rule in budget-fraud criminal cases with regard to confiscation of property. Confiscation must be ordered against the perpetrator if the crime committed is related to a budget payment obligation, and against the legal person if illegally obtained property has enriched the legal person. However, the court needs to consider the prohibition of double deprivation: if the perpetrator or legal person was obliged to repay the financial loss of the tax authority, the court shall not order confiscation. This rule has been clarified by an amendment to the Criminal Code in 2021, by which no confiscation of property can be ordered if the tax authority had already imposed an obligation on the legal person to pay tax fine related to the same property on the basis of the same facts up to the amount of obligation. This rule is consistent with the *ne bis in idem* principle.

³¹ However, the Constitutional Court's position allows for a different conclusion when it emphasizes that the parallel application of sanctions classified as criminal does not in itself violate the *ne bis in idem* principle when the legislation provides for the possibility of integrated, parallel, and interconnected application of administrative and criminal procedures. This may be the case where the procedures and the resulting sanctions are foreseeable for the person concerned and there is a close material and temporal link between the various legal consequences, in particular when the level of the sanction imposed in criminal proceedings takes into account the administrative fine previously applied.

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