

## TRENDS REGARDING FINES AND SANCTIONS IN COMPETITION LAW, LABOR LAW AND DATA PROTECTION LAW<sup>1</sup>

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**Abstract:** *The reason on writing this paper is based on the fact that nowadays civil and administrative sanctions and fines have become huge from a financial standing point, making a significant issue on the matters of the constitutionality – the right to property. ECHR and the European Court of Justice also have talking points on this. The Romanian Courts and mostly judges form second tier courts such as Tribunals or Courts of Appeal have*

*become more aware of the fines they are presented with to be cancelled or at least diminished and regard some of them to be exaggerated.*

*The research has been done on the basis on European and national Romanian law and, also on the basis of cases presented in front of the courts and their outcome. The fines in competition law can be negotiated but are a percentage of your annual income, the ones regarding labor law for working without a contract are 10.000 lei per person (about 2100 euros) and the ones in data protection law are also based on a fix sum and a percentage. Thus the results with which we came up are amazing, regarding that some cases have been won, but most of the fines and sanctions remained in place, some companies even agreeing to pay in advance or asking for a payment plan without going to trial. In other cases we noticed that Romanian national law is more rigorous and at some times even more severe than that of other EU member states.*

*In conclusion, there should be a more strict revision on fines and sanctions throughout the whole European legal system and to ensure a more transparent and equitable framework in which companies and even natural persons can be aware of the fines and sanctions and if they are not contrary to Constitutional and European Law.*

**Key words:** *Public Law, Constitutional law, competition law, labor law, data protection law, contraventions, fines, sanctions, companies, natural persons, ECHR*

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## Introduction

The purpose of a fine might be a different one depending on the standing point of the lawmaker, or the law abider. A fine should prevent antisocial behavior or any other potential issues that might harm individuals or the entire society, but without restricting the right to individual freedom of the person infringing the law. If fines are set to a fixed sum, the issue might arise that some felons, citizens or companies might see them as a tax to violate the law. In order not to have a society in which the rich, *de facto*, can be above the law, we should investigate if we need to use proportional measure in direct correlation to the wealth of the person infringing the law.

Most fines are created for minor antisocial behavior that are both encountered with people no matter the wealth, and not just natural persons but also companies. One has to ask himself if the new trends in fines and sanctions in order to make them bigger and directly proportional to the amount of income is lawful or constitutional.

ECHR jurisprudence, national Romanian courts, also other national courts of law have to come to the agreement that most of the principles from criminal law are also usable in contraventional sanction law. Coming to an individualised applied sanction be it by means of the law, or by means of a judicial decision is an inherent logical process through which we take into account individuality, personality and proportionality.

The degree of danger of the violated law, in concrete and *in abstracto*, and also all of the personal circumstances, the limits of fines and proportionality are mentioned by the general law applicable, and have to be taken into account when issuing or changing such a sanction.

Fines, warning and community work are the type of sanctions regulated by Romanian law. Similar sanctions are found throughout Europe and the world. Common law systems have also the possibility to issue common law punishments thought up or created by the judge himself. Most northern countries within or outside the European Union always check the validity of fines with the participation of a public prosecutor.

Every sanction has to be distinctly weighed, analyzed and debated and the courts and judges unfortunately have the tendency to examine the amount of the fine, before taking in the facts of the case.

Regarding article 6 of the ECHR, the repeated offence of a law might at worst constitute a personal circumstance, but cannot *ab initio* exclude the possibility of issuing a warning instead of a fine.

This being said, one has to ask oneself what is the limit when a fine for such a violation of law is too great and thus becomes unconstitutional. Also a question arisen is the small difference between such fines and those from criminal cases, that are sometimes incredibly smaller.

## 1. Defining sanctions and fines

### 1.1. Contravention

Contravention is a term from French law meaning an act violative of a law, a treaty, or an agreement made between parties; a breach of law punishable by a fine of fifteen francs or less and by an imprisonment of three days or less. In the U.S. legal system, a breach or violation of the provisions of a contract, statute, or treaty.

From a historical point of view, contraventions and their penalties are determined by the executive organs of the State, unlike crimes which are determined by the legislative organs (Parliament), but this is not always the case.

Nowadays contraventions are mostly known all over the world in regulating road conditions, drivers, public order and the such, and in romanian law also encountered in consumer law, labour law, competition law, data protection law and so on.

### 1.2. Fines

A fine or mulct is money that a court of law or other authority decides has to be paid as punishment for a crime or other offence. The amount of a fine can be determined case by case, but it is often announced in advance. The most usual use of the term is for financial punishments for the commission of crimes, especially minor crimes, or as the settlement of a claim. A synonym, typically used in civil law actions, is mulct.

One common example of a fine is money paid for violations of traffic laws. Currently in English common law, relatively small fines are used either in place of or alongside community service orders for low-level criminal offences.

Larger fines are also given independently or alongside shorter prison sentences when the judge or magistrate considers a considerable amount of retribution is necessary, but there is unlikely to be significant danger to the public. For instance, fraud is often punished by very large fines since fraudsters are typically banned from the position or profession they abused to commit their crimes.

Fines can also be used as a form of tax. Money for bail may be applied toward a fine. A day-fine is a fine that, above a minimum, is based on personal income.

For example in Romania traffic violation fines are calculated on the basis of the basic minimum income salary as the lawmaker has gathered that as long as you have a drivers license it must mean you have a job or at least the means to pay such a fine. <sup>3</sup>

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<sup>3</sup> Study on minimum sanctions in the EU Member States, <https://op.europa.eu/en/publication-detail/-/publication/1226bed2-be78-11e5-9e54-01aa75ed71a1/language-en>.

### 1.3. Sanctions

Sanctions, in law and legal definition, are penalties or other means of enforcement used to provide incentives for obedience with the law, or with rules and regulations. Criminal sanctions can take the form of serious punishment, such as corporal or capital punishment, incarceration, or severe fines. Within the civil law context, sanctions are usually monetary fines, levied against a party to a lawsuit or his/her attorney, for violating rules of procedure, or for abusing the judicial process. The most severe sanction in a civil lawsuit is the involuntary dismissal, with prejudice, of a complaining party's cause of action, or of the responding party's answer. This has the effect of deciding the entire action against the sanctioned party without recourse, except to the degree that an appeal or trial de novo may be allowed because of reversible error.

As a noun, the term is usually used in the plural form, even if it only refers to a single event: if a judge fines a party, it is not said that they imposed a sanction, but that they imposed sanctions.

Conversely and sometimes confusingly, the word may be used to imply "approve of," especially in an official sense. "The law sanctions such behavior" would imply that the behavior spoken of enjoys the specific approval of law.

To sanction implies make a legal agreement. The word is derived from sanctus, to make holy. A legal agreement or sanction imposes approvals, rules, guidelines and penalties on conduct.

The Sanction is defined as an element associated with an accountability and which corresponds to the consequence resulting from the justification of the realisation (or not) of this accountability.

## 2. Competition law, labour law, data protection law

### 2.1. Sanctions in Competition Law

Competition law is a law that promotes or seeks to maintain market competition by regulating anti-competitive conduct by companies. Competition law is implemented through public and private enforcement. Competition law is known as "antitrust law" in the United States for historical reasons, and as "anti-monopoly law" in China and Russia. In previous years it has been known as trade practices law in the United Kingdom and Australia. In the European Union, it is referred to as both antitrust and competition law<sup>4</sup>.

In a very condensed form according to national Romanian law most of the contraventional sanctions and fines given on the basis of competition law can be negotiated if you plead guilty to the Competition Council (the legal body entrusted to investigate such violations). The amounts of fines range from 0.1% up

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<sup>4</sup> Ioan Muraru, Nasty Marian Vladoiu, Silviu Gabriel Barbu, Andrei Muraru, ``Contencios constitutional - Constitutional litigation``, Hamangiu publishing house.

to 1%, 0.5% up to 10% of the annual income of a business, and they can go up to 2.500.000 lei (about 523.000 euros). There is also a separate sanction of 5000 lei (about 1020 euros) per day of delay to submit the required information.

Thus the competition law field proves to be the most permissive of all examined, and grace to the fact that you can negotiate your position we notice there is an almost complete lack of trials going to court for competition law fines.

There is also a system a place in which a company can enroll itself for the future to denounce violations of competition law, in order to supersede any future investigation.

Thus, we can conclude that competition law, borrowing from European law<sup>5</sup>, and being very orientated to the actual reeducation and regulation of the interested persons is completely constitutional and lawful and there are no pressing issues here.

## 2.2. Sanctions in Labor Law

Labour law (US spelling: labor law, sometimes incorrectly conflated with employment law) is the area of law most commonly relating to the relationship between trade unions, employers and the government.

While the development of the field in different jurisdictions has resulted in different specific meanings of what is meant by labour law, it is generally used in reference to employment contexts that involve a trade union, while the term employment law is usually used for workplaces where the legal relationship is directly between the employer and the employee. While in some jurisdictions the term may be used to refer to such law that may not involve trade unions, the genesis of the term is historically inseparable and begins with the labour union movements.

At the statutory level, Labour law is concerned with the establishment of a labour-relations framework that provides for orderly and peaceful industrial relations between employers and organized workers, and usually includes rules on forming a union, conditions under which the union becomes bargaining agent, strikes and lock-outs, process for negotiations, and other structural elements that then permit the employer and the union to bargain a collective agreement and fill-in the rest specific to rules and conditions relating to the workplace

The most known sanction in romanian labour law is that for receiving at work persons without signing a labour contract the day before. This sanction 10.000 lei or 20.000 lei (about 2250 up to 4500 euros) per person up to ten persons. Should the facts regard more than 10 persons it becomes a criminal offence.

One must agree that such a sanction in the case of two or three persons can completely destroy a company reaching up to 60.000 lei, reaching also the threshold for bankruptcy according to romanian national law.

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<sup>5</sup> Articles 101 to 109 from the Treaty on the Functioning of the European Union.

Thus, one might conclude, that when the *Inspectorate for Work relations* issues such a huge fine it can and it will almost surely destabilise or even destroy that company.

Most of the times, according to jurisprudence, if the sanctions is only for one person, judges will be lenient, and if it is the first time, they will change the fine to a warning. If unfortunately the company is fined for two or more persons, the judge will take into consideration any other personal circumstances but the denial of the complaint is almost assured.

In conclusion, we believe that such huge sanctions are unconstitutional because they are a disproportionate interference in the basic right to property of the company. One should be fined for such a contravention, but there should be a law in place to create proportional measures, not just a direct fine of 20.000 lei per person, or at least the possibility of the judge (like in common law) to issue a payment plan.

Should a company desire a payment plan it should go to the internal revenue agency and submit a huge documentation only to be turned down by the bureaucracy of it all.

Our proposition would be that the lawmaker change the provisions of this law and create the mandatory issue of a warning for the first sanction of such case, only when one person is involved in the trespassing of the law, and if it is the first time. There was a desire for the lawmaker to issue warning for the first time in all such cases – Prevention law, but it was reduced to only a couple of laws and types of fines where the body issuing the warning takes great care in the company getting into accordance with law.

### **2.3. Trends in Data Protection Law**

The General Data Protection Regulation (GDPR) also know as Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. This text includes the corrigendum published in the OJEU of 23 May 2018.

The regulation is an essential step to strengthen individuals' fundamental rights in the digital age and facilitate business by clarifying rules for companies and public bodies in the digital single market. A single law will also do away with the current fragmentation in different national systems and unnecessary administrative burdens.

The regulation entered into force on the 24th of May 2016 and is applicable since the 25th of May 2018.

Directive (EU) 2016/680 on the protection of natural persons regarding processing of personal data connected with criminal offences or the execution of criminal penalties, and on the free movement of such data is also an important law regarding this field.

The directive protects citizens' fundamental right to data protection whenever personal data is used by criminal law enforcement authorities for law enforcement purposes. It will in particular ensure that the personal data of victims, witnesses, and suspects of crime are duly protected and will facilitate cross-border cooperation in the fight against crime and terrorism<sup>6</sup>.

The directive entered into force on the 5th of May 2016 and EU countries had to transpose it into their national law by the 6th of May 2018.

Several high level cases are ongoing in the EU and could cause fines up to 4 % of the annual of a business, if there is a serious infringement.

A list of the top 10 GDPR fines up to date are as follows:

British Airways, UNITED KINGDOM, a fine of 204.600.000 euros, Insufficient technical and organisational measures to ensure information security;

Marriott International Inc, UNITED KINGDOM, a fine of 110.390.200 euros, Insufficient technical and organisational measures to ensure information security;

Google Inc., FRANCE, a fine of 50.000.000 euros, Various contraventions;

Austrian Post, AUSTRIA, a fine of 18.000.000 euros, Insufficient legal basis for data processing

Deutsche Wohnen SE, GERMANY, a fine of 14.500.000 euros, Non-compliance with general data processing principles;

National Revenue Agency, BULGARIA, a fine of 2.600.000 euros, Insufficient technical and organisational measures to ensure information security;

UWV (Dutch employee insurance service provider), THE NETHERLANDS, a fine of 900.000 euros Insufficient technical and organisational measures to ensure information security;

Morele.net, POLAND, a fine of 644.780 euros, Insufficient technical and organisational measures to ensure information security;

DSK Bank, BULGARIA, a fine of 511.000 euros, Insufficient technical and organisational measures to ensure information security;

Haga Hospital, THE NETHERLANDS, a fine of 460.000 euros, Insufficient technical and organisational measures to ensure information security.

In Romania alone there have been issued several fines as it follows: 9000 euro for the owners of the website avocatnet.ro – lack of proper consent; a bank and its subsidiary with 170.000 euros – use of Whatsapp to traffic personal data for credit scoring; 2500 euros for a private company for revealing the personal identification numbers of employees when it was not necessary on a flyer inside the company; 3000 euros for the owners of the website of avocato.ro regarding lack of security measures to the personal data files published on the websites, 15.000 euros for a private company for unauthorised acces to public data, and last but not least

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<sup>6</sup> <https://www.dataprotection.ro/?page=allnews>.

130.000 euros for another bank for improper use of personal data and publication via documents<sup>7</sup>.

Some of these cases are pending in front of prime instance courts, and thus we can only talk about the fact that GDPR will surely create huge fines as all of them are proportional to the amount of business you create.

We agree that fines are better when they are calculated proportional as they can insure also more leeway and possibility on behalf of the judge when he or she is examining a complaint.

Thus one can only promote at this point more regulation and education and less sanctions.

#### 2.4. Statistics

During our research for the present paper we were confronted with the following short statistic information provided publicly by the courts via portal.just.ro (the website of the Ministry of Justice that works with the information inserted by the court clerks).

**The percentages in 2019 are as follows:**

Complaint denied in a percentage of 23.56%,

Partially admitted complaint in a percentage of 10.30%,

Complaint admitted fully 8.55%,

Denial of appeal – no reason of appeal 8.23%,

Denial of appeal – no new evidence 7.18%,

Other solutions – the rest.

Out of the total trials listed by Romanian courts by year we have up to 1.11.2019 the following statistic regarding the percentage of trials against contraventional sanctions: 5.13% percent in 2019, 7.95% percent in 2018, 8.44% percent in 2017, 9.93% in 2016, 11.78% in 2015, 12.81% in 2014, 13.41% in 2013, 12.81 in 2012, 10.75% in 2011, 4.90% in 2010. There is no data beyond 2010.

Thus we can conclude that either the amount of the persons going to court to revert sanctions and fines has diminished over the last 5 years, or the amount of persons actually fined has diminished. In lack of other evidence, we would rather believe that it is the latter case.

#### Conclusions

There are voices that say that fines should be big enough to hurt you, but for everyone, and this means it should be proportional, in order to avoid discrimination. Sanctions seek to bring about a change in the policy or conduct of those targeted.

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<sup>7</sup> <https://en.wikipedia.org/wiki/Sanction>.

Fines and sanctions for not abiding to the law should protect all citizens and also to ensure the good being of society. Sanctions are meant to determine one not to commit the same unlawful deed again. Thus the proportionality of fines is needed for their efficiency.

Persons, especially wealthy ones, being companies or natural persons might considered proportional or big sanctions as an abuse from the state.

Ourselves we can conclude that in competition law and data protection law there are converging trends from European Law to National romanian law that ensure an uniformity of sanctions and most of all, desirable to all parties, proportionality of sanctions.

National Romanian labour law is very strict when it comes to sanctions, and thus this is a diverging trend from that of the EU and other member states that have done away with the issues of unregistered labor force. One might think that Romanian labour law is still orientated to punitive measures as we still have a problem with unregistered workers, and thus not only the State loses money, but actually that employee that will not receive pension and social benefits he or she is entitled to.

In conclusion, the Romanian national law maker should revise other European national law, and also appreciate the trends in European Law in general, and decide upon chaning the proportionality of sanctions in labour law to make them fully constitutional and in accordance to the present day.