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THE SYSTEM OF SANCTIONS IN ELECTRONIC COMMUNICATIONS GOVERNANCE, WITH SPECIAL FOCUS ON THE HISTORY OF CHANGES TO ITS RULES

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Act C of 2003 on Electronic Communications (hereinafter: Electronic Communications Act) has regulated the system of penalties applicable in communications governance since 1 January 2004. Similarly to other comprehensive sectorial laws, the Electronic Communications Act represented a major challenge for the legislator due to the fact that a single act of law was to regulate sanctions encompassing all breaches of law across the whole of this industry. All this is especially difficult to achieve with a subject and substance such as electronic communications governance, which is undergoing permanent technical development, as regulation is often unable to change simultaneously with technical innovation and merely follows it with a time delay.

Considering sectorial regulations and the evolution of such regulations on the whole, one might simply say that the system of sanctions is a stable and permanent factor; after all, public administration legal doctrine circumscribes, regardless of the content and subject of a law, the principles of imposing sanctions,[1] so that there is no need to provide for them in the law and the applicable sanctions do not change dynamically, either (several sectorial laws typically only regulate the sanctions applicable to acts causing pecuniary injury).

[1] 94/A, effective since 1 February 2012, of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter: Administrative Proceedings Act) regulates the procedural foundations for imposing administrative fines, instant fines and confiscation (satisfying thereby a long-standing legal doctrine need for eliminating the possibility of sectorial regulations to contain, as a result of what could be called discretional action by the acting authorities to introduce sanctions without legislative constraints and deliberation criteria defined in advance), although it allows deviations in specific laws, which means that the deliberation criteria provided for in the Administrative Proceedings Act shall be applied only if not otherwise required by the specific law.

The Electronic Communications Act, on the contrary, included differentiated sets of rules concerning the penalties in substantive law[2] back when it first took effect, as it determined the key principles and deliberation criteria, with a rather wide range of available sanctions. However, several issues (both of theoretical and practical) arose that made it necessary to reconsider the system of sanctions in the Electronic Communications Act.

Aware of the fact that the repeated amendment of a law is an interconnected process but unable to analyse each status across the timeline, we have undertaken to compare in this paper the text sections in the Electronic Communications Act concerning penalties as of its original promulgation date with the currently effective provisions in terms of legal doctrine and practice and thereby to discuss the key amendments that have had significant impact on the system of sanctions in the Electronic Communications Act over the course of nearly 10 years (as demonstrated by certain individually analysed aspects concerning a given legal institution).

Firstly, as regards the structure of sanction norms, it should be pointed out that the regulatory system in the Electronic Communications Act contains general regulatory principles that apply, as is typical in public administration law, to framework cases in regulating the administrative sanctions. The Electronic Communications Act also treats the norms of sanctions as a separate, standalone set of norms, which includes as its structural element a hypothesis of unlawful behaviour and a disposition to determine the means of sanctioning. However, initially and for purposes of disposition, the legislator had separated the regulation of the type and the means of sanctioning from the regulation of the extent of sanctioning, meaning that the rate of substantive law fines was provided for separately (Article 33) from the regulation of sanctions and penalties (Article 68). Although this solution did not engender explicit problems of interpretation, the text of the law has been amended on this matter too. Since 3 August 2011[3], the Electronic Communications Act has regulated penalties uniformly, consolidated under a single heading in Articles 48-50. These articles contain the legal institution of warning, the range of available sanctions, the minimum and maximum applicable penalties, the deliberation criteria, the principles for imposing sanctions and the legal institutions of seizure and sequestration (official measures). Compared

[2] There are several ways for grouping administrative sanctions, with the following categorisation seen as a generally accepted one: a) system of sanctions in infraction law, b) administrative penalties in substantive law, c) correction and prohibition sanctions. Kántás, Péter – Szalai, Éva: *Közigazgatási ismeretek*. [Public Administration Textbook] Budapest, 2002. 176.; Kis, Norbert – Nagy, Marianna: *Európai közigazgatási büntetőjog.* [European Public Administration Penal Law] Budapest, HVG-ORAC Lap- és Könyvkiadó, 2007. 27. Nevertheless, in reviewing Hungarian public administration law and the system of its sanctions, it may be a more practical and straightforward solution if we group sanctions in the following groups: a) sanctions in substantive law, b) sanctions in procedural law and c) the system of sanctions in infraction law. Infraction law is not relevant for the Electronic Communications Act, leaving the differentiation between substantive law and procedural law sanctions as a matter of substantive discussion.

[3] As certain measures amending the Electronic Communications Act took effect in Act CVII of 2011 on the Amendment of Acts of Electronic Communications.

to the earlier version, the system of rules in the Electronic Communications Act has become structurally simpler and more transparent in terms of penalties.

From the perspective of legal doctrine, a more significant amendment can be found in how the legislator consistently applies the heading Penalties in the current text of the law to the provisions concerning mostly sanctions. The initial text had used the title Market Supervision to stipulate the available sanctions and other penalties, and Article 68 (5) therein identified as measures certain legal institutions that cannot in fact be classified as measures as they are sanctions (such as publication) or a mandating measure (the prohibition of exhibiting behaviour in breach of the law, setting the conditions for conducting operations). Such distinction is relevant in the opposite direction as well, for seizure and sequestration, which are both measures in public administration law and were stated in the former Article 68 (5) of the Electronic Communications Act, cannot be classified as sanctions. The handling of the "measures" regulated in Article 68 of the Electronic Communications Act without a substantive system and the use of the concept of measure cannot therefore be seen as acceptable for a number of reason, as Community terminology (punitive measure) defines the range of measures in a manner different from the meaning applied in the Electronic Communications Act; moreover, Hungarian public administration law recognises only two types of measures, namely official and interim measures[4], and these should not be seen as sanctions. The prevailing law, on the contrary, no longer defines the legal institutions of seizure and sequestration as sanctions: it includes them separately, in Article 50, under penalties. As far as official measures are concerned, it should be emphasised that they are penalties for behaviour in breach of the law; therefore it is appropriate to place them in Article 50 for structural reasons as well as due to the specifics of public administration law.

Besides clarifying the position of the measures, we also need to focus on how the heading Penalties now allows the appropriate treatment of the legal institution of warning, for warning also should not be seen as a sanction but as a penalty.

This is because a sanction in public administration law (and therein a communications governance sanction) is defined as an act by the authorised and competent authority exercised in the course of its operations by force of the public power it holds, wherein it imposes a public administration or, specifically, a communication law penalty, exercised by the power of the State and using force, in response to unlawful conduct and aimed primarily at the restoration of the breached (social, economic, legal) order, although it may have a number of other various functions as well.[5] This basic definition of sanctions is therefore not plainly different in terms of its elements from other definitions of sanction and penalty, because the discipline of penalties and sanctions, whether in public administration law or in criminal law, does indeed define it, albeit with certain shifts in emphasis, as the action of authorised state bodies to respond to unlawful acts, exercised in possession

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[4] Aranyosné Börcs, Janka – Lapsánszky, András – Spakievics, Sándor (eds.): *A hírközlési igazgatás kézikönyve.* [A Manual for Communications Governance] Budapest, CompLex, 2010. 689.

[5] Aranyosné Börcs–Lapsánszky–Spakievics op. cit. 671.

of the power of the State and having a fundamentally similar function.

The general scholarly understanding of warning[6] is that it is a sanction-type act in the application of the law, with the function and aim of restoring order as before the breach of law by a warning for exhibiting lawful behaviour. A warning in fact serves the purpose of "alerting" the party in breach of the law in order to restore or create lawful conditions/situation,[7] i.e. the element of causing injury is missing from the legal institution of warning if we compare it to the above definition and term of sanction. Accordingly, the authorities[8] use warnings in order to avoid possible later sanctioning as a special manifestation of the principle of gradualism, which supports the fact that the system of penalties in the Electronic Communications Act is aimed primarily at prevention and the exercise of lawful behaviour, the promotion of voluntary compliance with the law. Naturally, there are breaches of law where warning is not appropriate to use but would, in fact, considerably obstruct the efficient application of the law. Pursuant to previous rules, the authorities did not have the right to deliberate in their role of market supervisors, it was mandatory for them to apply a warning in the event of a first breach of law and no sanctions were available to them. The current Electronic Communications Act, on the contrary, partly entrusts to the judgement of the authority whether it wants to apply a sanction or a warning. Article 49 (2) of the Electronic Communications Act says that in the event of a first breach of law (when repetition[9] cannot be established) and provided that the breach of law is of minor severity, it may warn the party in breach of the law and set an appropriate deadline for stopping the behaviour in breach of the law, require refraining from breaches of law in the future and exhibiting lawful behaviour, and it may set the conditions of the same. Accordingly, there is an objective precondition for applying a warning, namely the absence of repetition and another, a precondition that will be subject to deliberation, namely the minor severity of the breach of law. It is not possible to state generic rules on what breach of law classifies as having a minor severity, as the legislator cannot be expected to enshrine in law an exhaustive list of minor breaches of law, after all, the severity of a breach of law can be established only by reference to the circumstances of the specific case. Article 49 (3) of the Electronic Communications Act provides some guidance on this matter at the moment (when first promulgated, it did not resolve these matters, it was in

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6 According to Article 49 (2) of the Electronic Communications Act: "Without recourse to the deliberation criteria in Paragraph (1), if the breach of law is minor and repetition is not found, the Authority shall establish the fact of the breach of law and serve a warning, and call on the person in breach of the law to end the behaviour in breach of the law, to refrain from future breaches of law and to exhibit lawful behaviour, and it shall have the right to set the conditions of the same."

7 Ibid. 650.

8 In this essay, the term "authority" refers to the Office of the National Media and Infocommunications Authority together with the President of the National Media and Infocommunications Authority.

9 According to Article 49 (1) of the Electronic Communications Act, it shall classify as a repeated breach of law if the person in breach of the law repeats such behaviour, as established in a final ruling by the authority, on the same legal grounds and within the same scope of the rules on electronic communication.

subsequent practice that the need for such provisions became clear), as it declares that if a warning cannot be served given all the circumstances of the case or that it would not be an efficient means of eliminating the breach of law, then the authority has the right to, among other things, apply sanctions. In conjunction, these two provisions express the legislator's aim, which is in line with the legal doctrine foundations, that a warning shall be applied only if it can serve the purpose of restoring the breached order, because there are breaches of law where this is not possible by definition (e.g. if a provider terminates its services to its thousands of subscribes without advance notification). By default, the authority shall have the lawful right to apply sanctions only when a second, that is to say repeated, breach of law occurs, except in cases where the nature and severity of the breach of law warrants and even calls for the application of sanctions.

The range of available sanctions has not changed significantly, but many modifications have been made to reflect the authority's practice in applying the law and the judicial practice of the courts (or became necessary due to the mandatory implementation of EU regulations[10]). Regarding the sanction of publication, for instance, the Electronic Communications Act did not define either the subject of the publication or its place and duration (according to Article 68 (4) (c) of the Electronic Communications Act, the authority was entitled to mandate the party in breach of the law to publish certain information selected by the authority). According to its understanding of how to apply the law, the authority had considerable freedom in deciding where, with what content and for what duration the party in breach of the law was required to publish. Accordingly and as an example, in its resolution no. HZ-12864-8/2010 the authority mandated the service provider found to be in breach of the law to publish a short piece of information for 30 days on the home page of its website in order to inform its subscribers (in addition to imposing a penalty of HUF 23 million).[11] The resolution of second instance confirmed resolution no. HZ-12864-

[10] Article 3 (3) of Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and Directive 2002/20/EC on the authorisation of electronic communications networks and services amended Article 5 (6) of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) as follows: "Competent national authorities shall ensure that radio frequencies are efficiently and effectively used in accordance with Articles 8(2) and 9(2) of Directive 2002/21/EC (Framework Directive). They shall ensure competition is not distorted by any transfer or accumulation of rights of use of radio frequencies. For such purposes, Member States may take appropriate measures such as mandating the sale or the lease of rights to use radio frequencies." This provision was implemented by Article 49 (7) (e) of the Electronic Communications Act.

[11] "In the course of its market supervisory proceedings, the authority has found that Vodafone Magyarország Távközlési Zrt. has been unlawfully charging a call charge to its own subscribers since 28 September 2009 when they called international call numbers that can be dialled free of charge in a domestic format (so-called green numbers). The subscribers shall have the right to demand that the Operator repay to them such unlawfully made charges and to enforce this claim by civil lawsuit."

8/2010, but the service provider sought a judicial review, in which the provider in breach of the law contested the foundations for the authority's interpretation of the sanction of publication, with special attention to its opinion that an official "press release" was not information and that, in such a wide framework, the Electronic Communications Act did not furnish the authority with the right to determine the content, place, duration and font size of the text to be published. In its ruling no. 2.K.33.666/2001/9, the Budapest Metropolitan Court favoured the arguments of the authority and stated that, in compliance with the principles on sanctioning of the Electronic Communications Act, which constrain potential arbitrariness by the authorities, the authorities have the legal right to determine the conditions of applying the sanction of publication and the text designed in advance by the authority was in line with the definition of information in the Electronic Communications Act. Although the courts have established that this proceeding by the authority was lawful, the new rules in the Electronic Communications Act now set much more specific rules on the conditions of applying the sanction of publication, and according to the prevailing Article 49 (7) (a), the authority has the right to mandate the party in breach of the law to publish the press release stated in its resolution or the resolution itself on the home page of its website or in the press, in the manner and for the period stated in the resolution.

As regards amendments of specific sanctions, it should be noted that there is significant theoretical debate concerning the extent of penalties, should they be imposed (in some cases these amounts can be especially high), partly for the reason that certain legislation fails to set the minimum and/or maximum of penalties available. Some believe that the principle of the rule of law and legal certainty is jeopardised when a given law fails to regulate the minimum applicable penalty, because in actual fact this will mean that the legislator does not specify at what minimum abstract risk punishment will be due,[12] whereas the absence of a penalty maximum could, clearly, give rise to arbitrariness on the part of the public administration entity, as this means no limits apply to sanctions (the principles and safeguards of imposing sanctions will naturally limit this, but these are not always sufficient and judicial reviews can serve only as a means of retrospective control). In its initial form, the law used such a much-criticised solution lacking minimums and maximums to regulate the sanction of suspension; according to Article 68 (7) of the Electronic Communications Act, the authority had the right to suspend the service licence in the event of serious and repeated breaches of law, but the law failed to regulate the duration of the suspension period. It is clear that such form of regulation cannot comply with the principle of legal certainty and the requirement for predictable sanctions even if the Electronic Communications Act defined the principles for imposing sanctions and the process of, and requirements for, making deliberations. The legislator recognised this deficiency and fine-tuned the rules on suspension, so that Article 49 (7) (c) of

[12] Nagy, Marianna: *A közigazgatási jogi szankciórendszer.* [The System of Sanctions in Public Administration Law] Budapest, Osiris Kiadó, 2000. 114.

the Electronic Communications Act now stipulates that the authority is entitled to suspend the service licence for a period of 10 to 90[13] days.

It has been mentioned more than once before that sanction principles, safeguards and restrictions can serve as an important guideline in the practice of applying the law even if the law is incomplete. Ever since it was first enacted, the Electronic Communications Act has defined rules on the principles to be followed when imposing sanctions, as well as the deliberation criteria, wherein it satisfies requirements imposed by theory as well as practice. Regarding the principles of imposing sanctions, when the act first took effect, Article 68 (1) of the Electronic Communications Act stipulated that the authority should follow the principle of gradualism concerning the breach of law identified and impose a sanction that is commensurate with the breach of law.

The principle of proportionality is fundamental, since interference in the private sphere (the conditions of the operations of a business enterprise, a service provider, its property and the wealth of its senior managers) is permitted only if essential for the purpose of enforcing the laws, in the public interest or for specific purposes defined by law. The role of the principle of gradualism lies primarily in the repeated imposition of penalties or the use of other sanctions and measures involving progressive increases in the repeated sanctions, facilitating the transparency and predictability of sanctions (to which the legal institution of warning is added in communications governance).[14] These two principles already enjoy emphasis in the Electronic Communications Act and the authority's practice of imposing sanctions, but they must not be segregated from the deliberation criteria and the purpose of imposing sanctions, because the use of sanctions is a complex process, and Article 48 (2) of the Electronic Communications Act already states that the authority shall apply the principle of gradualism in view of the severity of the breach of law and its repetitions and imposes a penalty that is proportionate to all the circumstances of the case and the purpose that is to be achieved by this penalty, that is to say it interconnects the various elements of imposing sanctions in a logical order.

Another important change is that the Electronic Communications Act states the (primary) objective of applying penalties not only when it comes to penalties (the earlier text of the law defined in Article 33, under the heading "penalties", that the fundamental goal of penalties was prevention), as Article 48 (2) states that the authority must take into account that the sanction imposed (and not only penalties) should be suitable for preventing the party in breach of the law and other parties from

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[13] Setting a suspension period minimum of 10 days could be understood as considerable tightening of the rules compared to the earlier text, because the Electronic Communications Act previously gave the authority right to suspend licences for as little as a single day, whereas now suspension must be imposed for at least 10 days; the authority has no discretionary right to set a shorter period. The amendment of the Electronic Communications Act thus affects service providers in breach of the law negatively, however, it should be noted that suspension is one of the most stringent sanctions and the authority has never applied it before, and therefore the 10-day minimum can be considered appropriate given the presumable severity of the infringement in such a case.

[14] Aranyosné Börcs–Lapsánszky–Spakievics (eds.) op. cit. 648–649.

further infringements, i.e. the primary objective of penalties is general prevention according to the Electronic Communications Act (a general deterrent, exercised not specifically in relation to the party guilty of the given breach of law) and specific prevention (the prevention of the party in breach of the law from future breaches of law). The Electronic Communications Act is consistent in requiring that the principle of prevention is observed whenever a penalty is applied. This does not mean, however, that this would be the sole purpose and function of sanctions. Although the Electronic Communications Act (just as most of the laws) does not regulate this in itemised detail, the function of enforcing the law is in theory present whenever any sanction is applied, since the public administration law norms, such as the rules on electronic communication, must always be enforced as a means to serve the public interest, and every sanction must ensure that the breached social, economic etc. order is restored, firstly without retribution. This means that the enforcement of the law is (should be) the primary function of sanctions, as stated by the Constitutional Court in its ruling no. 60/2009 (V. 28.). Most scholarly papers maintain[15], however, that this function of enforcing the law is always coupled with and joined by another function, or is perhaps achieved as a secondary goal underlying another function.[16] What is for certain, however, is that each sanction should serve the fundamental purpose of consistently holding to account.[17] In some cases, the fine could be the price for the breach of law but it may also serve as compensation; however, these functions are not typical in telecommunications sanctions. Repression, a basic feature of punishment, is much more relevant for a substantive analysis. It should be noted that punishment and sanction are different concepts. In public administration sanctions, the word punishment should basically be avoided (the Electronic Communications Act does not use this term at all), because punishment assumes repression due to its roots in criminal law (and thereby, according to many, a subjectivity of sanctions, too, whereas public administration sanctions must be objective, that is to say the cognitive approach of the party in breach of the law to the breach of law shall not be considered[18]). As for the substantial meaning of repression, we should note that

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15 Tibor Madarász considered the function of enforcing the law as the most fundamental requirement. He applied this feature first and foremost to the sanctions he called enforceable, which may only be applied if the behaviour required by the public administration entity has not yet been demonstrated, i.e. if the person in breach of the law has failed to do something it was supposed to do. Madarász, Tibor: *Az államigazgatási szankció fogalma és fajtái.* [The Concept and Types of Public Administration Sanctions] *"Jogi felelősség- és szankciórendszer alapjai"* ["The Foundations of a System of Legal Responsibility and Sanctions"] OTKA Research, Vol. 3., 117.

16 Nagy op. cit. 149–150.

17 Rendeki, Sándor: *A büntetés kiszabása. Enyhítő és súlyosbító körülmények*. [Imposing Punishments. Mitigating and Aggravating Circumstances] Budapest, Közgazdasági és Jogi Könyvkiadó, 1976. 30.

18 Looking at EU legislation, we find sporadic appearances of the term punishment. See for example Recommendation No. R(91)1 of the Council of Europe Committee of Ministers on public administration sanctions; elsewhere, EU laws declare explicitly that a given sanction cannot be seen as having penal law characteristics, e.g. in Article 15 of the Resolution of the European Economic Community on the implementation of Articles 85 and 86 of the Treaty.

repression is neither an aim nor a function, because the aim of punishment (sanction) is in and of itself, in retribution not mindful of any purpose, in declaring that the law is sound and complete.[19] The most common public administration sanctions are fines, which, in terms of their primary legal nature and characteristics constitute punishment, and repressive sanctions can be categorised as punishment in spite of the Hungarian legal terminology[20] and the objectivity of the sanctions, therefore sanctions in communications law (in particular fines) can be considered as forms of repression by public administration. On the other hand, we must remember that besides a preventative function, a high fine or other sanction imposed in the light of the severity of the breach of law, the loss caused to subscribers or the damage to the market etc. may be of such a magnitude that prevention is automatically coupled by repression in its effects (repression by prevention).

This leads us to the question of deliberation. Perhaps the most important amendment to the Electronic Communications Act concerns deliberation, and should fundamentally be seen as being taxonomical in nature. Initially, the law regulated the deliberation criteria in Article 33, but this article was limited to regulating the sums of the penalties, allowing an interpretation of the Electronic Communications Act, whereby the deliberation criteria applied only when determining the amount of the penalty and not when other sanctions are imposed. Such an approach would have naturally contravened the legal doctrine underpinning of sanctions and the requirement for predictable sanctions; therefore the authority used and interpreted the deliberation criteria stated in the Electronic Communications Act uniformly for each sanction. Another amendment concerning the deliberation criteria is the fact that the legislator has extended the range of these criteria. Deliberation criteria specifically regulated in individual legislation are of special importance because the deliberation criteria defined in the Electronic Communications Act must be considered by the authority for every possible sanction it may impose, without exception, and the authority must include them in its resolution, even those that are neutral or not applicable to the breach of law. As a result of these amendments to the text of the law as it stood on 1 January 2004, the authority is obligated to assess the repeated and/or continued nature of the breach of law, its duration and other criteria applicable to the particular case, and establish the appropriate sanction with a view to these criteria. The most important amendment to the rules enacted by law in this matter is perhaps not even the fact that the range of deliberation criteria has been expanded but that the Electronic Communications Act now stipulates that the authority must review all the criteria applicable in a given case and evaluate these when making its decisions. In general, the authority used to take into account other, primarily mitigating circumstances[21] even before the amendment of the Electronic

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19 In its ruling no. 23/1990 (XI. 31.) the Constitutional Court declared with theoretical emphasis that the principle of "crime merits punishment" may be satisfied even without purposefulness and efficacy. This means that punishment is not a purposed sanction, i.e. it does not necessarily have a purpose.

20 Kis–Nagy op. cit. 92.

21 E.g.: Resolution HP-16714-3/2009.

Communications Act to this effect, but the Act has now made it mandatory for it, ensuring thereby that the special considerations arising in individual cases (whether as mitigating or as aggravating conditions) are always considered and mandatorily evaluated, since neither the Electronic Communications Act nor any other law is suitable to give an exhaustive listing of each and every deliberation criterion.

It is clear therefore from the above analysis, which is far from being exhaustive and focuses on changes and amendments through examples and brief analyses, of the system of sanctions in the Electronic Communications Act that stipulations on sanctions are under constant development and transformation, primarily on the basis of experience from the application of the law and judicial practice, and the needs and requests arising from the same. The system enacted in the Electronic Communications Act has not changed fundamentally, no radically new sanction principles have been introduced and the purpose and function of penalties have not changed in this respect, either, however these structural modifications and changes to specific sanctions have allowed the Electronic Communications Act to function as a transparent and modern regulation of the system of penalties, providing proper safeguards.