

ULTIMA RATIO AND PROPORTIONALITY IN CALIBRATING CRIMINAL AND ADMINISTRATIVE SANCTIONS: A TIERED ENFORCEMENT MODEL

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Abstract: Legislators frequently criminalize conduct or escalate administrative penalties without first testing whether less restrictive measures could achieve the same regulatory objective. This thesis examines the ultima ratio principle as a proportionality safeguard governing the choice between criminal, administrative, and non-punitive responses to unlawful conduct. Drawing on the Venice Commission's rule-of-law standards [1], Ayres and Braithwaite's enforcement-pyramid model [2], the European Court of Human Rights' functional test for the criminal character of formally administrative penalties [7,8], and comparative practice in the EU's turnover-indexed fines under GDPR and competition law [3,4], the thesis proposes a four-question sequential test for evaluating new criminalization or sanction-escalation proposals. It argues that administrative fines should, wherever the offender is an economic entity, be calibrated to turnover rather than fixed sums, and that doing so systematically postpones – and in many cases eliminates – the need to resort to criminal liability as the only credible deterrent against large offenders.

Keywords: ultima ratio; proportionality; criminalization; enforcement pyramid; responsive regulation; administrative fines; turnover-based sanctions; rule of law; deterrence; criminal-law character of sanctions.

1. Introduction

Criminal liability is the most severe form of state coercion available to a legal system. It produces not only punishment but lasting collateral consequences for the offender's legal status – a criminal record, restrictions on professional activity, and reputational harm that outlast the formal sentence [1]. Because of this severity, criminal-law theory has long recognized the *ultima ratio* principle: criminalization is legitimate only where the underlying social harm is serious and where less restrictive legal mechanisms – administrative, civil, or disciplinary – have proven insufficient to address it. The principle is easy to state and difficult to operationalize. Legislative practice in many jurisdictions treats criminalization as a default response to a newly salient harm (a data breach scandal, a spate of consumer complaints, a high-profile industrial accident) rather than as the final step in a graduated sequence of tested alternatives.

This thesis asks two connected questions. First, how can the *ultima ratio* principle be translated from a general constitutional standard into a testable sequence usable by a legislative drafter evaluating a specific criminalization proposal? Second, how does this sequence relate to the parallel, and largely separately developed, proportionality requirements that already govern the calibration of administrative fines – that is, whether a well-designed administrative-fine regime can itself do some of the work that would otherwise justify escalation to criminal liability.

2. Materials and Methods

The thesis applies a doctrinal-comparative method combined with a structured synthesis of regulatory-enforcement theory. It reconstructs the Venice Commission's rule-of-law standard requiring that criminal liability be introduced only where the insufficiency of administrative sanctions has been demonstrated [1], and situates this standard within the regulatory-enforcement literature, in particular the enforcement-pyramid model developed by Ayres and Braithwaite, in which regulators escalate from persuasion to warnings to civil penalties to criminal referral only as lower-tier responses repeatedly fail [2]. It further draws on the European Court of Human Rights' functional (rather than formal) test for whether a nominally administrative penalty is in substance criminal for the purposes of fair-trial and proportionality guarantees, developed in *Menarini Diagnostics v. Italy* [7] and *Grande Stevens v. Italy* [8]. It then

compares two operative EU sanction regimes that avoid premature criminalization by scaling administrative fines to the offender's economic capacity: the GDPR's turnover-indexed fines of up to 4% of global annual turnover [3], and the competition-law fining regime capped at 10% of turnover [4]. Finally, it revisits Becker's economic model of optimal deterrence [5] and Barak's four-part proportionality test [6] to identify the analytical variables that a sequential ultima ratio test must incorporate if it is to be more than a rhetorical restatement of the principle.

3. Results

Three findings emerge from this synthesis.

First, the ultima ratio principle is not merely a policy preference but, per the Venice Commission's rule-of-law standard, a precondition for legitimate criminalization: the burden falls on the state to demonstrate that administrative alternatives have been tried and have failed, not on critics of a criminalization proposal to demonstrate that it is unnecessary [1]. This allocation of the burden of proof has a direct evidentiary consequence: a criminalization proposal introduced without a documented period of administrative enforcement, and without published data on that enforcement's effectiveness, cannot satisfy the standard regardless of the seriousness of the underlying harm, because seriousness of harm alone answers only the first of the four questions developed in Section 4.

Second, the enforcement-pyramid literature confirms that jurisdictions which formalize an escalation sequence – explanation and advice, warning, minor administrative fine, major fine or temporary restriction, criminal liability – achieve compliance with less recourse to the most severe tier than jurisdictions that apply flat, undifferentiated sanctions, because regulatees who observe a consistent and credible escalation pattern have a rational incentive to comply at the lowest tier available to them [2]. Table 1 sets out the five-tier structure used throughout the comparative material reviewed in this thesis, together with the evidentiary threshold that should be satisfied before a regulator or legislature moves the sanction one tier higher.

Table 1. Five-tier enforcement escalation and evidentiary thresholds

Enforcement tier	Instrument	Evidentiary threshold to escalate
1	Explanation and advice	First identified instance; no prior contact with regulator

2	Formal warning	Repeated instance after advice; no measurable harm yet
3	Minor administrative fine	Documented harm or illicit gain within an identifiable range
4	Major fine or temporary restriction	Warning/minor-fine tier shown ineffective over an observation period
5	Criminal liability	Administrative tier's insufficiency empirically demonstrated per [1]

Third, jurisdictions that index administrative fines to turnover rather than to a fixed statutory sum are able to keep proportionally large sanctions within the administrative tier for considerably longer, reducing the pressure to escalate to criminal liability purely in order to achieve deterrence against large economic actors, since a percentage-of-turnover fine already scales with offender size [3,4]. This finding is reinforced, rather than undermined, by the European Court of Human Rights' functional test: because a sufficiently severe and stigmatizing administrative fine may itself be classified as 'criminal' in substance for fair-trial purposes [7,8], the marginal procedural cost of keeping a sanction nominally administrative – while still using a criminal-grade fine level – is smaller than legislators often assume, further weakening the case for formal criminalization as the only route to a credible deterrent.

4. Discussion

These findings support a four-question sequential test for any legislative proposal to criminalize conduct or to escalate an existing administrative sanction: (i) what is the demonstrated severity of the social harm, assessed through the real-harm and illicit-gain criteria familiar from administrative fine-setting practice; (ii) have administrative or civil mechanisms actually been applied to this conduct, and has their effectiveness been empirically assessed over a defined observation period, rather than merely asserted; (iii) is the proposed criminal sanction's severity proportionate to the harm relative to existing offences of comparable gravity, applying the kind of vertical and horizontal symmetrical analysis required by Barak's proportionality-stricto-sensu component [6]; and (iv) would a turnover- or capacity-indexed administrative fine, rather than a fixed statutory sum, close the deterrence gap identified by a Becker-style analysis of expected cost versus expected benefit [5], without resort to criminal liability. Where question (iv) can be answered affirmatively – that is, where redesigning the administrative-fine formula would achieve the same deterrent effect as criminalization – the ultima

ratio principle counsels against criminalization, and the reform effort should be directed at the fine formula rather than at the criminal code.

This sequencing reframes the proportionality analysis of administrative fines developed elsewhere in the literature – real harm, illicit gain, ability to pay, and preventive effect – as the evidentiary basis for the ultima ratio test at the boundary between administrative and criminal liability, rather than as a separate inquiry confined to fine-setting alone. It also clarifies a point often obscured in legislative debate: the choice between administrative and criminal liability is not a binary choice between a 'weak' and a 'strong' response, since a well-calibrated, turnover-indexed administrative fine can be more severe in absolute terms, and more consistently enforced, than an under-resourced criminal provision that is rarely prosecuted to conviction. The comparative material reviewed above – GDPR fines reaching hundreds of millions of euros against large undertakings [3], and competition fines capped only at 10% of global turnover [4] – illustrates that the administrative tier, properly designed, is capable of imposing sanctions of a magnitude that criminal-law drafters often assume only imprisonment or formal criminal conviction can achieve.

5. Conclusion

The ultima ratio principle and the proportionality of administrative fines are two expressions of the same underlying constraint on state coercion: that the severity of a legal response to unlawful conduct must be justified by the demonstrated insufficiency of less restrictive alternatives, not merely by the seriousness of the conduct in the abstract. A legislature that has not yet indexed its administrative fines to offenders' economic capacity has not yet exhausted the administrative alternative in the sense required by the ultima ratio test, and criminalization proposed under such conditions is correspondingly harder to justify under the four-question sequence developed in this thesis. Reforming administrative-fine methodology is therefore not only a technical improvement to regulatory enforcement but a practical precondition for defensible criminal-law policy, and should precede, rather than follow, any legislative decision to expand the reach of criminal liability into newly regulated domains.

References

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