From the Velvet Glove to the Iron Fist:
Sanctions and Penalties for the Enforcement of Community Law

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COURSE OUTLINE

This specialised course will explore the use of sanctions and penalties for the enforcement of Community law. The course will be divided into two main parts.

A) The “Velvet Glove”: National Sanctions for the Enforcement of Community Law

In the absence of Community legislation prescribing the penalties to be imposed for the enforcement of substantive Treaty norms, it is left to each Member State to provide for appropriate sanctions within its national legal system – whether civil, administrative or criminal in nature – subject to various obligations imposed under Community law. Those obligations are largely derived from Article 10 EC as interpreted by the Court of Justice in Case 68/88 Commission v Greece (Greek Maize) [1989] ECR 2965. In particular, a large body of caselaw has built up elaborating on the Member State’s duty to ensure that national penalties for the enforcement of Community law are effective, dissuasive and proportionate.

In addition, the Court of Justice has established that other general principles of Community law apply to national sanctions intended to enforce provisions of the Treaty. Such principles are generally intended to protect individuals from the unfair / arbitrary exercise of public power, especially in the context of domestic criminal proceedings: for example, the principle that unimplemented provisions of Community law cannot serve as a basis for aggravating existing national criminal liabilities; and the principle that the most lenient criminal sanction should apply retroactively for the benefit of individual citizens.

The Greek Maize caselaw, and its associated jurisprudence, is most relevant to the imposition of “public sanctions”, i.e. by the competent national authorities. However, difficult issues arise when such public enforcement obligations are viewed in their wider context, alongside the principles underpinning the private enforcement of Community law. In the first place, Community law may create subjective individual rights calling for the provision of effective individual remedies; when (for example) might such remedies be considered sufficient to constitute an effective sanction for the purposes of the Greek Maize caselaw? In the second place, Community law may instead recognise that an individual enjoys mere rights of standing, for the purposes of enforcing Treaty obligations: when (for example) may a Member State seek instead to establish a
monopoly over the implementation of Community law in favour of the competent national authorities?

B) The “Iron Fist”: Community Sanctions for the Enforcement of Community Law

In certain situations, Community legislation does indeed set out its own system of sanctions for the enforcement of substantive Treaty obligations. Occasionally that will involve a direct power for some Community institution to impose penalties: the most prominent example concerns the Commission’s powers to enforce the competition rules contained in Articles 81 and 82 EC through the imposition of fines and penalties. More usual, however, is for the Community legislature to provide for the harmonised / coordinated imposition of sanctions by or through the national legal orders. Such sanctions have traditionally been categorised – sometimes controversially – as of a purely administrative nature: for example, in fields such as the common agricultural policy, and as regards restrictive measures on individuals suspected of involvement in terrorism.

For some years, it was debated whether and how far the Community institutions might enjoy the power to legislate for the imposition not only of administrative but also of criminal penalties for the enforcement of Treaty norms. That debate was complicated by the introduction of Title VI TEU, which provides for police and judicial cooperation as regards criminal matters. After all, the Third Pillar employs a model of inter-institutional relations, a set of legislative instruments, and a system of judicial protection, all distinct from that of the First Pillar. In its rulings in Case C-176/03 Commission v Council (Environmental Crimes) [2005] ECR I-7879 and Case C-440/05 Commission v Council (Ship Pollution Sources) [2007] ECR I-9097, the Court of Justice confirmed that the Community does indeed enjoy a certain competence to provide for the harmonisation of national criminal sanctions. However, those rulings have proved deeply controversial on many levels: concerns have been expressed (for example) about whether the Court’s reasoning to support the existence of a Community criminal competence is robust enough to satisfy the principle of attributed powers; about the scope and strength of the Community’s newfound criminal competence (including how far it applies beyond the field of environmental law, or extends beyond the principle of criminalisation so as also to cover the nature and severity of the criminal penalty); and about the interaction between the First and Third Pillars when it comes to imposing criminal sanctions for the enforcement of Community law.

The debate over Community “own sanctions” is further complicated by the provisions of the Treaty of Lisbon 2007. Should the latter enter into force, it will both carry out a radical reform of the fields currently falling within the scope of the Third Pillar, and introduce a dedicated legal basis for the harmonisation of criminal sanctions necessary for the enforcement of other substantive Union policies. While at first sight those reforms might seem to resolve many of the controversies surrounding the Environmental Crimes and Ship Source Pollution rulings, further reflection suggests that the Treaty of Lisbon will in fact lead to fresh uncertainties and additional problems.
Participants in this specialised course should ideally familiarise themselves with the following major judgments in advance of the classes:

Case 68/88 *Commission v Greece (Greek Maize)* [1989] ECR 2965 [6 pages]

Cases C-387/02, C-391/02 & C-403/02 *Berlusconi* [2005] ECR I-3565 [14 pages]


Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453 [13 pages]

Case C-176/03 *Commission v Council (Environmental Crimes)* [2005] ECR I-7879 [9 pages]

Case C-440/05 *Commission v Council (Ship Pollution Sources)* [2007] ECR I-9097 [13 pages]

Prior reference to the following academic works may also prove useful in preparing for this specialised course:


