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Summary

"Sanction" as a Legal Term in the Law of the European Union. The Term and Its Function within the System of Remedies Foreseen by European Union Law

The object of this study was to examine the term "sanction" as a legal term in the law of the European Union and its function within the system of remedies foreseen by European Union law ("EU law"). The necessity to define the "sanction" from a European law perspective derives from the fact that there is a variety of areas within EU law where the term plays an important role. To name but a few: the substantial fines of competition law according to Articles 81 et seq. EC (now Articles 101 et seq. Treaty on the Functioning of the European Union, TFEU) and the respective regulations, the innovative measures provided for by European agricultural law, or the lump sums and penalty payments imposed upon defaulting Member States according to Article 228 para 2 EC (now Article 260 para 2 TFEU).

Although a reader, especially one learned in legal doctrine, may be able to identify a single measure as a sanction, an explicit and coherent understanding of what constitutes a sanction in EU law is yet to be found. However, in light of the impact a sanction may have on the person concerned, such a coherent understanding is desirable, not least because it would facilitate a coherent system of legal protection. Thus, the overall aim of the analysis is the definition of the unional concept of "sanction".

Chapter 1 examined whether legal philosophy, legal theory and legal sociology could provide insights into the nature of a sanction, i.e. what elements are essential for a measure to be characterised as a sanction. In this context, the function of sanctions for the application and effectiveness of law in general was examined. This analysis revealed that the definition of a sanction is as controversial and unsettled in these subjects as it is in the literature on EU law. The debate about the meaning and function of sanctions in law is made even more confusing because some authors use the term synonymously with coercion. Coercion, however,

includes elements not found in the concept of a sanction. Both terms are typically discussed when addressing the issue of whether and to what extent coercion and sanctions are necessary in order to deem a particular social system as constituting "law". Thus, the issue of what constitutes law formed a part of the examination of the nature of a sanction from the perspective of legal theory, legal philosophy and legal sociology.

Chapter 1 concluded by showing that these three disciplines were able to provide important insights into what constitutes a sanction and what constitutes coercion. Indeed, these insights were later drawn on as supporting arguments when the study turned to defining the term "sanction" within the meaning of EU law. All three disciplines roughly had the following elements in common when defining the term "sanction": speaking in a modern sociological terminology, a sanction must be a detriment, which is imposed on a legal subject to counterfactually stabilise normative expectations where the legal subject has acted in violation of a legal norm. However, it is necessary to firmly anchor the definition in EU legal doctrine if a precise definition of "sanction" in EU law is to be developed.

In **Chapter 2** it was shown that the concept of a sanction implies another specific legal function with respect to the system of legal protection. According to the European Court of Justice and the General Court there is a relationship between the imposition of a sanction and the applicability of procedural rights such that the person affected by a measure finds herself within the "certain area of application" of the rights of defence if the measure constitutes a sanction. The (judicial) finding that a measure is a sanction thus triggers rights of defence. Herein lies an effect specific to legal protection for several reasons: first, the rights of defence serve preventive legal protection by shaping the administrative procedure. Simultaneously, legal protection before the court is thereby facilitated and improved. Finally, the finding that a sanction has been imposed gives the courts jurisdiction because the affected party has standing where an organ of the EU has imposed a sanction. On the other hand, the term "sanction" has no independent meaning in respect of differentiating between the EU's and Member States' competences.

The specific function of legal protection implied by a sanction means that, aside from the scholarly need for clear and uniform definitions, it is necessary to define the term under EU law if a coherent legal theory is to be established. The most important differentiation was the one to "an act adversely affecting an individual". The case-law on acts ad-

versely affecting an individual adopted the function of legal protection attached to a sanction. It was shown that a sanction is a subset of the broader notion of "acts adversely affecting an individual". The former can thus serve as an exemplary rule or reference point for determining what other measures trigger the application of Union procedural guarantees. In this respect it was proposed that an "act adversely affecting an individual" exists where the measure in question has comparable effects to a sanction on the person or entity.

It was urged to focus on the term "sanction" due to its greater precision in comparison to "acts adversely affecting an individual" and to avoid confusion with questions of direct concern in claiming standing in actions for annulment. The term "sanction" has pre-eminent importance in the EU's system of legal protection also because of its potential to define the term "acts adversely affecting an individual".

This raised the question of what is to be understood by the term "sanction" within the meaning of EU law. In **Chapter 3** the positions in the relevant scholarly literature on European law were surveyed in respect of their underlying understandings of the term. The study showed that the authors surveyed used the term "sanction" differently. It emerged that the principal reason for this discrepancy was that the relevant works selected a pre-determined conception of a sanction as a starting point for the study rather than deriving it from the relevant documents of EU law. Consequently, they did not develop a definition of the term specific to EU law, which, however, is what was needed. Beyond identifying some common individual elements of what constitutes a sanction, the survey of scholarly literature on the subject revealed a mixed picture.

In **Chapter 4** the documents of the relevant actors in the European Union were examined to corroborate whether a European conception of a sanction exists. According to the methodology argued for here, this is the only approach which permits an appropriate definition of the term "sanction" under the system of European Union law (Chapter 4 A).

The study thus included the relevant legal texts of primary and secondary law as well as the judgements relating thereto. The European constitutional fathers', the legislator's and the European courts' understanding of the term "sanction" was examined on this basis.

No specific understanding of the term "sanction" could be discerned in the texts of primary EU law. Rather, only isolated references to penalties and coercive measures could be found (Chapter 4 B.I). However,

primary law assumes that sanctions and coercive measures are to be understood synonymously.

Secondary EU law provides important reference points for determining the definition of the term "sanction" in EU law. The most important starting point can be found in Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests ("PFI Regulation") (Chapter 4 B.II). The intent of this framework regulation is to establish common horizontal rules governing the application of sanctions for the protection of the Union's financial interests. It thus lends itself to establishing a general definition of the term "sanction" for the whole of EU law, even if it only relates specifically to the protection of financial interests. The analysis showed that the PFI Regulation uses an underlying concept according to which a "sanction" is a measure which goes beyond merely restoring legality – and which is not merely restitutive. However, the Regulation is not exhaustive, but rather also acknowledges the possibility of imposing other sanctions of an economic type. Given that the PFI Regulation assumes that its notion of a "sanction" has broader application within EU law, it can be drawn on as an important indication of what the term means within the EU's legal system.

On this basis it was established that the term "sanction" as used in the documents of secondary law largely corresponded to the clues set forth in the PFI Regulation. Nonetheless, there still exist other notions of "sanction" in secondary law, which are not covered by the notion of the PFI Regulation.

Some key elements of what is to be understood by the term "sanction" could be discerned in secondary law: all respective measures are adopted as a response to misconduct by a natural or legal person, which is objectionable under Union law. Another striking aspect emerged from the examination of the provisions regarded as being sanctions: they are intended to have a preventive-deterrent as well as repressive-punitive effect. Restitutive measures, on the other hand, are generally called "administrative measures" or something similar. Fines and other payment obligations, which amount to a fine in respect of their effects, the withdrawal of licences and penalty payments are typical repressive measures. In addition, the specific deterrent effect of the measures, in particular of the withdrawal of licences, is also of relevance. In fisheries law, the seizure of illegal catches, which represents a restitutive measure, is designated as a sanction.

The terminology corresponds in most cases to the differentiation used in the PFI Regulation. This means that the provisions of the PFI Regu-

lation provide a plausible starting point for a uniform definition of the term sanction in EU law. Isolated deviations could be found, but this does not lead to a different assessment. Rather – as was later discovered: in accordance with the case-law – it may be assumed that the conception of sanction found in the PFI Regulation remains a standard *de lege ferenda*. However, this thesis of legal policy is only defensible if it is also consistent with the case-law of the European courts.

In the following part the case-law of the European courts was therefore examined as to what understanding of the term "sanction" could be deduced from their judgements (Chapter 4 C). To sum up, it could be determined that the term "sanction", as it is used by the European courts, goes beyond a purely restitutive effect and includes a repressive-punitive aspect corresponding to the definition of a sanction derived from the PFI Regulation. In agricultural law this was evidenced in the case-law on total or partial removal of State aid and on loss of security, in institutional law in the case-law on lump sums or penalty payments against the Member States according to Article 228 para 2 EC Treaty (now Article 260 para 2 TFEU) and in the case-law relating to the Member States' obligations to prosecute and sanction conduct contrary to EU law based on Article 10 EC Treaty (now Article 4 para 3 Treaty on European Union). It could furthermore be demonstrated that the concept of "sanction" in the case-law of the Court not only was consistent with the concept underlying the PFI Regulation; the Court also confers on the PFI Regulation a *standard-setting function*. Finally, the analysis of the relevant case-law showed that the term "sanction" in EU law has to be confined to sovereign measures. Civil law measures thus do not fall within the scope of the EU definition of a sanction.

As a result of the insights of the foregoing chapters the term "sanction" within the meaning of EU law could be defined:

> *A sanction within the meaning of EU law is a sovereign reaction to conduct violating EU law, which imposes a burden on a legal subject, is intended to have a repressive-punitive effect and which goes beyond merely restoring the legal situation or the legal behaviour.*

The repressive-punitive effect is generally intended to also have a deterrent effect. The PFI Regulation proved to be satisfactory to capture the majority of the measures which are considered sanctions in accordance with this terminology. The Regulation is recognised as setting a standard for the concept of a sanction under Union law.

In **Chapter 5**, the concluding chapter, the EU definition of "sanction" was applied to two selected issues. The focus was on the issues of

whether the liability of the Member States for inadequately transposing Community law or its direct applicability are to be regarded as sanctions within this meaning. There are distinguished voices in legal scholarship which say that this is so for both legal institutions. The study demonstrated that, taking the conception worked out in Chapters 3 and 4, it would be inconsistent with the definition of a sanction under EU law to consider either legal institution as a sanction. Their function rather is to facilitate the protection of *individual rights* and they therefore do not have a punitive character which would place the emphasis more on the concept of the effectiveness of European law in general. While the notion of legal protection also derives its strength from the effectiveness of European law, this concerns making individual rights effective. State liability and direct applicability are merely the means by which individual rights are made effective.