# Regulatory Penalties: Two Lessons From The EU Context

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Regulatory penalties, particularly financial penalties, are in the news, and the stakes are rising. Prominent domestic cases in 2008 have included the Office of Rail Regulation ("ORR") imposing a fine of £14m on Network Rail after the engineering overruns at Christmas; and Ofgem imposing a fine of £41.6m on National Grid for restricting the development of competition in the domestic gas meter market.

But as the stakes grow higher, so do the risks. Higher penalties mean that supervisory tribunals and courts will insist on higher standards of procedural fairness and proof. Against that background, regulatory lawyers need increasingly to think not merely of a particular sectoral regime (e.g. the hoops through which the FSA must jump before declaring a person not "fit and proper"), but also of more general, overarching legal principles which can, where applicable, affect the penalties which can be imposed by any regulator.

At least three of those principles will be familiar to any regulatory practitioner:

- the right to a fair hearing, guaranteed both at common law and under Article 6 ECHR is a key protection, and can be asserted even against regulators whose decisions are not subject to judicial review: *Bradley v Jockey Club* [2004] EWHC 2164 (QB), para 37 per Richards J.

- the principle of legitimate expectation, again recognised in both domestic and European jurisprudence, provides protection where a regulator proposes to impose a penalty which would involve it resiling from a previous representation, whether as to substance or as to procedure. For an example from the medical context, see *R v General Medical Council ex p Toth* [2000] All ER (D) 865.

- the principle of proportionality, rooted most conspicuously in the law of the ECHR and the EU, but also potentially applicable at common law in penalties cases (*De Smith*, London 2008, §11- 076), is a merits-intrusive form of scrutiny

> which requires not only that the punishment should fit the crime, but also that it should go no further than is necessary for it to do so. This can lead to developed bodies of case law on the proportionality of fines in a particular area: see e.g. *Napp v DG Fair Trading* [2002] CAT 1; *Argos v OFT* [2005] CAT 13; *Sepia v OFT* [2007] CAT 13.

Furthermore, the field of EU law has in recent years highlighted two perhaps slightly less obvious general penalties "controls".

The first is the principle of double jeopardy, or, as euro-lawyers would have it, the principle of "non bis in idem". In essence this principle requires that the same person should not be sanctioned more than once for the same conduct in order to protect the same legal interest. The principle is a fundamental principle of EU law (Joined Cases C-238 etc. *Limburgse Vinyl v Commission* [2002] ECR I-8375 §59) and must therefore be complied with whenever penalties are imposed under a scheme of national measures adopted pursuant to Community rights (Case C-260/89 *Elliniki v Dimotiki* [1991] ECR I-2925 §43). The most topical application of the principle in the UK regulatory context has been seen in the context of competition law, in the case of *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] E.C.C. 4. In that case, it was held that under English law, exemplary damages are not recoverable from a cartellist who has already been investigated and fined by the Commission (or, by the same logic, the OFT), because such exemplary damages would fulfil the same deterrent purpose as a fine.

The second general control on regulatory penalties which has been highlighted by cases in the field of EU law is that of workability; a regulator must not impose a penalty which is unworkable and/ or incapable of effective supervision, especially if its sanctions regime is enforced by proceedings for contempt of court. The leading case in this area is *English, Welsh and Scottish Railway Ltd v E.ON UK Plc* [2008] E.C.C. 7, QB. The ORR, in exercise of its powers concurrent with the OFT, had investigated a coal carriage agreement and had concluded that, in various respects, the agreement was contrary to Article 82 EC and the Chapter II prohibition. The ORR then ordered the parties, by way of penalty, to remove or modify various provisions of the coal carriage agreement. However, on proceedings brought by the Claimant, the Commercial Court held that, as a matter of contract law, there could be no severance of the relevant terms and therefore the whole contract was void and unenforceable. In other words, the relief imposed by the ORR was unworkable and therefore could not be sustained as a matter of law.

Although these two further penalties "controls" arose in the context of EU law cases, they are plainly of wider application. The principle of double jeopardy is a long established common law principle (see e.g. *Archer v Brown* [1985] Q.B. 401), and the requirement that a form of relief should be workable is one familiar to any practitioner



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of the Commercial Court. Thus the field of EU law is likely to give impetus to other fields of regulatory law. The same process has applied in reverse to some extent in, for instance, the *Norris* litigation.

The increasing reach of regulators, and the increasing sums at stake, are thus leading regulatory lawyers to set aside their conventional taxonomy in penalties cases. It is no longer sufficient to think only in terms of a particular regulatory scheme (e.g. that of the GMC or the FSA); other areas of law such as public, criminal and EU law, which might not at first glance seem relevant, can have an important impact on the penalties which can be imposed.



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