A Banking Union without Criminal Law Enforcement

The Challenges Ahead

Silvia Allegrezza
Index:

I. Setting the scene: interactions between banking supervision and criminal law
II. Difficulties of criminal law enforcement
III. Lack of harmonization of which crimes?
IV. The US and the UK reforms
V. Challenges ahead
VI. A blueprint for an integrated enforcement model
I: Interactions

Sanctions are based on the same facts

Administrative sanctions are criminal in nature

Proactive policing

Supervisors are in the best position to detect crimes in banking activities

Ne bis in idem
II. Is there a need for a stronger criminal law response?

- Why only administrative sanctions in the EBU and in particular in the SSM?
  - Treaty limits
  - Flexibility
  - Only legal entities
  - Individuals criminal liability as a response to the “too big to jail”
  - Completeness and efficiency imply a stronger criminal law response
II. Characteristics of criminal law:

- **Criminal law has a monopoly on imprisonment**
- **It requires criminal intent (not mere negligence)**
- **The imposition of a criminal sanction carries a stigma**
- **Enforcement authorities have stronger investigative powers**
- **Rights of defence are stronger**
- **The body imposing the criminal sanction is separated from the investigator and/or the prosecutor**
- **The standard of proof is higher (BARD rule)**
- **It implies a weaker relationship, if any, between the size of the penalty and the size of the harm**
II. Impediments to criminal law enforcement:

• Transmission of the relevant documents
• Need for special investigative techniques and lack of specific legal basis
• Lessons from the Libor case: courts need to prove whether manipulation actually or could have produced “artificial prices”
• Difficulties in gathering evidence on excessive risk assessment (technological robots-control not applicable)
• Risk to lower the mens rea requirements
• Ne bis in idem: first come, first served is not adequate
• Cross-border cases: European harmonization of crimes is limited
III. Lack of harmonization of which crimes?

Financial market related crimes
- Money laundering
- Insider trading
- Market abuse
- Benchmarks manipulation
- Credit rating agencies
- Terrorism financing

Harmonization accomplished

Crimes directly related to the SSM
- Disclose of untrue material or information
- Conceal with fraud material information
- Lack of supervision as a crime by omission

No harmonization

Crimes related to the SRM
- Insolvency related offences
- Bankruptcy Fraud

- Disclose of untrue material or information
- Conceal with fraud material information
- Lack of supervision as a crime by omission
IV. UK Banking Act (2013): Section 36(1)

‘reckless misconduct’ in managing a bank

the manager’s decision, whether active or passive, caused the failure of the financial institution in question

at the time the decision was taken, the manager was aware of the risk

the manager’s conduct was ‘far below’ the reasonable standard expected from a person in such a position.

Proceedings in respect of this offence may be instituted by

Financial Conduct Authority (the ‘FCA’)

the Prudential Regulation Authority

the Secretary of State or the Director of Public Prosecutions

---

FACULTÉ DE DROIT, D’ÉCONOMIE ET DE FINANCE
IV. Dodd-Frank Act (2010)

• Two dozens of federal criminal provisions
  – Old offenses but extending criminal liability to include:
    • new financial instruments
    • new actors
  – New offenses
• Centralised enforcement
V: Current challenges

Interaction between administrative and criminal investigations

• Duty to report
• Administrative investigative measures
• File sharing
• Secrecy

Interaction between administrative and criminal sanctions

• Nature of administrative sanctions
• Ne bis in idem
V. Duty to report: Article 136 SSMR

Evidence of facts potentially giving rise to criminal offence
Because of supervisory tasks

“shall” request the NCAs to refer the matter to the national investigative authorities

“in accordance with national law”
V. “in accordance with national law’’

National law

- Definition of the crime*
- Duty to report to the criminal investigative authorities
- Interaction between administrative and criminal investigation
V. Consequences:

1. Differences in criminal law
2. Locus Commissi Delicti:
3. Concurrent jurisdictions intervening
4. Fragmentation
5. Inefficiency and Impunity
V. Consequences of the lack of harmonization

- **Euribor manipulation**
- SFO accused 4 Deutsche Bank employees of benchmark-rigging
- SFO issues an arrest warrant (March 2016)
- Parallel investigation by Frankfurt prosecutors dropped because alleged rigging of Euribor does not constitute a criminal offence under German law
- SFO Christian Bittar said that the authority will see if the four will “submit voluntarily” to the UK court process
V. Lack of specific offences protecting the duty to cooperate with the ECB/SSM

Country A
- Administrative sanction
- no criminal offense

Country B
- Administrative sanction
- Criminal offense
V. Fragmentation implies:

ECB “centralised” administrative enforcement v decentralized criminal law enforcement

ECB attempt to centralise information management: Control over the information disclosure to national investigative authorities by NCAs and NCBs

Indirect “supervision” of criminal investigations in the Eurozone member States

Decision(EU) 2016/1162 of the ECB on disclosure of confidential information in the context of criminal investigations (ECB/2016/19)
V. Confidentiality: Decision (EU) 2016/1162 of the ECB on disclosure of confidential information in the context of criminal investigations (ECB/2016/19)

Both the ECB and the NCAs
Both significant and less significant

Information created or received carrying out supervisory tasks

Requested by national criminal investigation authorities
V. Union law binding provisions

- Sincere cooperation
- Cooperation in good faith
- Interest of the Union
- Interference with the functioning or the independence of the ECB
- Exchange information within the SSM
- Personal data protection
- Professional secrecy
- Private interests…
**Requests received by the ECB**

- NCAs should answer on behalf of the ECB

- express obligation to disclose

  - no overriding reasons:
    - To safeguard the interest of the Union
    - To avoid any interference with the functioning or the independence of the ECB

**Requests received by the NCAs or NCBs**

- Duty to inform the ECB of every information disclosed (no difference between significant and non significant credit institutions)

- Duty to consult the ECB that “shall advise” as to whether the information may be disclosed
Administrative v Criminal

obstacle

cooperation
VI. A blueprint for an integrated enforcement model

- Clear distinctive criteria between administrative breaches and criminal offences
- Mixed composition of the investigative units and flaw of information
- Respect of fundamental rights in the administrative investigative measures in order to facilitate/allow the “file sharing”
- Avoid double penalties (prevention of ne bis in idem)
Thank you for your attention!

silvia.allegrezza@uni.lu