

Challenges in the Field of Economic and Financial Crime in Europe and the US

Edited by
Katalin Ligeti and Vanessa Franssen



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Current Challenges in Economic and Financial Criminal Law in Europe and the US

KATALIN LIGETI AND VANESSA FRANSSSEN

I. DEFINING THE PROBLEM

IN RECENT YEARS, criminal justice systems across the world have increasingly faced important global challenges in the field of economic and financial crime. The 2008 financial crisis and the subsequent economic downturn have made a number of these challenges painfully clear.

The first issue revealed by the financial and economic crisis was to what extent financial markets and economies are interconnected. If something goes wrong in one market or economy (eg the bankruptcy of a bank due to excessive risk-taking), others will also almost immediately be confronted with problems. The prevention, control and punishment of economic and financial crime is thus confronted with a strong globalisation.

Moreover, the second issue illustrated by the crisis is that misconduct in the economic and financial sectors is often of a systemic nature, with wide-spread consequences for a large number of (private, institutional and/or public) victims. In some cases, the misconduct may even affect an entire economic or financial system. Therefore, the call for prevention of harm becomes all the louder, and often results in the development of new regulatory and enforcement mechanisms. The question is, however, how these different mechanisms will interrelate.

Third, this economic and financial entanglement is reinforced by the use of the internet, online network systems and social media. In the virtual world, money can be easily transferred from one place to another; financial assets can be shifted quickly from one legal entity to another. Information about investments or economic performances spreads quickly, including when it is purposely misleading or incorrect, and once dispersed, the consequences are hard to estimate and often irreversible. In addition, offenders have become much more mobile thanks to modern and easily accessible means of transport. All these factors complicate the localisation, control, investigation and prosecution of economic and financial

crime. Moreover, it questions the appropriateness of existing investigative measures and sanctions, which are usually carried out and enforced within the boundaries of one single jurisdiction.

Fourth, due to continuous technological evolutions and socio-economic developments, the distinction between socially desirable and undesirable behaviour has become less clear-cut and less stable. This raises questions as to how to define and prevent misconduct.

A fifth challenge is that, for various reasons, economic and financial misconduct is particularly difficult to detect and to investigate. First, it should be noted that economic and financial offences tend to cause wide-spread, diffuse and long-term harm to private and public goods. For instance, environmental offences may injure the health of specific private persons and cause damage to plants and animals, but they are also harmful to public health and to the environment as a whole. Furthermore, in some cases of economic and financial crime (eg cartel offences) victims are simply not aware of being injured. For those reasons, public enforcement seems desirable.¹ Second, offenders are usually highly-qualified and have specialised knowledge or confidential information, giving them a comparative advantage over law enforcers. Moreover, they frequently operate in the context of (large) organisational structures which are ‘black boxes’ for the outside world. Authorities often do not even know that something went wrong, and even if they do, it is extremely difficult for them to find out who or what caused the misconduct without the cooperation of insiders, whether they are witnesses or suspects.

In light of these challenges, legislators and law enforcers are confronted with the substantive, procedural and jurisdictional boundaries of existing policies, norms and practices. In search of more adequate responses to combat economic and financial crime, they adapt existing policies, norms and practices, and create new enforcement mechanisms.

This book is the first volume in a series of publications summarising the outcome of a comparative research conducted at the University of Luxembourg on how various national criminal justice systems across Europe and the US, as well as the EU, deal with the above challenges. The volume is based on the papers presented at the conference ‘Global Challenges in the Field of Economic and Financial Crime in Europe’, which took place on 2 and 3 December 2014 in Luxembourg.

II. PRELIMINARY OBSERVATION: ECONOMIC AND FINANCIAL CRIMINAL LAW AS AN ILL-DEFINED BRANCH OF CRIMINAL LAW

Although the term ‘economic and financial criminal law’ sounds quite straightforward, it is actually extremely difficult to give a precise definition of this branch of criminal law. Roughly speaking, one could describe economic and financial

¹ R Bowles, M Faure and N Garoupa, ‘The Scope of Criminal Law and Criminal Sanctions: An Economic View and Policy Implications’ (2008) 35 *Journal of Law and Society* 389, 391–392 and 400–401.

criminal law as the whole of criminal law which relates to the criminal enforcement and sanctioning of violations of regulations in the economic and financial sphere. Obviously, the precise scope of this branch then depends on what is considered to belong to the 'economic and financial sphere' and thus on how extensively one interprets the protected economic and financial interests.

Clearly, the above 'working definition' is broad and general, and therefore does not allow the exact outer boundaries of economic and financial criminal law to be determined. One may, for instance, question whether this branch of criminal law includes environmental criminal law as a whole, or only those parts which are of direct economic relevance. Moreover, should one also take into account traditional offences against property rights if committed in a business context, or should they be disregarded?

What is more, the term economic and financial criminal law meets a diversity of corresponding terms at the national level. Each of these national terms has its own denotation and focus, and some of them may be specific for the legal system in point.

For instance, the French concept *droit pénal des affaires* includes any type of offence that protects either the economy as a whole or particular financial interests of private or public victims, as well as all offences which take place in a corporate setting, including traditional property offences.² By comparison, the German notion *Wirtschaftsstrafrecht* refers to offences relating to business activities and does not include traditional property offences.³

Comparable Anglo-Saxon (legal) terms are corporate criminal law,⁴ business criminal law⁵ and white-collar criminal law.⁶ These terms focus on the type of offender or the context in which offences tend to occur, and have criminological

² M Delmas-Marty and G Giudicelli-Delage, *Droit pénal des affaires*, 2nd edn (Paris, PUF, 2000) 13.

³ K Tiedemann, *Wirtschaftsstrafrecht. Einführung und Allgemeiner Teil mit wichtigen Rechtstexten*, 3rd edn (Köln, Carl Heymanns Verlag, 2010) 6–9 and 16.

⁴ Corporate criminal law can be defined as criminal law concerning criminal offences committed by a corporation or a representative of the corporation acting on its behalf. See eg BA Garner (ed), *Black's Law Dictionary*, 9th edn (St Paul, West/Thomson Reuters, 2009).

⁵ Similar to corporate criminal law, the term *business criminal law* refers to the context in which offences are committed, but it also covers criminal liability of individuals. See eg H First, *Business Crime: Cases and Materials* (Westbury, The Foundation Press, 1990).

⁶ This term relates to white-collar crime, defined by Sutherland as 'a crime committed by a person of respectability and high social status in the course of his [or her] occupation'. J Braithwaite, 'Challenging Just Deserts: Punishing White-Collar Criminals' (1982) 73 *Journal of Criminal Law and Criminology* 723, 723, with reference to E Sutherland (1949). However, due to its criminological basis, Sutherland's concept of white collar crime has been described as 'exceedingly broad', because it includes 'traditional non-violent crime categories, such as bribery, embezzlement, and tax fraud, but also certain tortious conduct which the law had never even considered criminal (...)' and even 'conduct which the law had never even considered tortious'. L Orland, 'Reflections on Corporate Crime: Law in Search of Theory and Scholarship' (1980) 17 *American Criminal Law Review* 501, 505. Actually, to be precise, the most frequently used terms are corporate *crime*, business *crime* and white collar *crime*. It seems, indeed, that authors prefer to focus on the behaviour rather than on the applicable rules when referring to a branch of criminal law. While this preference may, of course, have different explanations, one of them is perhaps that common law systems are less focused on categorising rules.

foundations. In addition, the term ‘economic criminal law’ (or, rather, economic crime) will also be encountered. This term is based on ‘the nature of protected interest’ and encompasses economic regulations ‘which impose restrictions upon the conduct of business as part of a considered economic policy’, including anti-trust offences, securities fraud and some tax laws.⁷ Such ‘economic regulatory offenses (...) seek to protect the economic order of the community against the harmful use by the individual of his property interest’.⁸ Traditional property offences⁹ are in principle not included, unless they were extended by courts and legislators to ‘newly developing ways of transacting business’, such as fraud or misappropriation.¹⁰

In many systems, one will also encounter a variety of (sub-)terms which can be classified under the heading of economic and financial criminal law. For instance, in Belgium, the French notion of *droit pénal des affaires* coexists with the English idea of *witteboordencriminaliteit* (white-collar crime) and more specific terms referring to subdivisions of economic and financial criminal law, such as *droit pénal économique/economisch strafrecht* (economic criminal law), *droit pénal fiscal/fiscaal strafrecht* (tax criminal law)¹¹ and *droit pénal social/sociaal strafrecht* (covering offences in the field of labour law and social security law).

In the Dutch system, the term *bijzonder strafrecht* (special criminal law) serves as an umbrella term for all criminal law and criminal procedure outside the Criminal Code and the Code of Criminal Procedure, and includes, among others, the following two subdivisions: economic criminal law and tax criminal law.¹² Together these two subdivisions are sometimes referred to as *sociaal-economisch strafrecht* (socio-economic criminal law).¹³ It is noteworthy that the Dutch term ‘economic criminal law’ is based on an organic criterion rather than on the underlying protected legal interests. Indeed, economic offences are all offences covered by the Economic Offences Act of 1950 (*Wet op de economische delicten*), which range from customs offences and banking law, through money laundering and financing of terrorism, to environmental offences, transport offences and violations of regulations concerning labour law, health care and product and food safety.¹⁴

⁷ SH Kadish, ‘Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations’ (1963) 30 *University of Chicago Law Review* 423, 424.

⁸ The term ‘regulatory offences’ immediately reveals one of the main objectives of economic criminal law, namely the regulation of business activities.

⁹ Defined as offences which ‘protect private property interests against the acquisitive behaviors of others in the furtherance of free private decision’. See Kadish, ‘Some Observations’ (n 7).

¹⁰ Kadish (n 7) 425.

¹¹ The more commonly used English term would be ‘tax offences’.

¹² FGH Kristen, RMI Lamp, JMW Lindeman and MJJP Luchtman, ‘Inleiding’, in FGH Kristen, RMI Lamp, JMW Lindeman and MJJP Luchtman (eds), *Bijzonder strafrecht: Strafrechtelijke handhaving van sociaal-economisch en fiscaal recht in Nederland* (The Hague, Boom Lemma, 2011) 4.

¹³ *ibid.* At the same time, these authors also treat ‘tax criminal law’ as a separate subdivision that is to be distinguished from socio-economic criminal law (see eg title of the book). This only confirms how difficult it is to establish a consistent categorisation and sound definition.

¹⁴ Art 1 and 1a Economic Offences Act of 1950.

The extremely wide scope of this Act has been criticised because it covers many offences that have only a very tenuous link with the economy.¹⁵

National terms are not only diverse and numerous, but they also appear hard to define in a precise and univocal manner. It usually requires a combination of criteria to define those terms.¹⁶ Moreover, to the extent that some terms are defined on the basis of organic features (eg the existence of special investigative authorities or courts) or statutes, there is the inevitable risk of a circular reasoning (eg the Dutch example on economic offences).

That being said, it is clear that most of those national terms have a common core, namely the protection of economic and financial interests, which largely corresponds to the earlier sketched working definition. Therefore, the contributions in this volume take that working definition as a general starting point and centre the analysis of special policies, rules and practices for economic and financial crime in the following four fields:

- substantive law, including the general and special part of criminal law as well as the sanctions (eg criteria for criminal liability, the adoption of new offences, special sanctions);
- criminal procedure (eg lower burden of proof, special investigative techniques, specific preventive measures);
- administration of justice (eg the establishment of specialised regulatory or investigative authorities); and
- cooperation between administrative and judicial authorities at the national and international levels (including jurisdictional issues).

III. CHALLENGES WITH RESPECT TO SUBSTANTIVE CRIMINAL LAW

In light of the potentially wide-spread or systemic consequences of economic and financial crime, prevention and control are key concerns. To this effect legislators, administrative and judicial authorities increasingly rely on pre-conviction measures as substitutes for actual punishment. This is a clear tendency in the US where public prosecutors are given more extensive powers to impose certain pre-conviction preventive or remedial measures upon suspects (mainly corporations). These include the requirements to put in place a corporate compliance programme to remove certain corporate officials or to conduct an internal audit, or the appointment of a corporate monitor. In the US, these measures are used quite frequently, especially with regard to large(r) corporations, and are sometimes more dreaded than the criminal sanctions that can be ultimately imposed

¹⁵ BF Keulen, 'De Wet op de economische delicten', in Kristen, Lamp, Lindeman and Luchtman (eds), *Bijzonder strafrecht* (n 12) 16–17.

¹⁶ See eg the definition of *droit pénal des affaires* in Delmas-Marty and Giudicelli-Delage (n 2) 8–13, in particular 11.

by a criminal court. In Chapter 2, Bruce Zagaris discusses the plethora of such pre-conviction measures in the US legal system, and also questions whether these measure really respect the separation of powers and the rule of law: how much power should prosecutors have and what is the role of criminal courts?

Similarly wide-spread practice on both sides of the Atlantic is the extensive use of compliance programmes. Compliance programmes are intended to identify and prevent possible unlawful conduct within the corporation.¹⁷ They promise to reduce crime and sustain the corporation's good reputation, but as Alexander Cappel explains in Chapter 3, they are also gaining increasing legal relevance. They may reduce or exclude criminal liability of corporations, and in specific areas of law they might even be required. Compliance programmes, therefore, are considered as a new approach to tackle economic and financial crime.

IV. CHALLENGES WITH RESPECT TO THE ADMINISTRATION OF JUSTICE AND CRIMINAL PROCEDURE

The main peculiarities of economic and financial criminal law nowadays concern the administration of justice on the one hand, and the cooperation between (national and supranational) administrative and judicial authorities on the other.

The need for a more effective investigation and prosecution of economic and financial crime leads to the introduction of new investigative measures, the creation of specialised investigating and prosecuting authorities, the intensified use of negotiated justice techniques, and the increased importance of the suspect's cooperation before, during and after the investigation.

Globally, the number of prosecutions and convictions for economic and financial crimes are low.¹⁸ This may be due to the complexity of such crime, making the investigation time-consuming and burdensome. At the same time, many national criminal justice systems are already overburdened and therefore tend to dispose of cases out of court to avoid lengthy trials.

Recourse to techniques of negotiated justice is indeed usually motivated by the objective of expediting proceedings and handling an increasing number of cases in an efficient manner. This makes such techniques particularly appealing in the area of economic and financial crime. Sabine Gless and Nadine Zurkinder point out in Chapter 6 that forms of negotiated justice are particularly attractive

¹⁷ U Sieber and M Engelhart, *Compliance Programs for the Prevention of Economic Crimes. An Empirical Survey of German Companies* (Max-Planck-Institut für ausländisches und internationales Strafrecht, Berlin, Dunker & Humblot, 2014) 1.

¹⁸ In Germany, see the *2014 Annual Report of the Federal Financial Supervisory Authority*, available at https://www.bafin.de/SharedDocs/Downloads/EN/Jahresbericht/dl_jb_2014_en.pdf?__blob=publicationFile&v=2, accessed 2 July 2015, at 214; for the statistics on insider trading, *ibid.* at 218; see also F Saliger, *Umweltstrafrecht*, Köln 2012, para. 542. According to an empirical study, the vast majority (more than 60 per cent) of court proceedings were settled by plea bargaining, see K Altenhain, I Hagemeyer, M Haimerl and K-H Stammen, *Die Praxis der Ansprachen in Wirtschaftsstrafverfahren* (Baden-Baden, Nomos, 2007) 79.

in complex cases of economic and financial crime which raise legal and evidential problems and where the defendant is mostly assisted by a defence counsel with extensive expertise.

In addition, the highly technical nature of economic and financial offences has called for greater specialisation of prosecuting authorities both in Europe and the US. By creating such specialised prosecuting authorities, criminal justice systems wish to ensure that the authorities are in the possession of the technical knowledge which is often needed in cases of economic and financial crime.

A recent European example of such prosecutorial specialisation is the setting up of the National Financial Public Prosecutor (NFPP) in France. The NFPP is an independent public prosecutor having national jurisdiction over economic and financial crimes, working in parallel to the Paris office of the Public Prosecutor and the other regional Public Prosecutor's offices.¹⁹ The NFPP has exclusive jurisdiction over stock market offences and shared jurisdiction for a number of listed offences based on the criterion of 'the very large complexity' of the case. In addition, in order to better equip investigators dealing with financial and economic offences, there is also a specialisation within the French police.

As Jeannot Nies highlights in Chapter 4, such specialised investigation and prosecution services are the main beneficiaries and users of new investigative techniques designed to help the investigation of economic and financial crime. As indicated above, the intensive use of the internet, online network systems (eg for high frequency trading) and social media (eg diffusion of confidential or sensitive information) makes economic and financial crime more volatile and more difficult to detect and record than more traditional offences; it also renders offenders of such offences increasingly mobile in their actions. This situation complicates the localisation, investigation and prosecution of economic and financial crime. To address this challenge, criminal justice systems developed new, tailor-made investigative measures. Over the last decade, we have witnessed the introduction of investigative techniques that allow law enforcement authorities to obtain banking and financial information, in order to gather evidence of the criminal conduct on the one hand, and to trace crime proceeds in the view of confiscation on the other hand. These new measures enable investigating authorities to determine the origin of transferred funds and to analyse transactions of bank and financial accounts.²⁰

Notwithstanding their sophistication, these special investigative measures alone are not sufficient to help the efficiency of criminal investigations of economic and financial crime. In addition, individuals and corporations are subject to far-reaching duties to report misconduct and to disclose information to the authorities. The current practice both in the US and Europe demonstrates the overwhelming importance of reporting and disclosure duties in all areas of

¹⁹ F Stasiak, 'Le procureur de la République financier: véritable innovation ou simple substitut?' (2014) *Revue Lamy Droit des Affaires*, no 4955.

²⁰ Moneyval, *The Postponement of Financial Transactions and the Monitoring of Bank Accounts*, Research report of the Council of Europe, April 2013, at 6.

economic and financial criminal law. These reporting and disclosure duties are obviously very useful for the authorities, but they also put a strain on the suspect's privilege against self-incrimination.²¹

Furthermore, investigative authorities often rely heavily on the input from whistleblowers and leniency applicants. As Christopher Harding shows in Chapter 5, in practice, leniency and whistleblower programmes put a huge pressure on corporations and individuals to cooperate with the authorities, and create serious tensions between the rights of individuals and corporations. For instance, the question arises who exercises the corporation's privilege against self-incrimination (unless the corporation is not entitled to this privilege) and how 'free' corporate officials and lower-level employees are to exercise their own right to remain silent when the corporation decides to cooperate with the authorities and conducts an internal investigation.²²

V. CHALLENGES WITH RESPECT TO MULTI-AGENCY COOPERATION AND MULTI-DISCIPLINARY INVESTIGATIONS

An effective detection and investigation of economic and financial crime usually requires the intervention and cooperation of several administrative authorities. In Chapter 7 Lothar Kuhl uses the example of the protection of the financial interests of the EU, where clearly the cooperation of various national administrative authorities (eg customs and tax authorities) is required. In this volume the term 'multi-agency investigations' will be used to refer to investigations involving various (national and/or supranational) administrative authorities.

Multi-agency investigations do not, however, always seem to function well on the ground. The information obtained by the different authorities involved is not always passed on to each other. This may be due to a lack of trust among the various authorities, but also due to the absence of a clear legal framework for the cooperation between those different administrative authorities. Even when there is a legal framework, the legislation is often fragmented, with diverging rules in different sectors.²³ For instance, sectorial differences in data protection and/or procedural rights may create obstacles to effective multi-agency investigations.

The situation becomes even more complicated when administrative authorities of one country (eg customs authorities) have to cooperate with foreign

²¹ CM Ferguson, 'The Required Records Doctrine: The Fifth Amendment Privilege Under Attack' (2011) *Journal of Taxation* 221; PS Diamond, *Federal Grand Jury Practice and Procedure* (Huntington, Juris Publishing, 2014) 6–22 et seq.

²² BL Garrett, 'The Constitutional Standing of Corporations' (2014) 163 *University of Pennsylvania Law Review* 128; JK Strader, *Understanding White Collar Crime* (Newark, Lexis Nexis, 2011) 368–369.

²³ K Ligeti and M Simonato, 'Multidisciplinary Investigations into Offences Against the Financial Interests of the EU: A Quest for an Integrated Enforcement Concept', in F Galli and A Weyembergh (eds), *Do Labels Still Matter? Blurring Boundaries Between Administrative and Criminal Law* (IEE Brussels, 2014) 81–94.

(or supranational) administrative authorities of a different kind (eg competition authorities or OLAF). Unlike mutual legal assistance, there is no coherent legal framework for mutual administrative assistance. Even if there are certain rules in place, they are usually limited to one sector (eg cooperation between customs authorities, or cooperation between competition authorities). This situation obviously hampers the detection, investigation and prosecution of economic and financial crime.

In addition to the prominent role of (specialised) administrative authorities in the field of economic and financial crime, these administrative authorities often need to cooperate with the police and judicial authorities. In this volume the term ‘multi-disciplinary investigations’ will be used to refer to investigations involving different types of authorities, in particular the police, national (and potentially supranational) administrative authorities and national judicial authorities. As Kuhl explains in Chapter 7, multi-disciplinary investigations are the norm in the field of the protection of the financial interests of the EU, where national customs or tax authorities as well as national prosecution authorities need to cooperate with the European Commission’s anti-fraud service. Practice shows that this cooperation often does not run smoothly because the various authorities do not fully trust each other and/or because the legal framework insufficiently regulates such multi-disciplinary cooperation.

Moreover, considering that economic and financial crime is often transnational, the investigation of such crime frequently involves the police, (one or more) administrative authorities as well as judicial authorities from different countries. Still, as John Vervaele points out in Chapter 8, there is no or very little coordinated transnational enforcement of economic and financial crimes. While Chapter 8 focuses on financial markets, one may also consider other examples. For instance, an investigation into illegal trade in fauna or flora may be triggered by inspections carried out by customs authorities, (air)port authorities or the road traffic police in one country. However, if the main suspects and/or evidence are located in another country, the environmental authorities or judicial authorities of that country may be in a better position to conduct the investigation. Of course, they will only be able to do so if the authorities which discovered the facts in the first country have experience in cooperating with authorities which specialise in the field of wildlife crime and if they are able to secure the evidence required, applying the same (or equivalent) standards as the ones required in the second country. Despite this reality, a comprehensive legal framework and practical experience in such multi-disciplinary cooperation are often lacking, which clearly undermines the combat against economic and financial crime.

Finally, transnational multi-disciplinary investigations also raise delicate questions about the protection of procedural rights of both natural and legal persons. In Chapter 9, Michiel Luchtman therefore examines how procedural rights can be guaranteed when multiple national and European enforcement authorities come into play. These authorities may pursue similar objectives but do so in accordance with different legal rules, whether of a criminal, administrative or other nature.

Hence, in such a multi-level constellation, the procedural safeguards that were developed in the context of the nation-state often fail to function adequately. The author therefore emphasises the need for ‘legal mechanisms that offer EU citizens an adequate indication of the content and scope of government power in a transnational legal area’, which ‘clearly “allocate” responsibilities for protecting defence rights over the many (EU and national) actors involved’. Ultimately, this also requires a ‘full and effective judicial control’. Yet, such allocation of responsibilities may prove to be even more challenging in post-Brexit times.

VI. CHALLENGES WITH RESPECT TO SHARED OR INTEGRATED ENFORCEMENT MODELS

In order to avoid and combat the potentially wide-spread consequences of economic and financial crime, new regulatory and public enforcement mechanisms have been put in place in many countries. A diversification of enforcement tools is supposed to be more effective.

Such diversification has, predominantly, three consequences. First, parallel administrative and criminal enforcement often leads to cumulative procedures and/or cumulative sanctions. Both in Europe and in the US, parallel action by administrative and criminal enforcement authorities is standing practice in several fields of economic and financial crime.

Second, there is a tendency in Europe²⁴ to label certain enforcement mechanisms ‘administrative’ even though the investigative powers and sanctions may be equally coercive and intrusive as the powers and sanctions under (formal) criminal law. For instance, the 2014 Regulation on market abuse²⁵ grants national competent authorities a wide range of far-reaching supervisory and investigative administrative powers. Some of these powers are comparable to the investigative powers of judicial authorities (eg they may require existing recordings of telephone conversations, electronic communications or traffic data held by investment firms, credit institutions or financial institutions).²⁶ Other administrative powers potentially require the intervention of judicial authorities (eg the search of premises and the seizure of documents).²⁷

²⁴ In contrast to US courts which do not examine and question the label used by Congress, in Europe Art 6–7 ECHR play an important recalibrating role ensuring that (national and supranational) legislators cannot simply use a different label to avoid the application of certain fundamental rights.

²⁵ Regulation (EU) 596/2014 of the European Parliament and the Council on market abuse and repealing Directive 2003/6/EC of the European Parliament and the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, [2014] OJ L 173/1 (‘Market Abuse Regulation’).

²⁶ Art 23(2), para 1(g) Market Abuse Regulation.

²⁷ Art 23(2), para 1(e) and para 2 Market Abuse Regulation. For a further analysis of the distinguishing criteria for administrative and criminal enforcement in the area of market abuse, see V Franssen, ‘EU Criminal Law and Effet Utile—A Critical Examination of the Use of Criminal Law to Achieve Effective Enforcement’, in J Banach-Guttierez and C Harding (eds), *EU Criminal Law and Crime Policy: Values, Principles and Methods* (Abingdon, Routledge, 2016) 84, 93–99.

Third, the shift to punitive administrative law does not only lead to quasi-criminal investigative powers of administrative agencies. It may also lead to the emergence of administrative agencies which do not respect the separation of powers. An example is the French Financial Market Authority, which is called in the French jargon the *jurislateur*. This authority combines the roles of a legislator (it defines the regulatory offences), an investigator (it conducts the administrative investigations) and a judge (it pronounces the penalty for regulatory offences). In addition, it also has controlling and sanctioning powers. These types of agencies very much resemble their American counter-parts, such as the Securities and Exchange Commission (SEC), which also fulfils both legislative and adjudicative functions. In contrast to Europe, however, given the specific constitutional framework in the US, uniting those two functions in one agency does not generate scholarly attention. Nevertheless, it should be mentioned that the SEC is endowed with administrative powers only. Criminal enforcement is the prerogative of the Department of Justice (DOJ).

Such a clear-cut distinction between administrative and criminal powers does not always exist in Europe. Several European countries grant, in certain fields, both administrative and criminal law powers to the same authority. An example thereof is the UK Competition and Markets Authority, which was established in 2013, joining together the UK's Competition Commission and parts of the Office of Fair Trading. As Stephen Blake explains in Chapter 13, the CMA has civil ('administrative') enforcement powers with respect to cartel offences committed by undertakings, as well as criminal enforcement powers with respect to cartel offences committed by individuals (and certain consumer protection offences). Major problems arise from this accumulation of merely administrative tasks and powers (covering the supervision and control of an economic activity, as well as the sanctioning and remedying of certain misconduct), and the punitive-repressive function into the very same authority. This 'double-hat model' allows for a more efficient handling of both administrative and criminal cases, but raises problems relating to procedural rights when a defendant is confronted with a Janus-faced authority with considerable powers under both administrative law and criminal law.

The potential accumulation of sanctions of a different nature (administrative, civil and criminal) imposed by different national and/or supranational authorities is also problematic in light of the principles of *ne bis in idem* and proportionality. Following the landmark ruling of the Court of Justice in *Åkerberg Fransson*,²⁸ courts in the EU have become more aware of this problem. For instance, in Sweden the Supreme Court overturned its previous jurisprudence in order to forbid the parallel imposition of tax surcharges and criminal charges for the same act of omitting or providing false information on tax returns. The Polish Constitutional Tribunal addressed the permissibility of imposing administrative and criminal sanctions for the same set of facts in several individual cases. In a

²⁸ Case C-617/10, *Åklagaren v Åkerberg Fransson* EU:C:2013:105, 26 February 2013.

recent judgment the Court considers such parallel sanctioning not to be per se unconstitutional, but requires that the criminal court takes into account the penalty imposed in another proceeding (civil or administrative) when imposing the criminal sanction in order not to violate the overall proportionality of the sanction.²⁹ The French Constitutional Council also handed down a landmark decision declaring the system of cumulative sanction for the offence and the administrative irregularity of insider misconduct unconstitutional.³⁰ The Council emphasised that the penalties associated with the offence of insider dealing on the one hand and the administrative irregularity of insider misconduct on the other cannot be considered to differ in nature.³¹

As Martin Böse explains in Chapter 10, the accumulation of sanctions is not prohibited in the US federal system, even though the principle of proportionality does apply. The problem of the potential of different types of sanctions gains more relevance in the context of negotiated justice, for instance when a corporate defendant wishes to achieve a global settlement with the US Department of Justice in order to avoid further federal sanctions after the settlement.

The above tensions could be resolved if the different enforcement mechanisms were part of a comprehensive and coherent enforcement policy or strategy. Such strategy could easily address the relationship of parallel enforcement systems and wipe out ambiguities.

European countries generally rely on the *ultima ratio* of criminal enforcement and the subsidiary role of criminal sanctions *vis-à-vis* other types of sanctions. These principles do not, however, answer all the above dilemmas, neither do they point towards uniform solutions. Whereas some countries forbid parallel proceedings of an administrative and criminal nature,³² others adhere to the principle of independence between administrative and judicial enforcement

²⁹ Judgment of the Constitutional Tribunal of 21 October 2014 P 50/13 OTK ZU 2014 no 9A Item 103.

³⁰ French Constitutional Council, Decision No 2014-453/454 QPC and 2015-462 QPC of 18 March 2015—Mr John L and others. English version available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2014-453/454-qpc-et-2015-462-qpc/version-en-anglais.143599.html>, accessed 10 June 2016.

³¹ The Constitutional Council noted that 'whilst only the criminal court may order that the perpetrator of an insider dealing offence be imprisoned if he or she is a natural person or be dissolved if it is a legal person, the fines imposed by the Enforcement Committee of the Financial Market Authority may be extremely severe and may, according to the contested provisions from Article L. 621-15, amount to more than six times those that may be imposed by the criminal court for insider dealing offences'. In addition, 'according to paragraph III of Article L. 621-15, the amount of the sanction for insider misconduct must be commensurate with the seriousness of the violations and any advantages or profits gained from said violations and, according to Article 132-24 of the Criminal Code, the penalty imposed following a conviction for the offence of insider dealing must be commensurate with the circumstances of the offence and the personal circumstances of the perpetrator'. It follows from the above that the conduct covered by Art. L465-1 and L621-15 'must be deemed to be liable to attract penalties that may not differ in nature'.

³² See for instance the decision of the Swedish Supreme Court, NJA 2013 S. 502.

mechanisms.³³ In countries following the latter path, parallel proceedings and sanctions have been the norm until recently.

On the other side of the Atlantic, there seems to be a much more conscious effort to create partnerships between regulatory authorities and the DOJ. A good example is the enforcement of securities fraud, where the competent authorities have developed over time a sort of 'natural' division of labour. On the one hand, the criminal justice authorities (DOJ) have investigative tools which are not available to the SEC, including the ability to obtain search warrants and wiretaps, and to conduct undercover investigations, which may prove critical to an investigation. On the other hand, the SEC may take the lead in document review and the analysis of records, and witness interviews may be jointly conducted. The SEC also has the ability to freeze assets and obtain temporary injunctions based on suspicious trading so that illegal profits are not dissipated during an investigation.³⁴

Similarly, US antitrust law shows that, although the Foreign Trading Commission and the DOJ have certain overlapping powers, they have developed expertise and special competency in different commercial fields. This specialisation helps determine which agency will exercise oversight over certain mergers. Nevertheless, there still remain occasions where both agencies have a claim to jurisdiction over the same transaction.

In contrast, most European legal systems demonstrate considerable difficulties to design and implement a coherent enforcement policy. The answer of policy makers and practitioners to the shortcomings of cumulative proceedings and sanctions depends on the country and the sector. While there are a number of positive examples of an integrated enforcement policy (eg the UK Competition and Markets Authority discussed by Blake in Chapter 13), the overall picture shows that European countries still need to work towards a coherent enforcement policy in most fields of economic and financial crime.

Furthermore, the development of economic and financial criminal law in European countries is also strongly influenced by the evolutions taking place at the EU level (eg in the area of cartel law, market abuse and environmental law). In this respect, one could expect some guidance from EU law. Indeed, the Lisbon Treaty gives the EU legislator broad powers to approximate national rules in respect of economic and financial criminal law. The EU may require its Member States to adopt minimum rules on criminal offences and sanctions in all areas in which harmonisation measures have been adopted (Art 83(2) TFEU). These areas may include offences in areas such as unfair market practices, VAT fraud, accounting fraud, market abuse, environmental law, health and consumer law and transport law.

³³ See for instance Art L171-7 Env C: 'irrespective of criminal prosecutions, (...) the administrative authority serves official notice...'

³⁴ MJ White, Chairwoman, Sec and Exch Comm'n, *All-Encompassing Enforcement: The Robust Use of Civil and Criminal Actions to Police the Markets*, 31 March 2014, available at <https://www.sec.gov/News/Speech/Detail/Speech/1370541342996>, accessed 10 June 2016.

What is more, on the basis of Art 325 TFEU, the EU and the Member States have shared competence to ‘counter fraud and any other illegal activities affecting the financial interests of the Union’ through deterrent and effective measures. Under this umbrella, one will encounter offences such as active and passive corruption, subsidy fraud, money laundering and misappropriation.

Finally, Art 83(1) TFEU contains a list of particularly serious crimes with a cross-border dimension for which the EU may establish minimum rules. This list also includes certain economic and financial offences, such as money laundering, corruption, counterfeiting of means of payment and computer (or cyber) crime.

Hence, one may conclude there is a true plethora of competences at the EU level which concern the broad field of economic and financial criminal law.³⁵ In view of the new EU competences it is to be expected that not only the descriptions of offences, but also the level and type of applicable sanctions will be largely approximated throughout the EU in the coming years.

It is crucial to highlight that the criminal policy choices made by the EU are founded on a predominantly economic logic, in line with the Union’s original ambition of developing a single internal market. As Jeroen Blomsma demonstrates in Chapter 11, many legislative initiatives in the field of criminal law build upon the Union’s pre-existing practice of administrative regulation in that respect. As a consequence, EU criminal law pursues an explicit effectiveness logic. Criminal law is regarded as a stronger, more effective enforcement tool, which exerts more powerful deterrent effects and helps better ensure the *effet utile* of EU law.³⁶

However, as the example of the enforcement of the European Banking Union described by Silvia Allegrezza and Ioannis Rodopoulos in Chapter 12 shows, in several EU policy fields the EU has only partially addressed the aspects of enforcement. Much emphasis is placed by the new Banking Union Regulation on the new role of supervision and enforcement given to the European Central Bank, together with the ESMA and the EBA. But EU law³⁷ establishes only a system of administrative supervision and enforcement and does not include, for instance, provisions concerning criminal law or judicial enforcement. As a result, the substantive law on financial markets is to a large extent harmonised in the EU, but the enforcement regime is still left to the Member States. While the effectiveness of this administrative enforcement needs to be carefully assessed and tested as to its potential, there is a lack of a general overall framework of enforcement that would take into account the different types of enforcement (self-regulation or private external review, administrative controls and criminal law enforcement) and the different enforcement levels (internal, national, European).

This EU instrumental approach to criminal enforcement seems to be at variance with a more traditional approach to criminal law, which is less governed by

³⁵ That being said, the outer boundaries of the EU’s criminalisation powers are actually not so clear. See Franssen, ‘EU Criminal Law and Effet Utile’ (n 27) 86–92.

³⁶ Franssen (n 27) 84–110.

³⁷ Regulation 2013/1024/EU.

concerns of efficiency and effectiveness and focuses primarily on the protection of certain moral values and classical civil rights (such as the right to life, the right to physical and sexual integrity and the right to property). Furthermore, the criminal law policy at the EU level seems to lack a coherent legal and, more importantly, theoretical framework on criminal liability, criminal procedure and punishment.³⁸

VII. CONCLUDING REMARKS

As the above overview suggests, the present volume offers the reader a rich collection of contributions. Each chapter addresses one or more of the aforementioned challenges in the field of economic and financial criminal law in Europe and the US. Certain authors focus on their own national system, others take an EU and/or trans-systemic approach. The primary ambition of this volume is, of course, to communicate the findings of the conference that was organised on 2 and 3 December 2014 at the University of Luxembourg. However, in doing so, it also aims to contribute to a better understanding of current tendencies and features of economic and financial crime, in the hope this may stimulate further research by other scholars and inspire future legislative and policy decisions in this important field of criminal law, in Europe and beyond. As the outcome of the 2016 Brexit referendum shows in a much more general way, national and EU legislators and policy-makers have to be flexible and inventive in order to cope with changing circumstances. Yet, at the same time, they should not lose sight of precious, well-established fundamental rights.

³⁸ C Harding, 'Tasks for Criminology in the Field of EU Criminal Law and Crime Policy', in J Banach-Gutierrez and C Harding (eds), *EU Criminal Law and Crime Policy: Values, Principles and Methods* (Abingdon, Routledge, 2016) 111 et seq.