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THE NEW FRONTIERS OF FINANCIAL INVESTIGATION:
BANKING SUPERVISION AND REAL-TIME MONITORING OF
FINANCIAL RECORDS

A comparative analysis between the EU and the US

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ABBREVIATION LIST

States:

AT	Austria
BE	Belgium
BG	Bulgaria
HR	Croatia
CY	Cyprus
CZ	Czech Republic
DK	Denmark
EE	Estonia
FI	Finland
FR	France
DE	Germany
EL	Greece
EU	European Union
HU	Hungary
IE	Ireland
IT	Italy
LV	Latvia
LT	Lithuania
LU	Luxembourg
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SK	Slovakia
SI	Slovenia
ES	Spain
SE	Sweden
UK	United Kingdom
US	United States

Other Abbreviations:

ACHR	American Convention on Human Rights
AML	Anti-Money Laundering
BCFP	Bureau of Consumer Financial Protection
BHC	Bank Holding Company
BSA	Bank Secrecy Act
BU	Banking Union
CFMA	Commodity Futures Modernization
CFREU	Charter of the Fundamental Rights of the European Union
CFT	Countering the Financing of Terrorism

CONSOB	Commissione Nazionale per le Società e la Borsa
CRA	Community Reinvestment Act
CRD	Capital Requirements Directive
CRR	Capital Requirements Regulation
DOJ	US Department of Justice
DGS	Deposit Guarantee Scheme
EBA	European Banking Authority
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EDIS	European Deposit Insurance Scheme
EIO	European Investigation Order
EIOPA	European Insurance and Occupational Pensions Authority
EPPO	European Public Prosecutor Office
ESA	European Supervisory Authority
ESFS	European System of Financial Supervision
ESMA	European Securities and Markets Authority
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FDIC	Federal Deposit Insurance Corporation
Fed. R. Crim. P.	Federal Rules of Criminal Procedure
Fed. Res.	Federal Reserve
FFIEC	Federal Financial Institutions Examination Council
FinCEN	Financial Crimes Enforcement Network
FIU	Financial Intelligence Unit
FSB	Financial Stability Board
FSOC	Financial Stability Oversight Council
GRECO	Group of States Against Corruption
HOSSP	Hawala and other similar service providers
IT	Informatic Technology
JIT	Joint Investigative Teams
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
NCA	National Competent Authority
NRA	National Resolution Authority
OCC	Office of the Comptroller of the Currency
OLAF	Office de Lutte Anti-Fraude
OTS	Office of Thrift Supervision
SAR	Suspicious Activity Report
SCA	Stored Wire and Electronic Communications and Transactional Records Access Act
SEC	Securities Exchange Commission

SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
SSM FR	SSM Framework Regulation
SSM R	SSM Regulation
TBTF	Too-Big-Too-Fail
UFIRS	Uniform Financial Institutions Rating System
UN	United Nations
USA PATRIOT ACT	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
USSC	US Supreme Court

CHAPTER 1

SUBJECT OF THE RESEARCH AND METHODOLOGY

Summary: 1. Subject of the research. – 1.1. The definition of “bank” and “financial institution”. – 1.2. Scope of application: banking supervision and real-time monitoring of financial records. – 1.3. The peculiarity of banking investigations v. traditional fact-finding criminal investigations. – 2. Methodology: Transversal comparative approach applied to a complex legal framework. – 2.1. The Hybrid Character of the EU Criminal Justice System. – 2.2. The interaction between the administrative and the criminal matter. – 2.3.1. The gathering of the information and the significance of cooperation. – 2.3.2. The sanctions: definition of “criminal matter” and transnational *ne bis in idem*.

1. Subject of the research.

The scope of application of this thesis concerns the effectiveness of financial investigative measures, and the protection of fundamental rights in banking investigations in the EU, especially considering the impact of the Banking Union reform¹.

The analysis on those themes will be developed through a comparison between the European Union and the United States, in order to enlighten the weaknesses and the strengths of their models of financial and banking investigations.

The reason why these countries have been picked up is twofold.

Firstly, they represent two of the most developed banking systems in the world, both for their historical background, and their actual weight in the global financial market.

Secondly, the EU and the US are both complex legal orders, organized in multi-level structures, and composed by several agencies and institutions often shaped by uneven principles².

The European Union consists of a particularly complicated system, which results from the interaction of numerous and different national, European and intergovernmental legal sources, that provide for dissimilar requirements and standards of protection. Not being a proper federal system already, it places itself somewhere in the middle, with a legal framework, especially but not exclusively in the field of financial investigations, characterized by the complexity of transnational relations, the obstacles caused by a still-fragmented criminal policy and the necessity of a uniform set of rules, to be obtained through the means of harmonization and approximation³.

¹ The new system of the Banking Union reform will be illustrated in Chapter 3, paragraph 2.3.

² Even if already developed in the second half of the XX century, the concept of “multi-level” governance has been successfully re-affirmed by the political scientists Liesbet Hooghe and Gary Marks in relation to their researches on European integration after the entry into force of the Maastricht Treaty.

Although the very idea of “level” may appear quite hard to define, in general, and for the purposes of this thesis, a “multi-level” system expresses the idea of the simultaneous and complex interaction of several authorities, at domestic as well as at central or federal level, often not strictly hierarchically organized, that share responsibilities, competences and cooperate at various level of governance. See L. HOOGHE, G. MARKS, K. BLANK, *European Integration since the 1980s. State-Centric versus Multi-Level Governance*, in *Journal of Common Market Studies*, 1996, 34, 3: 341-378; L. HOOGHE, G. MARKS, *Multi-Level Governance and European Integration*, Lanham, M.D.: Rowman & Littlefield 2001, XVI + 240pp; ID., *Types of Multilevel Governance*, in H. Enderlein, S. Wälti, M. Zürn (eds.), *Handbook on Multilevel Governance*, Cheltenham: Edward Elgar, 2010, p. 17-31.

³ The difference between harmonization and approximation methods, both explicitly specified by articles 81-82 TFEU, is not always clearly identifiable, since they share the same goals, even if the latter is mainly oriented towards the concurrence of legislative texts, rather than principles, and represents a weaker stimulus for the integration process, cf. A. KLIP, *European Criminal Law: An Integrative Approach*, Cambridge-Antwerp-Portland:

The United States, on the other side, represents a well-established federal system, more than two-hundred-year old. This notwithstanding, in the field of financial and banking investigations the overall picture does not appear to be much more simplified than the European one, especially in the light of the recent financial crisis. Indeed, the American system is characterized by an intricate network of agencies, whose tasks are not always easily detectable one to each other, and which act in a framework devoid of a *ne bis in idem* principle applicable both at federal and at local level.

However, before proceeding in the analysis of the two systems, and with the explanation of the research methods applied, some clarifications on the main issues involved in banking investigations are required, in particular with regard to the definition of banks and financial institutions, and the perspective under which they will be examined, as far as their involvement in financial investigations is concerned.

Finally, the peculiar role of banking investigations in the panorama of traditional criminal inquiries will be taken into account.

1.1. The definition of “bank” and “financial institution”.

In order to circumscribe the target of this research, it is necessary to start from defining which are the subjects involved in banking investigations, beginning with banks and financial institutions.

Both of them, in fact, are given specific technical meanings which differ according to the legal framework involved, and have notably changed and extended during the last century, following the evolution of the financial markets.

Under the first profile, the concepts of financial institutions in Europe and in the US are only partially overlapping. This *caveat* is meaningful not only for comparative reasons, but especially when it comes to select the regulation applicable to a certain institution.

Indeed, while banks are usually subject to most of the rules concerning administrative and criminal financial supervision, the same are not always applicable to every type of financial institution. That is particularly true comparing the Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) regulations and the judicial investigative measures which may be performed against financial crimes. While the first, both in the US and in the EU, have a wide scope of application that covers banks and other financial institutions, the latter are sometimes reserved (at least explicitly) only to banking institutions⁴.

Therefore, understanding what is included under the label of “financial institution” reveals to be extremely relevant in order to recognize which are the obligations of the subjects involved, and which are the powers of the judicial authorities in gathering information on banking and financial data.

In the EU, the main statutory definitions may be found in Regulation No 575/2013, better known as Capital Requirements Regulation (CRR), which also represents a relevant part of the Single Rulebook, the legislative text which stands at the core of the Banking Union project, together with the two leading principles which are founding the whole banking legislation in the EU: the home country control and the mutual recognition of services and activities.

Intersentia, 2016, III ed., p. 33.

⁴ Cf. J. TRICOT, A.N. MARTIN, *Monitoring of Banking Transactions and Traffic Data*, in K. Ligeti (ed. by), *Toward a Prosecutor for the European Union-Draft Rules of procedure*, Volume 2, Oxford, Hart Publishing (forthcoming).

According to the first, introduced in 1989 by the so-called Second Banking Directive, the supervision over financial institutions, banks and branches operating in a Member State different from that of origin, does not adopt a territorial competence criterion; on the contrary, those subjects are kept under the oversight of their national authorities even when operating abroad⁵. As prescribed by the second principle, the same institutions are granted a single licence, recognized throughout the EU, for the practice of a given set of listed activities, the exercise of which shall be treated in the same manner as national financial operators by hosting Member States⁶.

According to Regulation 575/2013, the operators are differentiated taking into account the type of pursued activities. “Financial institutions” are described as undertakings other than credit institution or investment firms, which have the principal goal of acquiring holdings or pursuing one or more of the activities subject to mutual recognition, with the exclusion of those strictly related to credit services. They may include financial holding companies, mixed financial holding companies, payment operators and asset management companies⁷.

Following this derogation, however, “banks” are not included in the category of financial institutions, but identify those undertakings the business of which is to take deposits or other repayable funds from the public, and to grant credits for their own account⁸.

Similarly, although insurance undertakings, insurance holding companies and mixed-activity insurance holding companies belong to the financial sectors, they are not considered “financial institutions” as such⁹.

A much broader definition of “financial institution” can be found in the US Code, that, following a more casuistic approach, provides for a copious list of operators that fall under that label.

In particular, it includes not only investment firms (listed as: broker or dealer registered with the Securities and Exchange Commission; broker or dealer in securities or commodities; investment company), but also “credit institutions” (listed as: insured, commercial and investment banks; and agencies or branches of a foreign bank in the United States), and insurance companies¹⁰.

Moreover, the US definition also encompasses some further operators, not explicitly taken into account by the European regulations, such as dealers in precious metals, stones, or jewels; travel agencies; casinos; telegraph companies; businesses engaged in vehicle sales, including automobile, airplane, and boat sales; persons involved in real estate closings and settlements; and the Postal Service¹¹.

⁵ Cf. art. 13, Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC and art. 3, First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.

⁶ Cf. Annex 7, Second Council Directive 89/646/EEC. Currently the list is provided for by Annex I, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (CRD IV Directive).

⁷ Cf. art. 4, § 1 (1)-(3)-(26), Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, already provided for by art. 1, First Council Directive 77/780/EEC.

⁸ Cf. art. 4, § 1 (1), Regulation 575/2013.

⁹ Cf. art. 4, § 1 (5)-(27, lett. h-j), Regulation 575/2013.

¹⁰ 31 U.S.C. § 5312(2), letters (A), (B), (D), (G),(H),(I),(M).

¹¹ Idem, letters (N),(Q),(S),(T),(U),(V),(X).

The list is completed by a broad safeguard clause, which affirms that any business or agency engaging in any activity which the Secretary of the Treasury determines, by regulation, to be an activity similar to, related to, or substitute for any of those previously described, or whose cash transactions have «a high degree of usefulness in criminal, tax, or regulatory matters» falls also within the definition of financial institution¹².

Lastly, whilst in the US the definition also includes public institutions, both at federal and local level, when exercising powers related to the above-mentioned businesses¹³, a similar provision is not explicitly provided in the EU legislation, which generally concerns only the private sector.

In light of the above, it appears clearly how the meanings of financial institutions in the EU and in the US cannot be completely superposed.

A shared and unambiguous understanding of their definition cannot be found either at the international level, even if these institutions are increasingly acting in a globalized context.

Indeed, an attempt in this direction is provided for by the Financial Action Task Force (FATF), which, following an approach similar to the European one, links the financial character of the institutions to the pursuing of certain activities. At the same time, however, conversely to the EU regulation, the FATF explicitly contemplates banks and insurance companies in this category. This notwithstanding, the FATF provisions do not possess a binding value, and thus can only be taken as influential standards or guidelines, which still need a transposition at domestic level to be fully implemented¹⁴.

In order to make the dissertation smoother from now on, unless differently specified, the term “financial institution” will be considered as comprehensive of “bank”, adopting the US and the FATF point of view.

The entailments of this choice reflect also the position of those who acknowledge the necessity to extend the tools for investigating financial crimes also beyond the traditional boundaries of financial regulations, which originally concerned only banks, securities firms and insurance companies.

This static perspective, however, does not take in due account two main variables.

First, although these institutions may be considered the core on which financial laws and regulations have been historically developed, they themselves could hardly be considered as a changeless category.

Indeed, even within the single domestic settings, the limitations to which those subjects are exposed have drastically changed over the years, especially concerning the range of practicable activities in relation to the level of risk-management pursued by the national authorities in a particular moment in time.

Since public control in the field of financial transactions and operations has always been strictly connected to the pace of the financial markets, the weight and the extent of financial regulations have been sensibly modified in the last century to meet the necessity to patch the national or international systems following a succession of systemic and occasional crises.

In this sense, after the Great Depression of 1929-1930, in the US and in most of Europe institutions were quite strictly specialized in the services they could offer, in order to delimit the risk exposure of the operators in the financial market, and to safeguard depositors.

¹² Idem, letters (y) and (z).

¹³ Idem, lett. (w).

¹⁴ Cf. definition of “Financial Institutions”, in FATF, *The FATF Recommendations. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, 2012, p. 116, available online at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf. The role played by the FATF in banking investigation will be illustrated in Chapter 2, paragraph 1.

With time, however, this specialization has greatly failed under a deregulation phenomenon that occurred almost in all Western countries, especially in the decades preceding the last financial crisis, and which substantially freed banks from the control of their supervisors in relevant fields of their activities.

Actually, the link between this trend and the burst of the more recent financial crisis appears far from been casual; on the contrary, the more typical case of banking crises «over the past 20 years has been one in which banks in various countries have faced capital requirements set too low based upon the overall riskiness of their activities»; a blind policy towards financial liberalization that, as was accurately pointed out, «in an environment in which banks are inadequately capitalized and bank regulation and supervision are weak is a recipe for disaster»¹⁵.

This process did not concern directly credit services *strictu sensu*, that have always traditionally been reserved to specifically licensed institutions, that are banks, but the very possibility for the latter to entail into other businesses. In particular, under the model of “universal bank”¹⁶, credit institutions are generally allowed to trade in financial products, whilst previously that activity was restricted to other financial operators, such as securities firms and insurance companies¹⁷.

In the US the prohibition of banks engaging in proprietary trading was eliminated starting from the 1999 repeal¹⁸ of the Glass-Steagall Act, that also allowed banks, securities firms and insurance companies to cooperate, and exempted investment banks holding companies from direct federal regulations¹⁹. Such an opportunity led several financial groups to merge together creating the so-called “Too-Big-To-Fail” (TBTF) financial institutions: giant corporations able to provide a whole package of financial service; the size, complexity, interconnectedness, and critical functions of which are such that, should they disorderly fail, the rest of the financial system and the economy would face severe adverse consequences²⁰.

¹⁵ Cf. J.R. BARTH, G. CAPRIO, JR., D.E. NOLLE, *Comparative International Characteristics of Banking*, in *OCC Economics Working Paper*, 2004-1, p. 43-45.

¹⁶ This model reduced the relevance of the type of activities exercised by banks, which previously were the bases for distinguishing Commercial banks (which «is authorized to receive both demand and time deposits, to make loans, to engage in trust services, to issue letter of credit, to rent time-deposit boxes, and to provide similar services») and Investment banks («whose primary purpose is to acquire financial businesses, esp. through the sale of securities» and “does not accept deposits, and apart from selling securities, does not deal with the public at large»), cf. B.A. GARNER (ed. in Chief), *Black’s Law Dictionary*, IX ed., April 2009, p. 165.

¹⁷ Even if, also before the lifting of the ban, similar results were often achieved through the establishment of financial groups composed by corporations of different nature and sector of activities.

¹⁸ Gramm-Leach-Bliley Act of 1999, also known as the Financial Services Modernization Act, P.L. 106-102.

¹⁹ Glass-Steagall Act of 1933, also known as the Banking Act, P.L. 73-66.

²⁰ The term TBTF became popular since 1984, when it was used by a Connecticut Congressman, Stewart B. McKinney, during a debate concerning the Federal Deposit Insurance Corporation’s intervention to rescue the Continental Illinois Bank, and it does not imply, of course, the impossibility for those entities to actually fail, as the Lehman Brothers example clearly showed.

Currently, the TBTF problem, that includes also a substantial inability to prosecute, is monitored by the Financial Stability Board (FSB) that explicitly deals with Systemically Important Financial Institutions (SIFIs), cf. FSB, *Reducing the moral hazard posed by systemically important financial institutions- FSB Recommendations and Time Lines*, 20 October 2010, available online at: http://www.fsb.org/wp-content/uploads/r_101111a.pdf.

The same institution has also released a list of the SIFIs or TBTF banks, recently updated, which includes 30 institutions such as (in descending order): HSBC, JP Morgan Chase, Barclays, BNP Paribas, Citigroup, Deutsche Bank, Bank of America, Credit Suisse, Goldman Sachs, Mitsubishi UFJ FG, Morgan Stanley, Agricultural Bank of China [...], Royal Bank of Scotland, Santander, Société Générale [...], Unicredit Group, Wells Fargo. cf. FSB, *2015 Update of List of Global Systemically Important Banks (G-SIBs)*, 3 November 2015, available online at: <http://www.fsb.org/wp-content/uploads/2015-update-of-list-of-global-systemically-important-banks-G-SIBs.pdf>.

In the EU, the official acknowledgment of the universal banking model was reached in 1989 with the Second Banking Directive and its national transpositions, which included trading in financial futures and options in the list of activities subject to mutual recognition that banks may exercise within the whole territory of the Union²¹.

Starting from late 2006, however, in both systems the repercussions of the financial crisis caused a partial amendment of these deregulation and the specialization trends.

In the US, that was mainly expressed by the Congress' approval of the Dodd-Frank Act, and especially by the so-called Volcker Rule there provided, which re-established a restraint on the possibility for banks and other large financial institutions to engage in proprietary trading and investments in hedge funds²².

In the European Union, while the crisis incentivized the creation of a centralized supervision, it did not bring to desert the model of universal bank as such. This notwithstanding, in 2012 the Liikanen Group, promoted by the Commission to study the necessary reforms to the banking system, clearly asserted the urgency to revise such paradigm, in order to reduce the exercise of high-risk operations undertaken by banks active in the deposit services. In this sense, the Group has concluded that «it is necessary to require legal separation of certain particularly risky financial activities from deposit-taking banks within the banking group. The activities to be separated would include proprietary trading of securities and derivatives, and certain other activities closely linked with securities and derivatives markets, as will be specified below [...] The central objectives of the separation are to make banking groups, especially their socially most vital parts (mainly deposit-taking and providing financial services to the non-financial sectors in the economy) safer and less connected to trading activities; and, to limit the implicit or explicit stake taxpayer has in the trading parts of banking groups. [...] Separation of these activities into separate legal entities is the most direct way of tackling banks' complexity and interconnectedness»²³.

Secondly, the traditional point of view on the range of financial regulations does not consider the constant increasing of “unconventional” subjects in the financial market, which are getting more and more relevance in the volume of financial operations carried out in the market, commonly without that being followed by a proportional increasing in the public oversight.

This is the case, for instance, of *Hawala* and Other Similar Service Providers (HOSSPs), informal money-transfer models deriving from specific geographic regions or ethnic communities, and spread worldwide with the growth of the migration flows.

Among them, the most notorious is certainly the *Hawala*, a system operating extensively since many centuries in South Asia, and particularly common in the Middle East and in

The critical issues related to those huge banking groups are taken into account also at EU level, see, e.g., European Commission, European Financial Stability and Integration Report 2012, 24 April 2013, SWD(2013) 156 final, p. 56 *et seq.*, available online at: http://ec.europa.eu/finance/financial-analysis/docs/efsir/130425_efsir-2012_en.pdf. The relevance of conflict of interests emerging from the TBTF will be dealt with further below in paragraph 1.2. and in Chapter 4, paragraph 4.1.

²¹ Cf. Annex, 7(c), Second Council Directive 89/646/EEC. In Italy, for instance, the removal of the separation of activities (realized with R.D.L. 12 March 1936, no 375 “legge bancaria”), removal begun with the law, 30 July 1990, no 218 (“legge Amato”) and was completed with the issuing of the new banking code in 1993 (d.lgs. 1 September 1993, no 385, “Testo Unico delle leggi in materia bancaria e creditizia – T.U.B.”).

²² Cf. “Volcker Rule,” Section 619 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203, H.R. 4173, better known as Dodd-Frank Act, effective from July 21, 2010.

²³ Cf. E. LIIKANEN (chaired by), *High-level Expert Group on reforming the structure of the EU banking sector, Final Report*, Brussels, 2 October 2012, p. 100 ss, available online at: http://ec.europa.eu/finance/bank/docs/high-level_expert_group/report_en.pdf.

Africa, in which service providers operate at a transnational level, through non-bank settlement methods founded on mutual trust, such as: physically moving currency or precious metals or stones, importing or exporting of goods, settlement of pre-existing debts, and paying or receiving money from third party accounts²⁴.

Other very successful models of “alternative” transactions may be found in money transfers, which put the issues of licensing and of the oversight of sub delegation with regard to small and spread businesses, and in the bit coins’ market, that combine together all the mentioned critical issues, being created precisely with the aim of avoiding the identification of the subjects and the sums involved in the transactions²⁵.

Of course, the above-mentioned systems are *per se* legitimate, neither necessary oriented towards illicit purposes. The freedom to conduct a business, recognised by the Charter of Fundamental Rights of the European Union (CFREU)²⁶, together with the protection of privacy, provided by the same CFREU, by the European Convention on Human Rights (ECHR)²⁷ and by the American Convention on Human Rights (ACHR)²⁸, may very well justify a preference for these models compared to the more traditional ones.

Some of them, such as the *Hawala*, may even be considered essential to support the financial development of areas in which access to traditional banking services are limited, or boast little confidence for geographical, cultural and historical reasons.

Likewise, the need of expatriate workers to transfer personal remittances, usually of low value, to their countries of origin, provides a perfectly legitimate explanation for the creation of such systems within certain ethnic communities.

On the other side, due to the use of alternative methods of payment, these models are often able to offer prices and velocity in transactions lower than those of the “conventional” ones. Moreover, a general lack of supervision, and the fragmentation of providers permit funds to be sent with little or no recording, through payments that usually leave few paper trails, such as cash or value, and a scarce risk of being identified.

All these reasons contribute to make such “unconventional” financial institutions very attractive channels for illicit transactions, especially for purposes of money laundering,

²⁴ The *Hawala* (*transfer*, in Arabic, from which also derives the Italian word *avallo*) is believed to have developed with the need of financing long-distance trades, especially among Italian cities and the Muslim world, in the early medieval period, introducing the concept of transfer of debt, otherwise not allowed under Roman law.

Even if *hawala* is not a universal term, there is a universal recognition of the existence of *hawala* or *hawala*-like providers across jurisdictions, characterized by similar and unique mechanisms; see G.M. BADR, *Islamic Law: Its Relation to Other Legal Systems*, in *Am. J. Comp. L.*, 26, Spring, 1978 [Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah, February 24-25, 1977]. For a comparative analysis on the impact of HOSSPs, see also FATF, *Report: The role of Hawala and other similar service providers in money laundering and terrorist financing*, October 2013, available online at <http://www.fatf-gafi.org/publications/methodsandtrends/documents/role-hawalas-in-ml-tf.html>.

²⁵ For an overview on the bit-coins, see, e.g., EBA, *Opinion on ‘virtual currencies’*, EBA/Op/2014/08, 4 July 2014; D. BRYANS, *Bitcoin and Money Laundering: Mining for an Effective Solution*, in *Indiana Law Journal*, 2014, Vol. 89, p. 441 *et seq.*; C. M. CHRISTOPHER, *Whack-a-mole: why prosecuting digital currency exchanges won’t stop online money laundering*, in *Lewis & Clark Law Review*, 2014, Vol. 18, p. 1 *et seq.*; O. MARIAN, *A Conceptual Framework for the Regulation of Cryptocurrencies*, in *University of Chicago Law Review*, 2015, Vol. 82, p. 53 *et seq.*; N.J. AJELLO, *Fitting a Square Peg in a Round Hole: Bitcoin, Money Laundering, and the Fifth Amendment Privilege Against Self-Incrimination*, in *Brooklyn Law Review*, Vol. 80, Issue 2, 2015, p. 435-461.

²⁶ Cf. art. 16 CFREU.

²⁷ Cf. art. 7 CFREU, and art. 8 ECHR, CETS 005, Roma, 04/11/1950.

²⁸ Cf. art. 11 of the Convention, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, and entered into force in July 18, 1978 (signed but never ratified by the US). The US Constitution does not explicitly provide for such a right, but it has been developed through the USSC case law.

terrorist financing, and tax evasions, which may hardly be detected if perpetrated through those means²⁹.

Facing the extreme difficulties in keeping those risks under control, several countries had prohibited the implementation of HOSSPs, to be fair with little or no results³⁰. Even where they are legalised, however, HOSSPs proved particularly hard to be officially licensed or completely regulated, notwithstanding the establishment of mechanisms aiming at their identification and monitoring, and the international support for the development and financing of supervisory systems over these forms of alternative remittance³¹.

In the US, these systems are under the combined supervision of the Financial Crimes Enforcement Network (FinCEN), the Homeland Security Investigations (HSI) and the FBI³². In the EU, the oversight on these alternative methods relies mainly at national level, namely in the coordination among Financial Intelligence Units (FIUs)³³, and the occasional establishment of Joint Investigative Teams (JITs).

In this sense, the recent approval of the new Directive on Payment Services (PSD) is certainly an important step towards a comprehensive registration of the transmitters, taking into account the risk-profile of the providers³⁴. However, the intrinsic transnational dimension of HOSSPs and e-commerce, and their virtual and instantaneous character require a level of cooperation among competent authorities, which is often not equal to the situation, due to the lack of political will, training, and resources³⁵. Moreover, such a task would also require substantial data able to describe the real magnitude of these systems, which unfortunately,

²⁹ On the possible use of HOSSPs for illicit purposes, see, e.g., FATF, *Report: The role of Hawala*, cit., p. 27 *et seq.*; European Parliament, Directorate General for Internal Policies - Policy Department D: Budgetary Affairs, *How does organised crime misuse EU funds?*, May 2011, p. 42, available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cont/dv/crime_misuse/crime_misuse_en.pdf; J. ROTH, D. GREENBURG, S. WILLE, *National Commission on Terrorist Attacks upon the United States: Monograph on Terrorist Financing. Staff Report to the Commission*, 82, 2004, p. 68, available online at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

³⁰ FATF, *Report: The role of Hawala*, cit., p. 11-25 «In the first decade after 9/11, the globe has been largely ineffective in supervising HOSSPs [...] the scale of unregulated *hawalas* is unknown and is impossible to generalize. Most countries have difficulties reaching credible estimates of the size of unregulated *hawala* and other similar service providers». Interestingly, most of developing countries are not allowing licensing or registration of *Hawala*, and usually consider that illegal; while most of developed countries provide the contrary, cf. FATF at 45 *et seq.*

³¹ Cf. Special Recommendation VI and its interpretative note, in FATF, *IX Special Recommendations*, October 2001 (incorporating all subsequent amendments until February 2008, including *Combating the Abuse of Alternative Remittance Systems: International Best Practices*, June 2003, OECD, Paris), available online at <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>.

The Recommendation has been transposed at EU level by Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, under the Commission initiative, see Communication from the Commission to the Council and the European Parliament on the Prevention of and the Fight against Terrorist Financing through measures to improve the exchange of information, to strengthen transparency and enhance the traceability of financial transactions, Brussels, 20 October 2004 COM(2004) 700 final, p. 7.

³² Cf. HSI, *Hawalas*, in *The Cornerstone Report*, Volume VII, No 2, Summer 2010, p.1-2.

³³ The FinCEN represents the US Financial Intelligence Unit; the role of FIUs will be illustrated in Chapter 2, paragraph 1.3.

³⁴ Cf. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

³⁵ Cf. FATF, *Report: The role of Hawala*, cit., p. 68.

also because they operate under the radar of regulated transactions, are currently still mostly lacking.

Indeed, in this context, often even achieving an effective supervision and appropriate investigative powers over “conventional” financial transactions has proven to be a challenging task for most of legal orders.

In the light of the above, and of the extreme variety of their structures according to the geographic context, such “unconventional” financial institutions will not fall directly under the scope of the present research, notwithstanding their relevance in quantitative terms.

Thus, this thesis will be mainly dealing with “traditional” financial institutions; among those, it will examine in particular banks, for which the regulation is particularly developed (and critical) both in the fields of administrative supervision and criminal investigations.

The existence of the above-mentioned “underground economy”, however, will be kept in mind when dealing with the adequacy of the supervisory systems, and of the investigative measures applicable in the fight against financial crimes.

Reaching a suitable level of efficiency of controls, and safeguards of rights with regard to “conventional” transactions is a necessary and urgent step that has to be pursued at national as well as at transnational level; it should not be forgotten, though, that a success in this field will still leave the bulk of the iceberg to be dealt with.

1.2. Scope of application: banking supervision and real-time monitoring of financial records.

Financial institutions might be involved in financial investigations under several perspectives. First of all, banks may be themselves the direct target of criminal investigations, for instance pertaining to the deception of conflicts of interest, at the expenses of their own customers, and the general safety and soundness of the market, as well as to accounting frauds and other irregularities.

A clear example of these phenomena comes from the last financial crisis, where relevant conflicts of interest have been decisive both in producing a false impression of safety for most of the too-late-discovered junk securities, and in exacerbating the already tragic consequences suffered by the vast public of investors.

As reported by the U.S. Senate Permanent Subcommittee on investigations in 2011 «the investigation found that the crisis was not a natural disaster, but the result of high risk, complex financial products; undisclosed conflicts of interest; and the failure of regulators, the credit rating agencies, and the market itself to rein in the excesses of Wall Street»³⁶.

Notable examples of such a conduct may be found in the violations of disclosure duties required by securities law, perpetrated by Goldman Sachs in the years 2006-2007, when, after having built a strong proprietary position in the mortgage market, the bank started to bet against it, in some cases taking positions «that paid off only when some of its clients lost money on the very securities that Goldman Sachs had sold to them and then shorted. Altogether in 2007, Goldman’s mortgage department made \$1.1 billion in net revenues from shorting the mortgage market»³⁷. Subject to several civil suits, in 2016 Goldman Sachs eventually agreed to settle the claims with a fine of about \$ 5 billion, accompanied by the

³⁶ See U.S. Senate Permanent Subcommittee on investigations – Committee on Homeland Security and Governmental Affairs, *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse*, April 13, 2011, p. 36, http://www.hsgac.senate.gov//imo/media/doc/Financial_Crisis/FinancialCrisisReport.pdf?attempt=2.

³⁷ *Id.*, p. 36.

admission of having provided incomplete information to the investors in the portfolio selection process, in particular as far as their economic adverse interest to the bank was concerned³⁸.

In the EU, a notable case of conflict of interests and of illicit cartels among banking and financial institutions concerned the 2012 Libor/Euribor scandals, involving several major banking groups, such as Deutsche Bank, JP Morgan, Citicorp, Barclays, Royal Bank of Scotland, Bank of America, UBS, HSBC, ICAP, Société Générale.

As is well known, the London Interbank Offered Rate (Libor)³⁹ and the Euro Interbank Offered Rate (Euribor)⁴⁰ have a great influence on consumers, since they represent the daily reference rates for mortgages, consumer lending products, futures, options, swaps and other derivative financial instruments. What came to light in 2012 was that the panels determining both indexes had been deliberately manipulated since almost fifteen years, for the benefit of banks and some securities traders, which requested fixed figures to take advantage of. That caused several of the above-mentioned financial institutions, and their legal representatives to face civil, administrative and criminal proceedings both in the US and in the EU⁴¹.

Due to the relevant interests involved, those cases assume a specific relevance toward the public opinion, especially when financial bubbles and crises break out, and professional and private investors are involved as victims of hazardous speculative financial operations.

Nonetheless, the position of banks that are intentionally engaging in such conducts will not be discussed here under the perspective of traditional criminal investigations.

In fact, besides for their tangible impact, under a technical point of view, these cases mainly concern the issue of corporate criminal liability, and the opportunity to adapt the standard rules of criminal proceedings when dealing with legal persons as defendants⁴². Thus, for the purposes of this research, it would be sufficient to consider the current *status quo* on the matter in the examined countries.

³⁸ Cf. M. GOLDSTEIN, *Goldman to Pay Up to \$5 Billion to Settle Claims of Faulty Mortgages*, in *NYT*, January 14, 2016, available online at: <http://www.nytimes.com/2016/01/15/business/dealbook/goldman-to-pay-5-billion-to-settle-claims-of-faulty-mortgages.html? r=0>; and C. FREE, *The Goldman Sachs Abacus 2007-ACI Controversy: An ethical case study*, January 19, 2012, available online at: <http://www.e-ir.info/2012/01/19/the-goldman-sachs-abacus-2007-aci-controversy-an-ethical-case-study/>.

³⁹ «A daily compilation by the British Bankers Association of the rates that major international banks charge each other for large-volume, short-term loans of Eurodollars, with monthly maturity rates calculated out to one year. These daily rates are used as the underlying interest rates for derivative contracts in currencies other than the euro» cf. *Black's Law Dictionary*, cit., p. 1027.

⁴⁰ «A measure of what major international banks charge each other for large-volume, short-term loans of euros, based on interest-rate data provided daily by a panel of representative banks across Europe» cf. *Black's Law Dictionary*, cit., p. 633.

⁴¹ The European Commission has fined 8 international financial institutions a total of € 1 712 468 000 for participating in illegal cartels in markets for financial derivatives, cf. European Commission, *Antitrust: Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry*, Brussels, 4 December 2013, available online at: http://europa.eu/rapid/press-release_IP-13-1208_en.htm. Citicorp, JPMorgan Chase & Co., Barclays PLC, The Royal Bank of Scotland PLC, and UBS AG agreed to plead guilty to felony charges to the US Department of Justice, cf. DOJ, *Five Major Banks Agree to Parent-Level Guilty Pleas*, Wednesday, May 20, 2015, available online at: <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

⁴² The main issues of the debate are: as the identification of the liable subjects within the legal person, the value of corporate compliance programmes, and the potential conflicts in terms of defence rights between the physical members of the legal entity and the entity in itself. Cf. S.S. BEALE, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability*, 126 *ZStW*, 2014, p. 27-54; L. LUPARÀ, *Processo Penale e Reati Societari: fisionomia di un modello "invisibile"*, in *Riv. dottori comm.*, (2010), fasc.4, 801; L.D. CERQUA, G. CANZIO, L. LUPARÀ (eds.), *Diritto penale delle società*, Padova, CEDAM, 2014.

In the US, the possibility for a collective entity to be held responsible for criminal offences was introduced at the beginning of the last century, through the Supreme Court decision *New York Central & Hudson River Railroad Co. v. United States*, which extended the tort doctrine of *respondeat superior* to criminal cases⁴³.

Since then, and notwithstanding several and often severe critics⁴⁴, the criminal liability of legal persons or organizations, mainly corporations, has become an established feature in the US system⁴⁵. The theoretical possibility to enforce such a liability, however, does not mean in itself that criminal convictions for corporations are frequently pursued.

Indeed, the decision to charge a corporation is particularly delicate, especially when considering the consequences that such a decision might have on shareholders and employees. This awareness, substantially increased after the *Arthur Anderson LLP* case in the wake of Enron's collapse⁴⁶, *de facto* led to a drastic slowdown in targeting corporations, and to a shift towards senior corporate executives⁴⁷.

Even if this trend has not appeared to change throughout the last crisis, it has neither led to the dereliction of organizations' criminal liability: nowadays, in fact, this is still maintained as a precious tool in the prosecutor's hand, in order to force the corporation to adopt internal reforms, frequently then opting for a pre-trial resolution of the controversy, for instance through deferred prosecution or non-prosecution agreements⁴⁸.

⁴³ 212 U.S. 481 (1909).

⁴⁴ See e.g. V.S. KHANNA, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 in *Harv. L. Rev.* 1477, 1996; M. MOORE, *Placing Blame: a General Theory of the Criminal Law*, 596–617, 1997; J. C. COFFEE Jr., *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 in *Mich. L. Rev.* 386, 386, 1981; P. H. ROBINSON, *The Virtues of Restorative Process, the Vices of "Restorative Justice"*, in *Utah L. Rev.* 375, 384-85, 2003; A. HAMDAMI, A. KLEMENT, *Corporate Crime and Deterrence*, 61 in *Stan. L. Rev.* 271, 274, 2008.

⁴⁵ Also in the Model Penal Code adopted by some States, in fact, the principle of corporation's criminal liability is not denied, even if the burden of proof is significantly higher for the Government, cf., e.g., Section 2.07(1); see also J. K. STRADER, *Understanding white collar crime*, III ed., Lexis Nexis, p. 20 *et seq.*

⁴⁶ *United States v. Arthur Andersen, LLP*, 374 F.3d 281, 284 (6th Cir. 2004), rev'd, 125 S. Ct. 2129 (2005). According to the Sentencing Commission's yearly reports of corporate convictions, from 2007 to 2012 fewer than 200 corporations were convicted per year in the federal courts, see, e.g., 2012 Sourcebook of Federal Sentencing Statistics – Table 51, U.S. Sentencing Commission (last visited Dec. 23, 2013), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table51.pdf>, reported by S.S. BEALE, *The Development and Evolution of the U.S. Law*, cit. For opposite comment to the impact of such a practice related to the financial crisis, see J.S. RAKOFF, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, in *N.Y. Rev. Books*, January 9, 2014 available online at: <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/?pagination=false&printpage=true>; D.M. UHLMANN, *Prosecution Deferred, Justice Denied*, in *NYT*, December 13, 2013, available online at: <http://www.nytimes.com/2013/12/14/opinion/prosecution-deferred-justice-denied.html>.

⁴⁷ Who nowadays are reported to be increasingly charged and convicted, see K.F. BRICKEY, *The Changing Face of White-Collar Crime: In Enron's wake: Corporate Executives on Trial*, 96 *J. Crim. L. & Criminology* 397, Symposium winter 2006, p. 15, according to whom «The corporate fraud prosecution cycle following Enron's collapse has produced an unparalleled number of criminal trials of senior corporate executives in just three years. While guilty pleas and cooperation agreements are strategically significant in developing these cases, the number of CEOs, CFOs, and other senior managers who have been charged and tried belies critics' assertions that mid-level managers who plead guilty become scapegoats, while their superiors go scot free».

⁴⁸ That was the case for instance of relevant financial institutions, such as Merrill Lynch & Co, and Monsanto, see S.S. BEALE, *The Development and Evolution of the U.S. Law*, cit., p. 24, citing B.L. GARRETT, *Structural Reform Prosecution*, 93 *Va. L. Rev.* 853, 2007.

In Europe, the situation over criminal responsibility for legal persons looks more fragmented⁴⁹.

While the EU legislation has strongly promoted the implementation of some form of liability for organizations committing crimes⁵⁰, it left full discretion to the Member States in choosing the nature of the responsibility, as long as the sanctions imposed are “effective, proportionate and dissuasive”⁵¹. In such a context, most of Member States did opt for models of criminal liability⁵². A consistent group of countries, on the contrary, strongly resisted to its insertion, and went for alternative forms of responsibility, namely administrative ones (*i.e.* DE and EL), or hybrid models combining some features of both paradigms (*e.g.* IT)⁵³.

In view of the above, even if with different degrees and proceedings, in the EU legal entities may be always held responsible for their involvement in criminal activities, either risking the application of criminal or administrative sanctions.

As already mentioned, however, looking at banks as targets of traditional criminal investigations is not the point of view that will be adopted in this research, which will analyse another critical form of investigation instead.

Increasingly in the last few years, credit institutions have been exposed to the supervisory inquiries carried out by specific administrative authorities.

Under this perspective in Europe, especially after the entry into force of the Banking Union reform, a new series of critical issues is emerging concerning the substantial (administrative or criminal) nature of the supervisory procedures, and, accordingly, of the guarantees that should be there safeguarded. This theme will be dealt with in Chapter 3, taking the US supervisory system as a basis for comparison.

Moreover, in several legal systems, including in the US and the EU, financial institutions are subject to a series of reporting obligations aiming at the identification of irregularities, and possibly, of crimes, with the duty to monitor transactions and periodically file suspect operations to the competent supervising authority⁵⁴. Again in general terms, if a reasonable

⁴⁹ S.S. BEALE, A.G. SAFWAT, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 *Buff. Crim. L. Rev.* 89, 2004, p. 97-98.

⁵⁰ Cf. articles 5-6, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA; art. 12, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment; recital (18) and art. 8, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive); art. 30, *lett. j*), Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC; art. 6, Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA.

⁵¹ This expression is typically repeated in most legislative acts of the Union, when it comes to impose sanctions, cf., *e.g.*, European Commission, *Towards an EU Criminal Policy*, cit., p. 9.

⁵² Cf. V. MONGILLO, *The Nature of Corporate Liability for Criminal Offences: Theoretical Models and EU Member State Laws*, in A. Fiorella (ed.), *Corporate Criminal Liability and Compliance Programs*, Volume II, *Towards a Common Model in the European Union*, Napoli, Jovene Editore, 2012, p. 75-95; CLIFFORD CHANCE (ed.), *Corporate Liability in Europe*, London, 2012, available online at: http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf.

⁵³ In addition to Italy, also Austria, Bulgaria, Sweden, Slovak Republic, Poland opted for a hybrid system, cf. V. MONGILLO, *The Nature of Corporate Liability*, cit., p. 85.

⁵⁴ Real-time monitoring of financial records will be dealt with in Chapter 4. Periodical reporting obligations are imposed both in the US (by The Currency and Foreign Transactions Reporting Act of 1970, commonly referred to as the “Bank Secrecy Act” or “BSA,” P.L. 91-508, codified at: 31 U.S.C. § 5311-5314e, 5316-5331, 5332e; 12

suspect of undergoing criminal activity emerges, the reporting duty is extended also towards the competent judicial authorities⁵⁵. In all those cases, judicial or administrative regulatory authorities address financial institutions as source of information in order to access the huge amount of data they own.

While these regulations are well established and mostly undisputed in most Western legal orders, the debate over the acknowledgement of forms of real-time reporting and monitoring over financial records, and around their application requirements, is still highly problematic, as will be discussed in detail in Chapter 4.

From one side, these measures are extremely relevant, and increasingly necessary in the fight against financial crimes. On the other side, these kinds of investigative measures put several fundamental rights at stake, above all the right of privacy, and the privilege against self-incrimination. Under such a perspective, defining which are the features of the proceedings to obtain such information, and their respective guarantees, assumes quite a relevant weight.

This is even more necessary in judicial systems, like the US and the EU, characterized by multiple investigative agencies, acting in the different fields of administrative and criminal inquiries, and linked together by several cooperative networks.

Certainly, financial institutions may become targets of investigation also as far as the compliance with reporting obligations is concerned: the negligence of the institutions in this field is usually sanctioned at administrative level, or even at a criminal one, if the inaction can be read either as a conspiratorial silence supporting the illegal origin or destination of their customer's deposits and transactions, or as a wilful blindness on the operations carried on in their offices.

A very notorious example in this sense may be found in J.P. Morgan's criminal liability arisen from the bank's failure to maintain an effective AML programme and to timely file a Suspicious Activity Report (SAR) to the competent regulatory authority on the transactions included in the fraudulent investment schemes carried out by its client Bernard Madoff, beginning in the mid-1980s and spanning over 20 years.

The case did not end with a decision on the criminal liability of the financial institution thanks to an out-of-court agreement before the competent supervisory authority, where J.P. Morgan consented to a settlement of overall \$ 2,05 billion for wilful violations of the Bank Secrecy Act⁵⁶.

Similarly, notorious violations of AML rules, with criminal implications may be found in the cases concerning the British bank HSBC - one of the largest financial institutions in the world - emerged, since 2008 after the publications of several files containing the name of numerous bank account holders by a former employee, Hervé Falciani⁵⁷. For the «massive backlog of

U.S.C. § 1829b, 1951-1959e) and in the EU (by the AML/CFT Directive, recently approved in its fourth amended version, see Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC).

⁵⁵ Cf. Chapter 3, paragraph 4.2.

⁵⁶ See U.S.A. Department of the Treasury-FinCEN *in the matter of: Number 2014-1 J.P. Morgan Chase Bank, N.A., Columbus, OH, Assessment of Civil Money Penalty*, available online at: https://www.fincen.gov/news_room/ea/files/JPMorgan_ASSESSMENT_01072014.pdf, FinCEN-News Release, *J.P. Morgan Admits Violation of the Bank Secrecy Act for Failed Madoff Oversight; Fined \$461 Million by FinCEN*, available online at: http://www.fincen.gov/news_room/nr/html/20140107.html.

⁵⁷ Cf., e.g., D. CARVAJAL, R. MINDER, *A Whistle-Blower Who Can Name Names of Swiss Bank Account Holders*, in *NYT*, August 8, 2013, available online at: http://www.nytimes.com/2013/08/09/business/global/a-whistle-blower-who-can-name-names-of-swiss-bank-account-holders.html?_r=0.

over 17,000 alerts identifying possible suspicious activity that had yet to be reviewed; ineffective methods for identifying suspicious activity; a failure to file timely Suspicious Activity Reports with U.S. law enforcement; a failure to conduct any due diligence to assess the risks of HSBC affiliates before opening correspondent accounts for them [...] inadequate and unqualified AML staffing; inadequate AML resources [...] severe, widespread, and longstanding AML deficiencies»⁵⁸ HSBC has been convicted in the US, agreed to an about \$ 2 billion fine, and faced a criminal proceeding in Switzerland, where it was closed in return for a £ 28 million settlement⁵⁹.

Falling again under the scope of corporate criminal liability, those cases will not be specifically discussed here; they will, however, be taken in due account insofar as they prove to be relevant in assessing the ground for refusals that financial institutions may oppose to the investigative authorities' requests for information.

1.3. The peculiarity of banking investigations v. traditional fact-finding criminal investigations.

Finally, it is worth spending a few lines on the peculiar features that characterize banking investigations compared to the traditional criminal ones.

Indeed, financial investigations in general hold a very peculiar role in criminal investigations as a whole.

Since their main goal is to chase the «movement of money during the course of criminal activity, the link between the origins of the money, beneficiaries, when the money is received and where it is stored or deposited»⁶⁰, they are usually conducted «in parallel to criminal investigation in order to identify and trace material benefit acquired by (the concrete) criminal offence, to identify the property of the suspects or third persons from whom confiscation of proceeds is possible and to secure final confiscation through the implementation of temporary measures»⁶¹.

Financial investigations may initiate through the ordinary law enforcement information gathering activities, including undercover operations and cooperation agreements with suspects, defendants or informants.

Obligations compelling banks to report suspicious activities, or currency transactions over a certain amount, however, represent the major mean through which banking investigations are often launched, since they permit to access to otherwise barely achievable financial data.

⁵⁸ Cf. U.S. Senate Permanent Subcommittee on Investigations- Committee on Homeland Security and Governmental Affairs, *U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History*, July 17, 2012, p. 3, available online at: <http://www.hsgac.senate.gov/subcommittees/investigations/media/hsbc-exposed-us-finacial-system-to-money-laundering-drug-terrorist-financing-risk>; and BBC, *HSBC money laundering report: Key findings*, December 11, 2012, available online at: <http://www.bbc.com/news/business-18880269>.

⁵⁹ See M.V., *The fall-out from Falciani*, in *The Economist*, October 16, 2013, available online at: <http://www.economist.com/blogs/schumpeter/2013/10/banks-and-tax-evasion>; J. GARSIDE, *HSBC pays out £28m over money-laundering claims*, in *The Guardian*, June 4, 2015, available online at: <http://www.theguardian.com/business/2015/jun/04/hsbc-fined-278m-over-money-laundering-claims>.

⁶⁰ FATF, *Operational Issues - Financial Investigations Guidance*, July 2012, p. 3, available online at: http://www.fatf-gafi.org/media/fatf/documents/reports/Operational%20Issues_Financial%20investigations%20Guidance.pdf.

⁶¹ R. GOLOBINEK, *Financial Investigations and Confiscation of Proceeds from crime. Council of Europe - Training Manual for Law Enforcement and Judiciary*, August 2006, p. 7, available online at: https://www.coe.int/t/dghl/cooperation/economiccrime/specialfiles/CARPO-ManualFinInv_eng.pdf.

Nonetheless, financial inquiries usually require remarkable amounts of time, and a level of specialization that ordinary law enforcement agents are rarely able to provide at a satisfactory level⁶². Following the “paper trail”, retracing the criminal conducts, and developing evidence that can be used in further inquiries, as well as in criminal proceedings are all steps which may be properly enforced only thanks to technical investigative abilities in dealing with highly specialized data analysis.

Such a training, proper economic funding, and strict cooperation are thus crucial for the positive outcome of financial investigations, both at national and at the international level. However, they cannot be considered sufficient as such.

In order to result successful in the fight against financial crime, legal orders also need to develop specific measures able to allow a sharp and prompt access to data stored by financial institutions, as will hereinafter be illustrated.

2. Methodology: Transversal comparative approach applied to a complex legal framework.

The research adopts a transversal comparative approach that will focus on relevant themes, and discuss how they are developed in the selected countries.

Thus, after having provided a general, and necessary, overview on the pertinent legislative frameworks at the international level, it will examine the EU and US systems, focusing on the more relevant traits of their banking supervisory models, and on the legal bases allowing (or not allowing) the undertaking of real-time surveillance over financial records.

In dealing with these tasks, however, it is important to take into account a series of peculiarities, which characterize criminal investigations, and especially banking investigations, when they took place within multi-level systems.

These profiles partially descend from the mere differences among legal orders; partially are attributable to the systematic complexity of these federal (or semi-federal, in the EU case) organizations.

In particular, they concern, in both countries, the constant interaction between administrative and criminal inquiries, which may be found at domestic and at transnational level, and, in the EU, the hybrid character of its criminal justice system.

2.1. The Hybrid Character of the EU Criminal Justice System.

Before comparing the European legal framework it with the US model, it is important to remind that the EU criminal justice system – even if explicitly provided by the Treaties, especially after the 2009 reform, and the 2014 extension of the competence of the Court of Justice to the Area of Freedom, Security and Justice (AFSJ)⁶³ - represents neither a homogeneous system, structured in the way internal national legal orders usually are, nor a properly formed federal paradigm, being still lacking a clear democratic accountability for criminal policy choices, and an autonomous European judicial system.

⁶² FATF, *Operational Issues*, cit., p. 6.

⁶³ Cf. Consolidated version - Treaty on the Functioning of the European Union C 326/52 Official Journal of the European Union 26.10.2012, Title V, Area of Freedom, Security and Justice, articles 67–89, and especially articles 82–89.

Currently in the middle of the integration process, whose outcomes are far to be foreseeable, the AFSJ also persists in missing a systematic repartition of competences between the central and the local levels, and a clear identification of its objectives and its scope of application⁶⁴.

As a result, the Union competence in this field is deeply characterized by a hybrid structure, in which national and EU law may apply together at the same time, integrating each other⁶⁵.

Such a phenomenon is especially evident in financial investigations, which represent one of the fields in which the Union's criminal competences are more developed but also, according to the Treaty, an area shared between the EU and the Member States⁶⁶.

Whilst shared competence may be also found in the US system⁶⁷, where it entails the concurrent application of local and federal law, each of which possesses an intrinsic autonomy, its implementation in the EU is quite peculiar.

Especially in the area of the former Third Pillar, in fact, most of legislative texts at the central level adopts the form of a directive, an act which is generally not self-executing, but becomes enforceable only after its transposition by national legislators: a phenomenon that is completely unknown to the American federal system.

Therefore, while in the US the applicable federal law is defined by the combination of federal statutory legislation, and case law, in the EU the applicable European law is resulting from the combination of EU legislation, and case law, and the national transposing legislation (not to mention the fundamental role played by the Council of Europe and, above all, by the jurisprudence of the European Court of Human Rights).

As a result, the EU and US models look quite different, even if both countries recognize the principle of supremacy of the federal and Community law, respectively⁶⁸, and such a variance needs to be taken in due account when dealing with the analysis of the applicable financial investigative measures.

⁶⁴ Cf. art. 10, §§ 1-3, Protocol (No 36) on Transitional Provisions concerning acts adopted on the basis of Titles V and VI of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon.

⁶⁵ Cf. A. KLIP, *European Criminal Law*, cit., p. 1 *et seq.*

⁶⁶ Cf. art. 4, § 2 (j) TFEU: « Shared competence between the Union and the Member States applies in the following principal areas: [...] area of freedom, security and justice» and art. 325, par. 3 and 5: «Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities [...] The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article», cf. also A. KLIP, *European Criminal Law*, cit., p. 172.

⁶⁷ For instance, as provided by the Tenth Amendment of the US Constitution: «The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people».

⁶⁸ Even if it is «a cornerstone principle of Community law», the principle of primacy of EU law is not explicitly stated in the Treaties, even if this fact «shall not in any way change the existence of the principle and the existing case-law of the Court of Justice, which firstly developed its content» (see Judgment in *Flaminio Costa v E.N.E.L.*, Case 6-64, 15 July 1964, ECLI:EU:C:1964:66), cf. 17. Declaration concerning primacy, in TFEU, A.1. Declarations Concerning Provisions of the Treaties («The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law»), and attached Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260).

In the US, the same principle, expressed by article VI, sec. 2 US Constitution («This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding») has also been affirmed in several leading cases, see, e.g., *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Hammer v. Dagenhart* 247 U.S. 251 (1918).

2.2. The interaction between the administrative and the criminal matter.

The other main feature that needs to be considered in this analysis is the increasingly strict connection that results from the interaction of the administrative and criminal matters.

The conclusion that these two fields should not be studied only as separated systems anymore has long been affirmed by scholars for a long time, even if often without receiving an acknowledgement adequate to its practical importance⁶⁹.

Adopting such an approach is particularly pressing for the area of financial and banking investigations, whose effectiveness highly depends on the coordination between criminal and administrative rules. For this reason, describing financial crimes, and banking investigations requires to take into account not only the investigative tools used in criminal proceedings, but also those which are applied at administrative level, namely supervisory inquiries and following sanctions concerning financial institutions.

However problematic such an analysis might become, this multidisciplinary, and at the same time in-depth assessment, seems to be the only method able to explain the phenomenon of banking investigation, and keep up with its evolution in a globalised world and dematerialised financial market.

In general, the origin of the interaction between these two fields may be found in the circumstance that the same fact, or conduct may be relevant both under criminal and administrative liability, and thus bring to the application of sanctions of different nature.

It is precisely on the definition of this “nature”, and consequently of the nature of the proceedings causing the sanctions too, that the challenge for the extensions of guarantees also to administrative (including supervisory) proceedings is currently at stake. That of course highly depends on which are the criteria adopted to solve the issue.

The consolidated jurisprudence of the ECtHR on this profile clearly opts for a substantial approach, expressed by the so-called *Engel* criteria, which define the criminal matter taking into account the classification in domestic law; the nature of the offence; and the severity of the penalty that the person concerned risks incurring⁷⁰.

The first criterion, however, is interpreted by the Court only as a starting point, and it is decisive only if at national level the conduct is classified as criminal. Otherwise, what will be crucial are the other two criteria. In particular, the nature of the offence should be assessed taking into account the parameters developed by the ECtHR case law, such as whether the legal rule in question is directed solely at a specific group or is of a generally binding character⁷¹, if it has a punitive or deterrent purpose⁷², and whether the imposition of any penalty is dependent upon a finding of guilt⁷³.

These criteria have been used by the Court to confer criminal nature also to some sanctions classified as administrative at national level, such as in the fields of tax surcharges

⁶⁹ The necessity of this comprehensive approach has been recognized already in the 80s, see., e.g., E. PALIERO, *Il "diritto penale-amministrativo": profili comparatistici*, in *Riv. trim. dir. pubbl.*, 1980, p. 1254 *et seq.*

⁷⁰ *Engel v. the Netherlands*, 8 June 1976, Application no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, §§ 82-83.

⁷¹ *Bendenoun v. France*, 24 February 1994, Application no. 12547/86, § 47.

⁷² *Öztürk v. Germany*, 21 February 1984, Application no. 8544/79, § 53; *Bendenoun v. France*, § 47.

⁷³ *Benham v. the United Kingdom*, 10 June 1996, Application no. 19380/92, § 56. For the third criterion see *Campbell and Fell v. the United Kingdom*, 28 June 1984, Application nos. 7819/77; 7878/77, § 72; *Demicoli v. Malta*, 27 August 1991, Application no. 13057/87, § 34.

proceedings⁷⁴, customs law⁷⁵, and to those applied by certain administrative authorities with powers in the spheres of economic, financial and competition law⁷⁶.

According to its case law, the ECtHR has then extended the protection of the *ne bis in idem* principle, as well as the rights listed in art. 6 ECHR, to all punitive sanctions, and relative proceedings, as much as criminal or administrative they might be.

In view of the above, it is clearer why administrative and criminal sanctions, even if aiming at different purposes, cannot be considered two separate systems anymore.

More precisely, the link between the criminal and the administrative field is twofold, and may regard both the developing of the proceedings and their results.

2.3.1. The gathering of the information and the significance of cooperation.

Thanks to the above-mentioned polyvalent nature of certain facts, and to the mechanisms of reporting obligations, it is quite common that relevant information is largely gathered outside the boundaries of traditional criminal proceedings, and, particularly, during administrative inquiries. Many of financial investigations derive from administrative investigations concerning mere irregularities, and are reported to the judicial authorities only if and when reasonable suspects of offences are emerging.

Firstly, that is due to the fact that the authorities competent for receiving the reports are usually administrative ones, generally classifiable as banking supervisors or regulators, securities market supervisors, and tax agencies.

In multi-level systems as the EU and the US, due to their scale, and intrinsic complexity, the operators of the financial market are normally overseen by numerous governmental and/or independent administrative agencies.

Narrowing the perspective solely to banking institutions, but taking into account the broad range of activities that banks are entitled to pursue according to the model of universal banking, in the EU the financial supervision is reserved to the European Banking Authority (EBA), to the European Central Bank (ECB) and to the numerous National Competent Authorities (NCAs).

In the US, the regulatory tasks are shared – just to mention the federal level – among the Federal Reserve (Fed. Res.), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Securities Exchange Commission (SEC) and, until 2010, the Office of Thrift Supervision (OTS)⁷⁷.

Also on the side of criminal investigations, however, the competence is rarely relying only on just one agency, being commonly shared, just at federal level, among prosecutorial offices and several law enforcement agencies, such as those under the Department of Justice

⁷⁴ «On the basis of the following elements: (1) the law setting out the penalties covered all citizens in their capacity as taxpayers; (2) the surcharge was not intended as pecuniary compensation for damage but essentially as a punishment to deter reoffending; (3) it was imposed under a general rule with both a deterrent and a punitive purpose; (4) the surcharge was substantial», cf. ECtHR, *Guide on Article 6. Right to a Fair Trial (criminal limb)*, p. 8, available online at: http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

⁷⁵ *Salabiaku v. France*, 7 October 1988, Application No 10519/83.

⁷⁶ Cf. *Lilly France S.A. v. France*, 14 October 2003, Application no 53892/00; *Dubus S.A. v. France*, 11 June 2009, Application no 5242/04; *A. Menarini Diagnostics S.r.l. v. Italy*; 27 September 2011, Application no 43509/08; *Grande Stevens and others v. Italy*, 4 March 2014, Application No18640/10 – see: G. DE AMICIS, *Ne bis in idem e “doppio binario” sanzionatorio: prime riflessioni sugli effetti della sentenza “Grande Stevens” nell’ordinamento italiano*, in *Dir. pen cont. – Riv. trim.*, 3-4, 2014, p. 201; F. VIGANÒ, *Doppio binario sanzionatorio e ne bis in idem: verso una diretta applicazione dell’art. 50 della Carta?*, *ivi*, p. 219.

⁷⁷ The roles of the mentioned authorities in the EU and in the US will be illustrated in Chapter 3, paragraph 3.

direction - including the Federal Bureau of Investigation, the Drug Enforcement Administration, the US Marshals Service - and those under the Department of Homeland Security - such as the US Customs and Border Protection, the US Immigration and Customs Enforcement, the US Secret Service, and the Homeland Security Investigations, not to mention the criminal division of the Internal Revenue Service, formally under the Department of the Treasury.

Consequently, the coordination issue becomes pivotal.

In fact, the cooperation of financial and banking institutions is essential in order to supply supervisory authorities with due information about alleged irregularities; and coordination of regulatory supervisors is necessary to allow both an efficient oversight, and judicial authorities to promptly counteract against financial offences.

In this sense, the concomitant presence of several agencies within the same territory, often with competence over the same subjects, and with sometimes overlapping but still diverging goals, requests to adopt a comprehensive perspective, that holds together the features of single institutions' investigative procedures, and the outcomes resulting from their combined actions.

That is also because in the field of cooperation, practice needs to be weighted at least as much as the law on the books. In fact, whilst obviously poor rules would likely impeach the workability of the system, good rules are often not enough to ensure satisfactory results: when it comes to cooperation, mutual trust, personal relationships and good will still play a critical role for success⁷⁸.

The relevance of practice in this field may be even drawn from the circumstance that legal orders based on poles apart grounds (such as civil and common law systems) frequently tend to converge towards similar implementations, and to bring about similar problems.

Even if this thesis will not deal in details with the analysis of the different cooperation models, it will look into this theme while analysing both the legal framework in which banking investigations take place in the EU and in the US, and the free movement of the evidence so obtained.

With regard here to the interaction between administrative and judicial authorities, it can be stated that in the US cooperation seems to work pretty smoothly as long as criminal offences are concerned, thanks to the leading principle according to which if a crime is discovered or suspected during an administrative inquiry, the evidence collected should be reported to the competent criminal agencies, with generally no restriction whatsoever concerning their further use⁷⁹.

Whilst this feature certainly lifts the efficiency of investigations up under the prosecutorial point of view, it also raises substantial concerns on the rules for collecting data in the perspective of defence rights, privacy protection, and risk of double jeopardy.

On the other side, such an optimistic approach cannot be shared when it comes to assess the efficiency of cooperation among the above-mentioned supervisory authorities.

⁷⁸ That is particularly evident in the field of the so-called "spontaneous cooperation" «one of the most innovative and interesting tools for closer co-operation in fighting serious crimes. The boosted circulation of information is, in fact, indicative of a renovated and advanced conception of relationships between judicial authorities, which finds its most meaningful expression in the co-ordination of parallel investigations», cf. M. SIMONATO, *The Spontaneous Exchange of Information between European Judicial Authorities from the Italian Perspective*, in *NJECL*, 2(2), 2011, p. 220.

⁷⁹ Cf. Chapter 3, paragraph 4.2.

The high number of federal regulators in the US and their sometimes-overlapping partition of competences, represent some of the most debated issues concerning banking investigations overseas.

In fact, as illustrated by the analyses carried out after the breaking out of the financial crisis in late 2006, in such a context the undertaking of contemporary or subsequent parallel proceedings by different authorities has proved to result more often in open rivalry rather than into institutional collaboration⁸⁰.

In the EU, the principle of sincere cooperation is expressed by art. 4, § 3 of the Treaty on European Union (TEU), which establishes the duty for Member States to assist each other in ensuring the fulfilment of the Treaty obligations⁸¹.

Within this general provision, administrative and judicial cooperation has notably increased in its horizontal, vertical and transversal dimensions⁸².

Similarly to the US, however, also the European forms of cooperation highly rely upon the authorities' good will to exchange information, and enforce the requests issued by foreign authorities. These conclusions seem to be validated also by the more recent legislation on the matter, that is Directive 2014/41 regarding the European Investigation Order, in which the huge amount of grounds for refusal that States' authorities might exert de facto leaves the execution of the investigative orders to the discretionary choice of the requested agency⁸³.

Contrary to the US, however, at Community level not all the information gathered during administrative investigations may freely circulate for purposes different from those for which they were collected.

That is the case, for instance, of the inquiries carried out by the Directorate-General for Competition, where information exchanged shall only be used for the purposes of ensuring the internal market protection from conducts causing prevention, restriction or distortion of competition⁸⁴.

⁸⁰ See R.E. MYERS II, *Complex Time Don't Call for Complex Crimes*, 89 in *N.C. L. Rev.*, 2011, p. 1849.

⁸¹ Consolidated version of the Treaty on European Union, C 326/13 Official Journal of the European Union 26.10.2012, art. 4 § 3 «Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives».

⁸² For a general analysis of the different vertical, horizontal and diagonal cooperation models, see A. KLIP, *European Criminal Law*, cit., p. 342 *et seq.*

⁸³ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters; for a critical analysis, see, e.g., S. RUGGERI, *Horizontal Cooperation, Obtaining Evidence Overseas and the Respect for Fundamental Rights in the EU. From the European Commission's Proposals to the Proposal for a Directive on a European Investigation Order: Towards a Single Tool of Evidence Gathering*, in ID. (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings. A Study in Memory of Vittorio Grevi and Giovanni Tranchina*, Heidelberg-New York-Dordrecht-London, 2013, p. 279 *et seq.*; S. ALLEGREZZA, *Collecting Criminal Evidence Across the European Union: the European Investigation Order between Flexibility and Proportionality*, in S. RUGGERI (ed.), *Transnational Evidence in Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*, Heidelberg-New York-Dordrecht-London, 2014, p. 51 *et seq.*; M. CAIANIELLO, *La nuova Direttiva UE sull'ordine europeo di indagine penale tra mutuo riconoscimento e ammissione reciproca delle prove*, in *Processo Penale e giustizia*, 3, 2015, p. 1.

⁸⁴ According to Articles 101-102 of the Treaty (former articles 81-82), cf. art. 12, COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; art. 15 § 4, Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty; articles 107-142, Commission

In the light of above, any assessment about the impact of the financial investigative measures, analysed further below, shall carefully consider the origin of information, and its potential circulation within cooperation networks in which authorities with different backgrounds play a decisive role.

2.3.2. The sanctions: definition of “criminal matter” and transnational ne bis in idem.

The other critical issue concerning the interaction of the examined matters derives by the lack of clear and objective criteria for distinguishing what is “criminal”, and what is “administrative”.

Deciding if to incriminate or not certain conducts falls into the main prerogatives of State sovereignty, and thus may greatly differ from one country to the other. Nonetheless, the very possibility for national labels to hold valid in an increasingly globalised context, characterized by intense transnational cooperation, is currently at stake⁸⁵.

Indeed, in a time in which a huge part of administrative, and criminal financial investigations involves authorities belonging to different countries, the shortage about common criteria for the definition of the criminal matter, and for the attribution of jurisdiction at transnational level risk to result in a “first come first served” approach which is neither efficient in fighting crime, nor adequate in guaranteeing the defence fundamental rights⁸⁶.

Such critical issues emerge quite clearly in multi-level systems, whose organization in several local, and central legal orders, different but also bound to guarantee a certain level of coherence as a whole, implicates by definition a high degree of internal conflicts.

If that is true for the US, which present a proper federal structure with a clear separation between federal and local jurisdictions, the same is even more true for the European Union, where the settlement of transnational conflicts of jurisdiction relies upon a pretty vague and non-binding regulation⁸⁷.

In such a context, one of the most evident critical outcomes concerns the protection against double jeopardy or *ne bis in idem* principle.

In addition to the provision contained in the American Convention on Human Rights, as interpreted by the Inter-American Court of Human Rights⁸⁸, in the US, the *ne bis in idem* arises from the Constitution, that in its Fifth Amendment states that «nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb».

Notwithstanding it, the case law of the US Supreme Court (USSC) substantially narrowed the scope of application of this clause that actually proves effective only within the system in which the proceeding has been carried out.

notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, 2011/C 308/06; art. 48, Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004; recital (33), Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11.

⁸⁵ *Öztürk v. Germany*, cit.

⁸⁶ M. LUCHTMAN, J.A.E. VERVAELE, *Enforcing the Market Abuse Regime: Towards an Integrated Model of Criminal and Administrative Law Enforcement in the European Union?*, in *NJECL*, Vol. 5, Issue 2, 2014, p. 219.

⁸⁷ See Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, in which though the role of Eurojust in resolving them has not binding value, cf. J.A.E. VERVAELE, *European Territoriality and Jurisdiction: The Protection of the EU's Financial Interests in Its Horizontal and Vertical (EPPO) Dimension*, in M. Luchtman (ed. by), *Choice of Forum in Cooperation Against EU Financial Crime*, The Hague, Eleven International Publishing, 2013, p. 173.

⁸⁸ Cf. art. 8 § 4, American Convention on Human Rights: «An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause».

Thus, whilst nobody can be tried twice for the same fact within the federal or a local jurisdiction, it is not considered a violation of the principle to have trials for the same fact, and against the same defendant first at federal and then at national level, or vice versa.

This outcome has been constantly affirmed by the USSC since its 1932 decision *Blockburger v. United States*, according to which «A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other»⁸⁹.

The only substantial attempt to overrule such a strict test was made in 1990, when the Court stated, in *Grady v. Corbin*, that «[A] technical comparison of the elements of the two offenses as required by Blockburger does not protect defendants sufficiently from the burdens of multiple trials [...] If Blockburger constituted the entire double-jeopardy inquiry in the context of successive prosecutions, the State could try Corbin in four consecutive trials: for failure to keep right of the median, for driving while intoxicated, for assault, and for homicide. [...] Thus, a subsequent prosecution must do more than merely survive the Blockburger test. As we suggested in Vitale, the double-jeopardy clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted»⁹⁰.

Nevertheless, three years later, the Supreme Court reconsidered its previous orientation, reinstating the *Blockburger* test on the consideration that «Grady must be overruled because it contradicted an unbroken line of decisions [...] and has produced confusion»⁹¹.

Similarly, the USSC has so far denied a generalized application of the principle as far as administrative sanctions are concerned⁹².

In the EU, on the contrary, the principle of *ne bis in idem* finds its main obstacles in the divergences between the CFREU and the provisions of the ECHR, and in the intrinsic limits of their scope of application.

In the ECHR, the prohibition of *bis in idem* shows two main substantial gaps.

Firstly, according to the rules on the implementation of the Convention, the principle can be enforced only within domestic jurisdictions and not at transnational level, that is, among Member States.

Secondly, the *bis in idem* may play a limited role also at national level due to its location not in the Convention itself, but only in one of its Protocols.

That implicates that the provision of article 4, Protocol 7 may be enforced only towards the Member States who ratified it, which are currently not including DE and NL⁹³.

⁸⁹ 284 U.S. 299 (1932), in conformity with the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433.

⁹⁰ 495 U.S. 508 (1990).

⁹¹ See *United States v. Dixon*, 509 U.S. 688 (1993), according to which: «The double-jeopardy clause's protection attaches in non-summary criminal contempt prosecutions just as it does in other criminal prosecutions. In the contexts of both multiple punishments and successive prosecution, the double-jeopardy bar applies if the two offenses for which the defendant is punished or tried cannot survive the 'same elements' or 'Blockburger' test [...] Grady must be overruled because it contradicted an unbroken line of decisions [...] and has produced confusion [...] Moreover, the Grady rule has already proved unstable in application [...] Although the Court does not lightly reconsider precedent, it has never felt constrained to follow prior decisions that are unworkable or badly reasoned».

⁹² See, e.g., *In re John P.*, 311 Md. 700, 706, 537 A.2d 263, 266 (1988); *In re Blessen H.*, 392 Md. 684, 706, 898 A.2d 980, 993-94 (2006); even if the possibility to recognize a violation of the double jeopardy clause in case of civil penalty has been admitted exceptionally in *United States v. Halper*, 490 U.S. 435 (1989).

Moreover, among these, a fair number further narrowed the scope of the principle, making it subject to substantial reservations that notably vary from State to State.

Italy provides a significant example in this sense, since it explicitly excluded the application of the principle when it comes to administrative proceedings (and sanctions), at least until the ECtHR stated its inconsistency in the case *Grande Stevens v. Italy*⁹⁴.

For all these reasons so far, notwithstanding the effort of the Court of Strasbourg, the principle provided by the Convention does not seem to possess real transnational character to ensure an equivalent protection against double-jeopardy among the participating countries.

At the Union level, the prohibition of *bis in idem* is established both by art. 50 CFREU⁹⁵, and by articles 54 and 55 of the Convention Implementing the Schengen Agreement (CISA)⁹⁶.

Even in this legal framework, however, the scope of application of the principle is not always clearly predictable.

On one side, the CISA allowed States to narrow the scope of the protection through reservations, which has been presented by several countries. The value of those limitations, which substantially restrict the *ne bis in idem* enforceability has been long debated after the integration of the CISA into the Treaties of the European Union⁹⁷. Currently, however, it remains still uncertain whether the reservations are still holding valid, or if they should be considered implicitly abolished by the above-mentioned integration process⁹⁸.

⁹³ Cf. http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117/signatures?p_auth=MdUPhQMD, last update 14 June 2016.

⁹⁴ Cit., §§ 204-212.

⁹⁵ According to which: «No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law».

⁹⁶ Article 54: «A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party»; article 55: «1. A Contracting Party may, when ratifying, accepting or approving this Convention, declare that it is not bound by Article 54 in one or more of the following cases:

(a) where the acts to which the foreign judgment relates took place in whole or in part in its own territory; in the latter case, however, this exception shall not apply if the acts took place in part in the territory of the Contracting Party where the judgment was delivered;

(b) where the acts to which the foreign judgment relates constitute an offence against national security or other equally essential interests of that Contracting Party;

(c) where the acts to which the foreign judgment relates were committed by officials of that Contracting Party in violation of the duties of their office.

2. A Contracting Party which has made a declaration regarding the exception referred to in paragraph 1(b) shall specify the categories of offences to which this exception may apply.

3. A Contracting Party may at any time withdraw a declaration relating to one or more of the exceptions referred to in paragraph 1.

4. The exceptions which were the subject of a declaration under paragraph 1 shall not apply where the Contracting Party concerned has, in connection with the same acts, requested the other Contracting Party to bring the prosecution or has granted extradition of the person concerned».

The Schengen Acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

⁹⁷ Protocol 19 annexed to the Treaty of Amsterdam on European Union (TEU).

⁹⁸ As illustrated by two notable cases before the European Court of Justice, cf. Judgment in *Procura della Repubblica v. M.*, C-398/12, 5 June 2014, EU:C:2014:1057 and

Judgment in *Criminal proceedings against Zoran Spasic*, C-129/14 PPU, 27 May 2014, EU:C:2014:586, see, e.g., J.A.E. VERVAELE, *Schengen and Charter-related ne bis in idem protection in the Area of Freedom, Security and Justice: M and Zoran Spasic*, in *Common Market Law Review* 52: 1339–1360, 2015. For the divergence between art. 50 CFREU and articles 54 and 55 CISA, see also J.A.E. VERVAELE, *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, in *Utrecht Law Review*, Volume 9, Issue 4 (September) 2013.

In any case, the Convention provides for a transnational but at the same time limited *ne bis in idem*, which may be enforced only if the sanctions are or have been executed or it cannot be executed anymore according to the law of the executing State⁹⁹.

These clauses, however, run counter the other provision against double jeopardy that characterizes the EU legal system. The Charter of Fundamental Rights, in fact, provides for an unlimited protection against double jeopardy, to be enforced also at transnational level.

At the same time, though, the fields in which the CFREU may be applied are not explicitly defined yet. In fact, where the legislative text only states that it applies only when the institutions and bodies of the Union and the Member States «they are implementing Union law»¹⁰⁰. The interpretation of this condition has been highly debated, and saw some Member States advocating a narrow interpretation, by which the application of general principles of EU law in a certain field would not be enough to trigger the protection of the Charter¹⁰¹. In the case *Åklagaren v Hans Åkerberg Fransson*, however, the European Court of Justice (ECJ) clearly excluded the possibility for those subjects to disregard the application of the rights of the Charter when acting within the scope of EU law¹⁰².

Finally, the two elements of this principle (*bis* and *idem*) have not always been interpreted in the same way by the ECJ and the ECtHR.

As far as the meaning of the expression *idem* is concerned, after a long evolution in its case law, as clearly stated in *Zolotukhin v. Russia*¹⁰³, the ECtHR adopted an harmonized approach, inspired by the *idem* definition elaborated by the ECJ in the AFSJ, which takes into account the same facts or acts, notwithstanding for their legal classification as different offences¹⁰⁴.

When it comes to the definition of *bis*, however, the interpretations of the two Courts are more diverging.

As already mentioned, in the ECtHR's interpretation, the principle of *ne bis in idem* applies both to the criminal and to punitive administrative fields, according to notorious *Engel* criteria. The scope of application of the *Engel* criteria, especially with regard to the application of the protection against double jeopardy, is still far below its real potential.

Also the Court of Justice has recently started to follow the same approach, as notably affirmed in *Bonda*, and in *Åkerberg Fransson*¹⁰⁵. Nonetheless, the same Court shows some resistance to apply this method also to the area of competition law, in which the risk of double jeopardy is still defined by stricter criteria. As stated in the Cement cases, in fact, in this area,

⁹⁹ Art. 54 CISA.

¹⁰⁰ Art. 51 § 1 CFREU.

¹⁰¹ Cf. J.A.E. VERVAELE, *European Criminal Justice in the Post-Lisbon Area*, cit., p.192.

¹⁰² Cf. Judgement in *Åklagaren v. Hans Åkerberg Fransson*, C-617/10 [GC], 26 February 2013, ECLI:EU:C:2013:280, § 21: «Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter».

¹⁰³ 10 February 2009, Application no. 14939/03 [GC], §§ 70-84.

¹⁰⁴ Cf. J.A.E. Vervaele, *European Criminal Justice in the Post-Lisbon Area of Freedom, Security and Justice*, with a prologue by G. Fornasari and D. Sartori (eds.), Quaderni della Facoltà di Giurisprudenza, Trento, 2014, p. 190. Similarly, according to the Inter-American Court of Human Rights in *Loayza-Tamayo v. Peru*, 17 September 1997, Series C No. 33, § 66: «This principle is intended to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause. Unlike the formula used by other international human rights protection instruments (for example, the United Nations International Covenant on Civil and Political Rights, Article 14 § 7), which refers to the same 'crime', the American Convention uses the expression 'the same cause', which is a much broader term in the victim's favour».

¹⁰⁵ Cf. Judgement in *Criminal proceedings against Łukasz Marcin Bonda*, C-489/10, [GC], 5 June 2012, ECLI:EU:C:2012:319, §§ 42-44, and *Åklagaren v. Hans Åkerberg Fransson*, cit.

the principle finds its application only if a threefold condition is met, regarding the identity of facts, the unity of the offender and of the legal interest protected¹⁰⁶.

Moreover, as will be illustrated, also the new investigative mechanism developed by the European Central Bank, within the competence of the Single Supervisory Mechanism does not seem to be completely in line with the case law of the ECtHR on this parameter.

Therefore, currently neither the wordings of the principle at the EU level, nor at the Council of Europe's can ensure the equivalent protection of *ne bis in idem* at a real transnational level within the mere label of criminal proceedings, not to mention the equivalent protection that should be recognized to the punitive-administrative sanctions, according to *Engel*.

As will be discussed further on, such conclusions have a substantial weight in assessing the scope of application, and limits of the supervisory mechanism and the applicable investigative measures, above all as far as the fundamental rights of the defendant are concerned.

¹⁰⁶ Cf. Judgement in *Irish Cement v Commission*, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and others v. Commission*, [2004] ECR I-123, §§ 338-340.

CHAPTER 2

THE INTERNATIONAL LEGAL FRAMEWORK

Summary: 1. The Financial Action Task Force (FATF). – 1.1. Supervision of financial institutions. – 1.2. Investigative measures. - 1.3. Cooperation: the EGMONT Group and the FIUs. - 2. The Council of Europe. – 2.1. MONEYVAL. – 2.2. GRECO. - 3. The Basel Committee on Banking Supervision. – 3.1. Capital requirements. – 3.2. Banking supervision.

The applicable law in banking investigations results from the combination of different areas of expertise, originated by numerous subjects with legislative competences.

While such a framework is already complex within the domestic systems, for the interaction - and sometimes the overlapping - of multiple agencies¹⁰⁷, it is also necessary to take in due account the substantial body of rules developed at the international level, which has often proved fundamental in shaping national regulations, and in enhancing forms of cooperation among different countries.

Even if mostly oriented towards specific forms of financial offences, such as money laundering, financing of terrorism and corruption, this framework has a major impact also to the matter of banking investigation itself, providing both recommendations and rules for criminal investigations concerning banks, and their oversight.

The first, and more traditional, category of international legal sources in the field of financial and banking investigations is represented by the Conventions, mostly elaborated by the United Nations (UN) and, at regional level, by the Council of Europe (COE) and the Organisation of American States (OAS).

The reference here especially goes to the 1997 UN Declaration against Corruption and Bribery in International Commercial Transactions¹⁰⁸, and to the 2003 Convention in the same field¹⁰⁹; to the 1988 UN Convention on Illicit Traffic of Narcotics, Drugs and Psychotropic Substances¹¹⁰, and to the 2001 Convention against Transnational Organised Crime¹¹¹, as well as to the 2000 International Convention for the Suppression of the Financing of Terrorism¹¹².

In the jurisdiction of the COE, the more notable texts are: the 2015 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism¹¹³, the 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism¹¹⁴, and its previous version of 1990¹¹⁵; the 2001 Convention on Cybercrime¹¹⁶; the 1959 European Convention on Mutual Assistance in Criminal Matters¹¹⁷, and, of course, the European Convention on Human Rights.

¹⁰⁷ Cf. Chapter 3, paragraph 4.2.

¹⁰⁸ Adopted by General Assembly Resolution 51/191 of 21 February 1997.

¹⁰⁹ Adopted by General Assembly Resolution 58/4 of 31 October 2003.

¹¹⁰ Adopted by the UN Conference of Vienna (25 November-20 December 1988), convened pursuant to Resolution 1988/8 of 25 May 1988 of the Economic and Social Council acting on the basis of the General Assembly Resolutions 39/141 of 14 December 1984 and 42/111 of 7 December 1987.

¹¹¹ Also known as Palermo Convention, adopted by General Assembly Resolution 55/25 of 15 November 2000.

¹¹² Adopted by the General Assembly of the United Nations in Resolution 54/109 of 9 December 1999.

¹¹³ CETS 217, Riga, 22/10/2015.

¹¹⁴ CETS 198, Warsaw, 16/05/2005.

¹¹⁵ CETS 141, Strasbourg, 08/11/1990.

¹¹⁶ CETS 185, Budapest, 23/11/2001.

¹¹⁷ CETS 030, Strasbourg, 20/04/1959 and its Additional Protocol, CETS 099, Strasbourg, 1/3/1978.

Lastly, a relevant role is played overseas by the Inter-American Conventions against Terrorism (2002)¹¹⁸, Corruption (1996)¹¹⁹; and on Mutual Assistance in Criminal Matters (1992)¹²⁰.

There is, however, another kind of international legal sources, less typical in its effects, able to issue only measures of soft-law, and lacking direct enforcing powers, which nonetheless plays a decisive role in shaping the domestic systems of financial supervision and investigations, *i.e.* Self-Regulation¹²¹.

Due to their capacity of gathering representatives from all over the world, self-regulatory bodies are often the privileged platforms for launching challenging proposals in the international debate, providing for solutions that may be later adopted at supranational or national level.

The weight of such entities, however, goes far beyond a mere call to cooperate among different legal orders, since they actually possess quite a substantial strength in enriching domestic systems.

In general, the action of these organizations consists mainly of three elements: the setting of common rules, standards or guidelines, the monitoring over their implementation, and the creation of a cooperation platform for national operators.

Under the first profile, high qualification and specialization grant these institutions a big deal of credit over single national contexts when it comes to drafting common rules for complex and technical matters, characterised by an intrinsic global dimension, such as the management of the financial market and of its irregularities. That has led to the transposition of many standards within the national or supranational systems, thus conferring them a direct binding value. As will be described hereafter, such is for instance what happened in the EU for almost two decades in the field of banking supervision.

Secondly, the role of self-regulatory bodies usually extends also to the periodical monitoring of the implementation of the guidelines set. That allows the collection of notable amounts of data of certain phenomena in the State members, combining information provided by the same countries inspected, and those acquired in loco by the international bodies through their own inspectors.

Moreover, usually those entities can issue recommendations both on a general level, and against single national lacunas; a prerogative which allows them to “softly” push their members towards a common implementation of rules and standards; that is currently the phenomenon closer to harmonisation at the international level.

The self-regulating bodies, which will be taken into account for their relevance in the field of financial investigations, are the Financial Action Task Force and its national ramifications, the Anti-Money Laundering and Anti-Corruption Committees of the Council of Europe, and the Basel Committee on Banking Supervision.

¹¹⁸ A-66, adopted at the second Plenary Session, held on June 3, 2002.

¹¹⁹ B-58, adopted at the third Plenary Session, held on March 29, 1996.

¹²⁰ A-55 adopted at: Nassau, Commonwealth of Bahamas, 05/23/1992, and its Optional Protocol, A-59, adopted at: Managua, Nicaragua, 06/11/93.

¹²¹ «The process by which an identifiable group of people, such as licensed lawyers, govern or direct their own activities by rules; specif., an organization’s or industry’s control, oversight, or direction of itself according to rules and standards that it establishes /Self-regulation is often subject to the oversight of various governmental agencies, such as the Securities Exchange Commission and the Commodities Futures Trading Commission», cf. *Black’s Law Dictionary*, cit., p. 1398.

1. The Financial Action Task Force (FATF).

The Financial Action Task Force is an independent inter-governmental body that currently comprises 35 member jurisdictions¹²², and 2 regional organizations, including the European Commission, representing overall the world major financial centres; in addition to more than 20 organisations with an observer status¹²³.

Ruled by a Plenary, which meets three times per year, the FATF operates under a fixed life span, requiring periodic political mandates by its Members to continue its activity¹²⁴. The Task Force has been established in 1989 with the goal of examining and developing measures to combat money laundering¹²⁵. After 9/11, the FATF scope has been extended also to protect the global financial system from the financing of terrorism, and the proliferation of weapons of mass destruction¹²⁶.

In order to achieve so, the body identifies the vulnerabilities of the single national systems in these fields, and promotes the implementation of international common guidelines to suggest an effective and coordinated response to financial crimes at the investigative level¹²⁷.

The first FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, better known as the “Forty FATF Recommendations”, were issued in 1990, and afterwards completed with the Special Recommendations against Terrorist Financing¹²⁸.

These Standards, reviewed throughout the years (lately in February 2012), nowadays comprise 49 Recommendations, and provide a framework of legal, regulatory and operational measures that all the States under FATF jurisdiction should adopt and implement, in order to

¹²² The number includes the US, and 15 EU Member States (BG, HR, CY, CZ, EE, HU, LV, LT, MT, PL, RO, SK, SI are not participating).

¹²³ Such as the European Central Bank, Eurojust, Europol, the International Monetary Fund, the International Organisation of Securities Commissions, Interpol, the UN, the World Bank, the World Custom Organization, the Basel Committee, and the Egmont Group, cf. <http://www.fatf-gafi.org/about/membersandobservers/>. The FATF is also associated with the Council of Europe (through MONEYVAL).

¹²⁴ The current mandate was adopted in 2012, cf. FATF, *Mandate (2012-2020)*, Washington, DC, April 20, 2012, available online at: <http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf>.

¹²⁵ Cf. G-7/8 Summit, *Economic Declaration*, Paris, July 16, 1989, at (16): «Financial activities are being increasingly carried out with new techniques on a worldwide basis. As regards insider trading, which could hamper the credibility of financial markets, regulations vary greatly among our countries. These regulations have been recently, or are in the process of being, strengthened. International cooperation should be pursued and enhanced [...] 53. Accordingly, we resolve to take the following measures within relevant *fora*: [...] Convene a financial action task force from Summit participants and other countries interested in these problems. Its mandate is to assess the results of cooperation already undertaken in order to prevent the utilization of the banking system and financial institutions for the purpose of money laundering, and to consider additional preventive efforts in this field, including the adaptation of the legal and regulatory systems so as to enhance multilateral judicial assistance», available online at: <http://www.g8.utoronto.ca/summit/1989paris/communique/index.html>.

¹²⁶ Cf. Financial Action Task Force on Money Laundering, *Annual Report 2001-2002*, June 21, 2002, at (16), available online at: <http://www.fatf-gafi.org/media/fatf/documents/reports/2001%202002%20ENG.pdf>.

¹²⁷ Cf. FATF, *Annual Report 2014-2015*, p. 7 *et seq.*, available online at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Annual-report-2014-2015.pdf>.

¹²⁸ The first Eight Special Recommendations against terrorist financing were issued in October 2001; after a review in 2003, in October 2004 the FATF published a Ninth Special Recommendation. For the last complete version of the Special Recommendations see FATF, *IX Special Recommendations*, October 2001 (incorporating all subsequent amendments until February 2008), available online at: <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/ixspecialrecommendations.html>.

improve the national resistance to the above-mentioned criminal activities, and to contribute in protecting the whole international financial system¹²⁹.

The relevance of the FATF Standards in the field of financial investigations and banking supervision is multiple, and the Recommendations have a determinant influence both in the rule creation process, and in the development of good practices by the main regulatory agencies.

In this sense, it is worth to stress out that the Standards have an extended application, which is not limited to financial institutions (even in the widest meaning illustrated above with regard to the US system¹³⁰), but addresses also Non-Profit Organisations and some Designated Non-Financial Businesses and Professions (DNFBPs)¹³¹, including lawyers, notaries, and other independent legal professionals and accountants.

The FATF wisely recognizes that these subjects may have an important weight in aiding and abetting money laundering and other illicit financial practices, and thus they can also play a decisive role in the fight against those phenomena.

1.1. Supervision of financial institutions.

In the field of financial supervision, the FATF Recommendations require all its members to establish adequate and effective oversight on financial institutions, applying the principles of prudential oversight, established by the Basel Committee of Banking Supervision (which will be illustrated shortly below), also for AML/CFT purposes¹³².

Accordingly, the Standards specify the minimum investigative powers that national supervisors should be able to exercise, starting from conducting inspections, and compelling the production of any relevant information¹³³.

The FATF Recommendations also require its members high Customer Due Diligence (CDD), prohibiting financial institutions from keeping anonymous accounts, or accounts in obviously fictitious names, for both physical and legal beneficiaries, and requesting to maintain all necessary records for at least 5 years¹³⁴.

On the side of sanctioning powers, Recommendation (35) recognizes regulating authorities the power to impose «effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative» in case the controlled subjects are failing to comply with the AML/CFT standards.

In order to be more effective, the range of sanctions should not be limited to pecuniary fees, but shall also include disciplinary measures, such as the power to withdraw, restrict or suspend the financial institution's license. Lastly, sanctions should be applied not only to

¹²⁹ Cf. *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The FATF Recommendations*, February 2012, available online at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

¹³⁰ Cf. Chapter 1, paragraph 1.1.

¹³¹ Cf. FATF Recommendations (8), (22), (23), according to which DNFBPs are required to comply with customer due diligence and record-keeping obligations only when they engage in the relevant activities listed by the Recommendations (22) and (23), and involving the engagement in financial transactions. The DNFBPs' category includes: «a) Casinos; b) Real estate agents; c) Dealers in precious metals and dealers in precious stones; d) Lawyers, notaries, other independent legal professionals and accountants [...]; f) Trust and company service providers[...]», see *Definitions*, in *The FATF Recommendations*, cit., p. 113.

¹³² FATF Recommendation (26).

¹³³ FATF Recommendations (27) and (35).

¹³⁴ FATF Recommendations (10), (11) and (24), and their interpretive notes, p. 59 *et seq.*

financial institutions, and DNFBPs, but to liable natural persons as well, such as directors or seniors management¹³⁵.

The very possibility for supervising authorities to impose criminal sanctions, also to natural persons, raises several issues concerning the legal basis for such powers, the characteristics of the subjects that apply the sanctions, and the respect of fundamental rights with regard to the substantial nature of the matter. However, the FATF Standards are not dealing with such details: their purpose is not to provide for a complete regulation of supervisory institutions, but to furnish some leading bases for the effective protection of the financial market.

Nonetheless, the questions raised about the pertinence and desirability of conferring such investigative and sanctioning powers to an administrative organ of banking supervision represent the very core of the analysis of the new EU Supervisory Mechanism, and will be accordingly discussed in that context.

1.2. Investigative measures.

The FATF Standards specifically address the field of criminal financial investigations too, establishing some measures, which should be available in all the State members for conducting AML/CFT investigations.

Firstly, judicial authorities should be able to obtain access to all necessary documents and information, and to rely on mechanisms able to identify, in a timely manner, the actual subjects who are controlling the interested accounts, and the assets without prior notification to the owner¹³⁶.

Accordingly, the implementation of such measures calls for a reduction, de facto a repeal, of financial institution secrecy law that should not inhibit their efficiency, nor constitute a legal ground for refusing to execute a request for mutual legal assistance¹³⁷.

In addition, competent authorities should be able to exercise a «wide range of suitable» investigative techniques, aiming at tracing suspicious subjects and accounts for preventative purposes and confiscation¹³⁸.

These include some measures already present in most of legal orders, such as searching of persons and premises, and taking witness statements, but also some which are still highly varying from country to country, such as the monitoring of wire transfers and wire tapping¹³⁹, undercover operations, access to computer systems, controlled delivery¹⁴⁰, and cash couriers detection¹⁴¹. Moreover, once the suspicious accounts have been identified, seizure, freezing, and confiscation of criminal property and proceeds should be exercised¹⁴².

Clearly, in this field, the FATF Recommendations represent an influential, but “soft” incentive for the introduction of measures when not already provided: of course that is lacking any binding value, and still requires a political will to act in this sense.

Notably, however, the Standards are also quite relevant for investigative techniques which are already part of domestic legislations.

¹³⁵ FATF Recommendations (35) and (27).

¹³⁶ FATF Recommendation (31).

¹³⁷ FATF Recommendations (9), and (37(d)). The issue of banking secrecy law will be discussed in Chapter 4, paragraph 2.

¹³⁸ FATF Recommendations (4), (16) and (30).

¹³⁹ FATF Recommendations (30) and (31).

¹⁴⁰ FATF Recommendation (31).

¹⁴¹ FATF Recommendation (32) and Special Recommendation IX.

¹⁴² FATF Recommendations (4), (6), (16) and (30).

In fact, the Task Force's monitoring over the practices developed under its jurisdiction plays a substantial role in highlighting the severe limits of an implementation that varies from country to country, and possibly helps reducing their inefficiency.

Most of the FATF action, in fact, relates to the increase of cooperative networks among national authorities, and to the achievement of the free movement of the information so obtained; and these are perhaps the fields in which this self-regulatory body reveals its utmost relevance.

1.3. Cooperation: the Financial Intelligence Units and the EGMONT Group.

According to the Standards, the competent authorities of the State members should be enabled to use all the listed investigative measures not only in domestic inquiries, but also in response to mutual legal assistance requests, or through the creation of specialized and multi-disciplinary joint investigative teams¹⁴³.

With regards to this perspective, the FATF Recommendations require all AML/CFT agencies to exercise the «widest possible range of mutual legal assistance», and State members to provide «adequate legal basis» to allow so¹⁴⁴.

The importance of the Financial Task Force in this area, however, mainly relies on the request to each member of establishing a Financial Intelligence Unit (FIU), an agency that «serves as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis»¹⁴⁵.

To achieve so, the Standards require financial institutions to report to the competent FIU their suspicions on potential relations of funds and criminal activities; granting, at the same time, criminal and civil law immunity for the duly disclosure¹⁴⁶.

In particular, such entities should refer to the national FIU information such as: «the identity of the accountholder and of the other subjects authorized to operate the account; the beneficial owner and, in relation to legal persons and arrangements, the ownership and control structure; the type and amount of the transactions performed as well as the counterparts involved; for wire transfers, information on the payer and the beneficiary; the nature and purpose of the activities conducted by the customer; and any other information gathered in the Customer Due Diligence process»¹⁴⁷. According to their functions, and as long as that is necessary to undertake them properly, FIUs should also be able to obtain information from sources other than financial institutions, such as law enforcement agencies¹⁴⁸.

¹⁴³ FATF Recommendations (30), (37) and (38).

¹⁴⁴ FATF Recommendations (2), (29), (36), (37) and (40).

¹⁴⁵ FATF Recommendation (29) and its interpretive note, p. 94 *et seq.*

¹⁴⁶ FATF Recommendations (20) and (21).

¹⁴⁷ Egmont Group of Financial Intelligence Units, *Operational Guidance for FIU Activities and the Exchange of Information*, 28 October 2013, at (48), available online at: www.egmontgroup.org/library/download/292.

¹⁴⁸ FATF Recommendation (29) and its interpretive note, and in particular cf. p. 96 at (13) «countries should ensure that the FIU has regard to the Egmont Group statement of purpose and its Principles for Information Exchange Between Financial Intelligence Units for Money Laundering and Financing of Terrorism Cases (these documents set out important guidance concerning the role and functions of FIUs, and the mechanisms for exchanging information between FIUs)».

Currently, FATF members have established their FIUs according to different models¹⁴⁹, often but not necessarily combining their functions to those of the authorities already responsible for combating money laundering and terrorist financing¹⁵⁰.

In particular, some States gave the FIU's competence to administrative authorities; that is the case, for instance, of France (Traitement du renseignement et action contre les circuits financiers clandestins-TRACFIN); Spain (Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias-SEPBLAC); Italy (Unità di Informazione Finanziaria della Banca d'Italia-UIF), and the US (Financial Crimes Enforcement Network-FinCEN).

The choice for an administrative-type FIU generally allows it the best position to get information from financial institutions, especially if the Unit is placed in central banks or other regulatory agencies, since they can be perceived as "neutral" and technical interlocutor for the reporting parties¹⁵¹. Their administrative nature, moreover, usually allows them to share the information collected with every kind of FIU, without major legal issues for their dissemination.

On the other side, however, administrative FIUs are lacking judicial coercive powers of investigations, and thus their task might be limited to the receipt, analysis and dissemination of suspicious information, without any possibility of adopting measures such as the freezing of the transactions. They are applying the (low) level of guarantees generally granted in administrative proceedings, and crimes discovered during the regulatory activity cannot be dealt directly, since the FIU, after having substantiated the suspicion, has to refer it to the authorities in charge of criminal investigations, which - if not timely executed - may substantially delay the prosecution.

Other countries, such as Germany (Bundeskriminalamt-BKA), and the UK (National Crime Agency-NCA), opted for a law-enforcement-type of FIU. Also for this kind of agencies the pro and cons are multiple.

From one side, they can be more easily established, since they may be based on existing police infrastructures. Thanks to their position, these FIUs can also provide a quicker repressive reaction for serious crimes discovered in the course of the supervision, even if that usually requires the launching of a formal investigation. In addition, the information collected can be easily exchanged worldwide through already existing networks, such as Interpol or other intelligence services.

On the other side, however, law enforcement FIUs naturally tend to be more effective in investigations rather than in preventive oversight; they are usually only referred currency transactions over a fixed threshold, and thus analyse just with the more serious misconducts; similarly to the administrative FIUs, in many legal orders they are quite influenced by the political power, and the level of guarantees applied may vary substantially from country to country.

Significantly, moreover, these FIUs are often lacking the technical skills necessary to effectively deal with highly specialized systems and data, and have to build them *ex novo*,

¹⁴⁹ For a complete analysis of the FIUs models and system, see also International Monetary Fund & World Bank, *Financial Intelligence Units: An Overview*, Washington, D.C., 2004, p. 10 *et seq.*, available online at: <https://www.imf.org/external/pubs/ft/FIU/fiu.pdf>.

¹⁵⁰ The designation of an AML authority has been required in the EU since the First AML Directive, see Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering of 10 June 1991.

¹⁵¹ International Monetary Fund & World Bank, *Financial Intelligence Units: An Overview*, cit., p. 11.

together with the trust of financial institutions with whom they have to establish effective cooperation: both tasks which may require years before full efficiency is achieved.

In order to prevent the above-mentioned critical issues, some other States, such as Luxemburg (Cellule de Renseignement Financier), gave FIU's powers directly to a judicial authority.

That allows the FIU to act with a higher degree of both independence from political interference, and safeguard for the parties involved, and to immediately adopt judiciary measures, such as searching and seizing funds, freezing accounts, conducting interrogations, and detaining people, if needed. In return, these judicial Units share the same disadvantages of the law enforcement-type, and they might also run into further difficulties in exchanging information with non-judicial FIUs.

Lastly, some other countries, including Jersey (Jersey States of Jersey Police/Joint Financial Crimes Unit-FCU) and Denmark (Hvidvasksekretariatet Stadsadvokaten for Særlig Økonomisk Kriminalitet/ Hvidvasksekretariatet-SØK/HVIDVASK), opted for the creation of hybrid models, whose characteristics depend on the combinations of the features selected among the paradigms illustrated above.

Clearly, none of these models is per se exempt from criticism; notwithstanding the existence of different profiles, however, the real added value of FIUs, and the reason why the Recommendations strongly insisted in their establishment, regards their capacity to cooperate, and disseminate gathered information¹⁵².

Indeed, the FATF's main goal concerning Financial Intelligence Units has been the establishing of a global network of cooperation, with the aim of providing support in the areas of information exchange, training and sharing of expertise.

Such network, known worldwide as the EGMONT Group, was created in 1995, and currently comprises 151 members, even if the number is expected to grow in the next years, inasmuch as its subscription has become mandatory for all FIUs since 2012¹⁵³. Within the Group, cooperation should be equally characterized by a free movement of information, irrespective of the differences among national legal systems, and by the protection of confidentiality¹⁵⁴.

Thanks to the meetings, regularly organized in Brussels, FIUs may reciprocally exchange financial information on a global dimension, stemming from suspicious or unusual transaction reports and other disclosures from the financial sector, to government administrative data and public record information. The meetings are also used to encourage the exchange of practices, and to provide training to the FIUs' officials for the specific tasks required by financial investigations.

¹⁵² At EU level cf., e.g., Tampere European Council Meeting of 15 and 16 October 1999: Creation of an Area of Freedom, Security, and Justice, Presidency Conclusions, at (54); European Council, The Prevention and Control of Organised Crime: a European Union Strategy for the beginning of the New Millennium (2000/C 124/01), at (54); EC Council Decision 2000/642/JHA of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information; Directive 2001/97/EC of the European Parliament and the Council of 4 December 2001 amending the Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering.

¹⁵³ For a complete overview on the governance of the Group and its structure, see Egmont Group of Financial Intelligence Units, *Charter*, 30 October 2013, available online at: https://www.google.it/?gfe_rd=cr&ei=o4j5VqykJsbD8gewqYFw&gws_rd=ssl#q=egmont+charter. The list of members and observers (including organizations such as FATF, IMF, UN, World Bank, OCSE, MONEYVAL) may be found at: <http://www.egmontgroup.org/membership/list-of-members>.

¹⁵⁴ Egmont Group, *Operational Guidance*, cit., at (3) and (6); Egmont Group, *Charter*, cit., at (3).

In addition, and with the aim of facilitating continuous cooperation, the EGMONT Group has established a secure Internet encrypted system (the Egmont Secure Web-ESW), which permits members of the Group to communicate with one another via secure e-mail¹⁵⁵.

In both cases, the exchange of information among FIUs may happen spontaneously, or upon requests founded on appropriate legal basis, including bi-and multilateral agreements or Memoranda of Understanding where needed¹⁵⁶.

In order to nurture reciprocal trust, to the extent possible when a FIU is requesting information to a counterpart, it should disclose the reasons for the request, and the purpose for which the information will be used¹⁵⁷. Moreover, while cooperation may be refused in case the requesting FIU is not able to guarantee an adequate protection to confidentiality, the existence, at domestic level, of financial institutions' secrecy law cannot constitute a ground for refusal in itself¹⁵⁸.

Similarly, the sharing of information should not be impaired neither by the different nature of the FIUs, nor by the contemporary undergoing of criminal or administrative proceedings in the requested State, unless the latter would impede their outcome – leaving thus some margin of appreciation to the authorities concerned¹⁵⁹. In this sense, FIUs may also penalize the inefficiency of cooperation, refusing to provide information towards those national agencies which are lacking reciprocity, or where inadequate co-operation practices are recurring¹⁶⁰.

In order to extend the free movement of the elements collected to its limits, the EGMONT Group also requires its members to «grant prior consent to disseminate the information» to other competent authorities¹⁶¹, unless that results in an impairment of criminal investigations, in a clear disproportion to the «legitimate interests of a natural or legal person or the State of the providing FIU, or would otherwise not be in accordance with fundamental principles of its national law»¹⁶².

In any case, however, the use of received information is restricted to the scope of application of AML/CFT policies, and should not exceed the purposes for which it was sought or provided. Whilst dissemination for further purposes is not prohibited, it requires the prior authorization of the requested FIU¹⁶³.

Lastly, it is worth underlining that even if these rules mainly regard the relation among national FIUs, their relevance goes far beyond the scope of application of the EGMONT Group.

As will be further discussed, in fact, their implementation has also a prominent impact in shaping the level of guarantees and efficiency of financial investigations within the single legal orders.

¹⁵⁵ Egmont Group, *Operational Guidance*, cit., at (9); Egmont Group, *Charter*, cit., at (3.3).

¹⁵⁶ See Egmont Group of Financial Intelligence Units, *Principles for Information Exchange between Financial Intelligence Units*, 28 October 2013, at (11), available online at: <http://www.egmontgroup.org/library/download/291>.

¹⁵⁷ Egmont Group, *Principles for Information Exchange*, cit., at (20). For the requests, FIUs may use templates provided by the Egmont Group itself, see Annex A and B, Egmont Group, *Operational Guidance*, cit.

¹⁵⁸ Egmont Group, *Principles for Information Exchange*, cit., at (25) and (24), lett. b).

¹⁵⁹ Egmont Group, *Principles for Information Exchange*, cit., at (24), lett. c-d), and Egmont Group, *Operational Guidance*, cit., at (30).

¹⁶⁰ Egmont Group, *Principles for Information Exchange*, cit., at (27).

¹⁶¹ *Idem*, at (26).

¹⁶² *Idem*, at (26).

¹⁶³ *Idem*, at (26) and (32); Egmont Group, *Operational Guidance*, cit., at (18); Egmont Group, *Charter*, cit., at (3).

2. The Council of Europe.

The mandate of the Council of Europe encompasses the development and the implementation of civil, political and social rights both through the adoption of legislative texts, and the active monitoring of its member jurisdictions.

Even if the most renowned tools of the Council with this purpose are certainly the European Convention on Human Rights and the Court of Strasbourg, under the COE's responsibility, and precisely under its Committee of Ministers¹⁶⁴, several other bodies have been set up to develop specialised analyses of the more serious threats to the rule of law.

In general terms, the oversight on the areas of crime prevention and control is allocated to several subcommittees, such as the European Committee on Crime Problems (CDPC), set up in 1958 with a competence over intergovernmental legal cooperation, and entrusted with the power to elaborate conventions, recommendations and reports; and the European Committee on Legal Co-operation (CDCJ), whose mission is to draw up common standards, and foster legal cooperation among the 47 members of the Council. These Committees are supported by the Justice and Legal Cooperation Department, which also provides assistance to national authorities, especially in the form of training for professionals¹⁶⁵.

In the field of banking investigations, however, two are the self-regulatory bodies with a major relevance: the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), and the Group of States Against Corruption (GRECO).

Within their specific scope of application, they both aim at enabling the Council to identify, and make up for, areas of non-compliance at domestic level. To fulfil their mission, the Committees engage in the fundamental task of gathering data, and elaborating comparative analyses both under the investigative and the safeguards points of view.

Using relevant international and supranational legislation as the parameter for their evaluations, these bodies are promoting the dissemination of common guarantees at the international level; thanks to their monitoring powers, they also urge the COE's members to give concrete implementation to the measures required.

Unlike the FATF, the recommendations issued by MONEYVAL and GRECO are never aiming at establishing general rules and criteria, but are always specifically related to the target examined in the light of rules and standards established by other organizations. Nonetheless, their persuasive power and impact in influencing the practical implementation of the latter, is often crucial in shaping the real features of the investigative and supervisory measures adopted, and in identifying the shortcomings, which needs to be addressed by the development of the legislation and the case law. For these reasons, an overview of the structures and methods applied by the Committees is provided hereinafter, while their direct relevance on banking oversight and investigations will be discussed in the following Chapter.

¹⁶⁴ As well known, the Committee is the decision-making body of the COE, and it is composed by the Ministers for Foreign Affairs of the member States and organized in several thematic subcommittees. The role and functions of the Committee are defined in Chapter IV of the Statute of the Council of Europe, CETS 001, London, 05/05/1949, and by the Rules of Procedure of the Committee of Ministers, 5th revised edition: 2005, available online at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e393a>

¹⁶⁵ This task is carried out specifically by the COE's justice committees: the European Commission for the Efficiency of Justice (CEPEJ), and two committees addressed directly to the judicial authorities-the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE), cf. http://www.coe.int/t/dghl/cooperation/capacitybuilding/presentation_en.asp.

2.1. MONEYVAL.

The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism was established in 1997 and, from 2011, it is an independent monitoring mechanism, answering directly to the Committee of Ministers.

Currently MONEYVAL is responsible for 33 jurisdictions, and counts numerous participants with an observer status, such as the European Commission, the Secretariat General of the Council of the European Union, Interpol, the FATF Secretariat, the UN, the EGMONT Group, the IMF, and the World Bank.

The Committee can be seen as partially complementary to the FATF, since it exercises its jurisdiction only over those members of the Council of Europe which are not part of the Financial Task Force, or which nonetheless requested to continue to be evaluated by the Committee. MONEYVAL also extends its action to the three UK Crown Dependencies of Guernsey, Jersey, and the Isle of Man - which possess a high relevance in the management of the financial market, being all three tax heavens - and even to some States which are not members of the Council, such as the Holy See and, currently, Israel¹⁶⁶.

Similarly to the FATF, with which it strictly cooperates, the Committee is entrusted with the monitoring of domestic systems' mechanisms countering money laundering and terrorist financing, and assesses their compliance with the major international standards on the matters, namely the FATF Standards, the 1988 UN Convention on Illicit Traffic of Narcotics, Drugs and Psychotropic Substances, and the 2000 UN Convention Against Transnational Organised Crime. MONEYVAL also monitors the implementation of some legal sources issued by the same Council of Europe, such as the 1990 and the 2005 Conventions on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, as well as of the EU AML directives¹⁶⁷.

Since 1998, the evaluation process is structured in mutual evaluation cycles, or rounds that are periodically launched and carried out according to specific sets of Rules of Procedure, revised with the same frequency in order to keep up with the necessities of the inquiries, and the development of the legislation¹⁶⁸. Notably, the Fifth round, currently underway¹⁶⁹, is the first evaluation which is taking into account the 2012 version of the FATF Recommendations, and for which it provided a length of at least two weeks of on-site visits for each State, instead of the previous 8 days maximum length.

¹⁶⁶ According to art. 2.2a, 2.2b, 2.2e of Resolution CM/Res (2010) 12 on the Statute of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL).

See also Resolution CM/Res (2011) 5 for the Holy See; and Resolution CM/Res (2012) 6 for the UK Crown Dependencies. The complete list of members and observers may be found at: https://www.coe.int/t/dghl/monitoring/moneyval/About/Members_and_observers_en.asp.

¹⁶⁷ So far the last EU parameter adopted during the evaluations of the Committee is the Third AML/CFT Directive, cf. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

The recent Fourth AML/CFT Directive has not yet been taken as a parameter in the action of MONEYVAL.

¹⁶⁸ See Rules of procedure for the 5th Round of Mutual Evaluations, last revised in April 2015, available online at: [http://www.coe.int/t/dghl/monitoring/moneyval/About/MONEYVAL\(2014\)36_ROP5th_en.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/About/MONEYVAL(2014)36_ROP5th_en.pdf). The evaluation takes also into account the Methodology for Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems, last revised in 2013, available online at: http://www.coe.int/t/dghl/monitoring/moneyval/Instruments/2013FATFMethodology_en.pdf.

¹⁶⁹ First round (1998-2000): evaluated 22 member States; Second round (2001-2004): evaluated 27 member States; Third round (2005-2009): evaluated 28 member States, the Holy See and Israel; Fourth Round (2009-2015): evaluation to be finalized; Fifth round (2015-2021): on-going.

At every cycle, the Committee is examining part of the countries under its jurisdiction, sending them questionnaires about the legislative and the regulatory contexts, and related statistics. MONEYVAL is also directly conducting part of the examination, through inspecting teams, which are meeting with relevant governmental agencies, regulators, law enforcement and prosecutors, as well as with representatives of the private sector and non-governmental organisations.

When the evaluation is concluded, the team drafts a report, which is discussed with the affected State before its submission to the MONEYVAL Committee. The monitoring tasks of this body, however, are not over with the official adoption of the document, since even afterwards, countries involved in the evaluation process may be required to submit progress reports describing the new measures they had put in place since then. If progress is not considered being sufficient by the Committee, MONEYVAL could take further steps, including the imposition of Compliance Enhancing Procedures (CEPs), articulated in several progressive steps¹⁷⁰, which last until the actions taken by the State member are judged as satisfactory¹⁷¹.

2.2. GRECO.

The Group of States against Corruption was created in 1999 as a response to the increasing transnational and organized dimension of criminal activities in general, and of corruption in particular, with the goal of monitoring the compliance of all the States under its jurisdiction with the international standards on the matter, and issuing recommendations with the aim of improving the resistance of domestic systems to those criminal phenomena.

Nowadays, GRECO encompasses all members of the Council of Europe, Belarus and the US, plus several organizations with an observer status, which however, differently from MONEYVAL, do not include any of the EU institutions¹⁷².

¹⁷⁰ Step 1: MONEYVAL invites the Secretary General of the Council of Europe to send a letter to the relevant Minister(s) of the State or territory concerned, drawing his/her/their attention to non-compliance with the reference documents and the necessary corrective measures to be taken;

Step 2: Arranging a high-level mission to the non-complying State or territory to meet relevant Ministers and senior officials to reinforce this message;

Step 3: In the context of the application of the 2012 FATF Recommendation 19 by MONEYVAL, issuing a formal public statement to assess that a State or territory has insufficiently complied with the reference documents, and invites all the members to take into account the risks posed by the non-complying State or territory;

Step 4: Referral of the matter for possible consideration under the FATF's International Co-operation Review Group (ICRG) process, if this meets the nomination criteria set out under the ICRG procedures, cf. MONEYVAL, *Rules of Procedure for the 5th Round of Mutual Evaluations*, Strasbourg, 17 April 2015 (last revision), available online at: [https://www.coe.int/t/dghl/monitoring/moneyval/About/MONEYVAL\(2014\)36REV1_ROP5th_en.pdf](https://www.coe.int/t/dghl/monitoring/moneyval/About/MONEYVAL(2014)36REV1_ROP5th_en.pdf).

¹⁷¹ The CEPs process may be applied as a result of a plenary decision, in a meeting with delegates from State members, two FATF member States, representatives of observer States, organisations and institutions or bodies. MONEYVAL's plenary meetings take place in Strasbourg thrice per year, cf. Resolution CM/Res (2010) 12, cit. In 2014 Lithuania and Bosnia and Herzegovina were subject to the procedure, cf. MONEYVAL, *Annual Report for 2014*, p. 32, available online at: https://www.coe.int/t/dghl/monitoring/moneyval/Activities/2014_AnnualReport_en.pdf. For an updated overview of the measures adopted by the members, see Idem, Appendix 3, p. 53. MONEYVAL is also carrying out horizontal reviews, in which the countries are examined under a specific perspective, e.g. payment of ransoms, financing of terrorism, just to mention the more recent.

¹⁷² In addition, any State that becomes party to the COE's Criminal Law Convention on Corruption, CETS 173, Strasbourg, 27/01/1999, or the Civil Law Convention on Corruption, CETS 174, Strasbourg, 04/11/1999, automatically accedes to GRECO and its evaluation procedures.

On this profile, the perspective of the EU accession to the Committee has been proposed in several occasions, lastly in June 2014, when the Council of the European Union expressly called for this option, in order to add credibility to the Community efforts against corruption. Currently, however, the implementation of the GRECO evaluative mechanism to the EU institutions still appears to have not proceeded further¹⁷³.

In its structure, evaluation process, and compliance enhancing procedure for dealing with members whose response to GRECO's recommendations has been found to be globally unsatisfactory within an 18 months period¹⁷⁴, the organization of the Group against Corruption is quite similar to the MONEYVAL's.

Here, however, each evaluation round concerns all the member jurisdictions at once, and it is carried out with a transversal approach, that analyses the legal orders according to a different perspective of the anti-corruption policy, selected at every cycle¹⁷⁵.

The parameters used by GRECO during its examinations mostly consist of the legal instruments adopted by the COE to fight corruption both at domestic and at the international level. As far as financial investigations are concerned, the more relevant legal texts are: the 1999 Criminal Law Convention on Corruption, and the 1997 Twenty Guiding Principles against Corruption. The latter, in particular, are especially significant with regard to bank secrecy law, since they clearly affirm that its existence cannot be invoked anymore as a ground for refusal in judicial cooperation when it comes to the fight against corruption¹⁷⁶.

¹⁷³ See Council of the European Union, Conclusions on the EU Anti-Corruption Report, Luxembourg, 5-6 June 2014, at 7, available online at: <http://gr2014.eu/sites/default/files/JHA%20ANTI%20CORRUPTION.pdf>, reported in GRECO, *15th General Activity Report 2014*, adopted by GRECO 67, 23-27 March 2015, p. 6, available online at: [https://www.coe.int/t/dghl/monitoring/greco/documents/2015/Greco\(2015\)1_GAR2014_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/documents/2015/Greco(2015)1_GAR2014_EN.pdf) ; GRECO, *Summary Report*, Strasbourg, 4 August 2014, p. 11, available online at: [https://www.coe.int/t/dghl/monitoring/greco/documents/2014/Greco\(2014\)9_SummaryRepGRECO64_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/documents/2014/Greco(2014)9_SummaryRepGRECO64_EN.pdf); and GRECO, *Summary Report*, Strasbourg, 9 September 2015, p.3, available online at: [https://www.coe.int/t/dghl/monitoring/greco/documents/2015/Greco\(2015\)10_SummaryRepGRECO68_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/documents/2015/Greco(2015)10_SummaryRepGRECO68_EN.pdf).

See also the Opinion of the Council of Europe's Directorate of Legal Advice and Public International Law on the modalities and possible legal basis of EU accession to GRECO (Greco (2014)6), and the European Court of Auditors' View on the Commission's Report on Anti-Corruption Measures (9 April 2014), available online at: http://www.eca.europa.eu/Other%20publications/PL14_LETTER/PL14_LETTER_EN.PDF.

¹⁷⁴ Cf. GRECO, *Rules of Procedure*, Strasbourg, 19 October 2012 (last revision), Rule 32, § 2: «(a) the President of GRECO sending a letter, with a copy to the President of the Statutory Committee, to the Head of Delegation concerned, drawing his/her attention to non-compliance with the relevant recommendations; (b) GRECO inviting the President of the Statutory Committee to send a letter to the Permanent Representative to the Council of Europe of the member concerned, drawing his/her attention to non-compliance with the relevant recommendations; (c) GRECO inviting the Secretary General of the Council of Europe to send a letter to the Minister of Foreign Affairs of the member State concerned, drawing his/her attention to non-compliance with the relevant recommendations», available online at: [https://www.coe.int/t/dghl/monitoring/greco/documents/Greco\(2011\)20_RulesOfProcedure_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/documents/Greco(2011)20_RulesOfProcedure_EN.pdf).

¹⁷⁵ The First round (2000–2002) dealt with the independence, specialisation and means of national bodies engaged in the prevention and fight against corruption, and the extent and scope of immunities of public officials. The Second round (2003–2006) focused on the identification, seizure and confiscation of corruption proceeds, the prevention and detection of corruption in public administration and the prevention of legal persons from being used as shields for corruption. The Third round (launched in January 2007-to be finalised) addressed the incriminations provided for in the Criminal Law Convention on Corruption, and the transparency of party funding. The Fourth round (launched in January 2012-on-going), deals with the prevention of corruption in respect of members of parliament, judges and prosecutors, source: https://www.coe.int/t/dghl/monitoring/greco/evaluations/index_en.asp.

¹⁷⁶ See articles 23(3) and 26(3), Criminal Law Convention on Corruption, CETS 173, cit., entered into force on January 1, 2002, but not ratified yet by Germany, Liechtenstein and San Marino.

The other legal sources used by GRECO are: the Twenty Guiding Principles against Corruption (Resolution (97) 24, the Civil Law Convention on Corruption (ETS 174), cit., Additional Protocol to the Criminal Law Convention

3. The Basel Committee on Banking Supervision.

In 1975, after the breakdown of the Bretton Woods system¹⁷⁷, central bank governors of the G10 countries founded the Basel Committee on Banking Supervision (BCBS), with the aim of enhancing financial stability worldwide, by improving supervisory knowhow and quality of banking regulation.

Currently the BCBS membership covers 28 jurisdictions, including the EU and nine of its Member States, the US, Russia and Switzerland, all represented in the Committee by their central banks and, where different, also by the authority responsible for banking prudential supervision¹⁷⁸.

Since the beginning, the Basel Committee has been designed as a forum for regular cooperation on the matter of banking regulation, with the goal of closing the gaps in international supervisory coverage «so that (i) no foreign banking establishment would escape supervision; and (ii) supervision would be adequate and consistent across member jurisdictions»¹⁷⁹.

In order to achieve so, the BCBS periodically sets minimum common standards for banking supervision, sharing approaches and techniques to improve cooperation, and helping identifying risks in the global financial market. To improve the resilience of the global banking system, since 2012 the Committee has also begun monitoring the implementation of its standards and guidelines in the States of its jurisdiction.

Even if BCBS decisions have no legal binding value *per se*, they had historically a great influence in implementing banking supervisory regulations, both at national and at supranational level, to the point that – as will be hereinafter illustrated - they are often used as a basis for the domestic legislation on the matter.

3.1. Capital requirements.

Coming to the goals of the Committee, its action mainly affects the areas of banking supervision and banks' capital requirements.

Firstly, the Committee has played a fundamental role in defining comprehensive approaches to the risk-control of banking activity, above all as far as capital requirements are concerned.

The capital measurement system developed by the BCBS has obtained a broad consensus in shaping the legislations of its members; in the EU, in particular, the Basel agreements have systematically been implemented in the Community legislation.

on Corruption (ETS 191), Recommendation on Codes of Conduct for Public Officials (Recommendation No. R(2000)10), Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Recommendation Rec(2003)4).

¹⁷⁷ Created in 1944, the system established commercial and financial rules for the US, Canada, Western Europe, Australia and Japan, until its dismemberment in the early 1970s, when the US put an end to the link between dollar and gold. Bretton Woods was the first example of a negotiated monetary order among independent States, operating through the establishment of fixed exchange currency rates. For further information about the system see, e.g., <https://www.imf.org/external/about/histend.htm>.

¹⁷⁸ The EU Member States are: BE, DE, ES, FR, IT, LU, NL, SE, UK. The European Banking Authority, the European Commission, and the International Monetary Fund are among BCBS observing members. For a complete list of the members, see <http://www.bis.org/bcbs/membership.htm>.

¹⁷⁹ Cf. BCBS, *A brief history of the Basel Committee*, October 2015, p. 1, available online at: <http://www.bis.org/bcbs/history.pdf>.

The first Basel Capital Accord, or Basel I was approved by the G10 Governors and released to banks in July 1988, followed by several revisions until 1997¹⁸⁰.

By September 1993, the requirements there provided, and above all the minimum capital ratio of capital to risk-weighted assets, were met by all G10 countries' banks, and also introduced in all other countries with active international banks¹⁸¹. In what was then called the European Economic Community, the Accord was used as the basis for the amendment of the First Banking Directive, and the issuing of the Second one.

In 1999, the Committee published a proposal for a new framework to replace the first agreement, which led to the release of the Revised Capital Framework or Basel II in 2004¹⁸².

The new standards were then structured on three pillars, covering the issues of minimum capital requirements (an expansion the 1988 version), supervisory review of the institutions' compliance with the standards required (incentivizing cooperation among competent authorities), and effective disclosure of banking information to the regulators.

In 2006, thanks to the cooperation with the International Organization of Securities Commissions (IOSCO), the text was integrated in order to encompass not only banking books, but also banks' trading books¹⁸³. In the same year, Basel II was transposed, without relevant changes, at the EU level, with Directive 2006/48/EC¹⁸⁴.

In Autumn 2008, the Basel Committee issued a new text, trying to address the dissemination of deplorable governance practices into the banking sector, clearly shown by phenomena such as disproportion between the banking leverage in the financial market, inappropriate structures and liquidity buffers, and poor risk management¹⁸⁵.

Indeed, the dangerous combination of these factors was demonstrated by the mispricing of credit and liquidity risk, and by the engagement in junk securities that gave rise to the last financial crisis, starting from Lehman Brothers' collapse in that very same September 2008.

At the end of 2010, a new comprehensive proposal was issued precisely for strengthening the three pillars: the Basel III Accord, which should be fully implemented, respectively, by 2015 for the part concerning new capital requirements, and by 2017 for what regards compliance procedures¹⁸⁶.

In 2013, the new agreement was introduced as part of the EU legal framework through the so-called Fourth Capital Requirements Directive, and its following Regulation (CRD IV and

¹⁸⁰ BCBS, *International Convergence of Capital Measurement and Capital Standards* (or "Basel I"), July 1988, available online at: <http://www.bis.org/publ/bcbs04a.pdf>.

¹⁸¹ The countries of the Group are BE, DE, FR, DE, IT, NL, SE, UK, Canada, Japan, Switzerland, and the US.

¹⁸² BCBS, *International Convergence of Capital Measurement and Capital Standards - A Revised Framework* (or "Basel II"), June 2004, available online at: <http://www.bis.org/publ/bcbs107.pdf>.

¹⁸³ BCBS, *Basel II: International Convergence of Capital Measurement and Capital Standards. A Revised Framework - Comprehensive Version*, June 2006, available online at: <http://www.bis.org/publ/bcbs128.pdf>.

¹⁸⁴ Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.

¹⁸⁵ BCBS, *Principles for sound liquidity risk management and supervision*, September 2008, available online at: <http://www.bis.org/publ/bcbs144.pdf>.

¹⁸⁶ See BCBS, *Basel III: the net stable funding ratio*, October 2014, available online at: <http://www.bis.org/bcbs/publ/d295.pdf>; *Basel III: A global regulatory framework for more resilient banks and banking systems*, December 2010 (rev June 2011), available online at: <http://www.bis.org/publ/bcbs189.pdf>; *Basel III: The Liquidity Coverage Ratio and liquidity risk monitoring tools*, January 2013, available online at: <http://www.bis.org/publ/bcbs238.pdf>. For the implementation of Basel III see also BCBS, *Progress report on implementation of the Basel regulatory framework*, April 2013, available online at: <http://www.bis.org/publ/bcbs247.pdf>.

CRR¹⁸⁷), making it compelling for all credit institutions licensed, or operational within its territory.

3.2. Banking supervision.

To address the theme of banking oversight, the Committee has formulated a detailed set of *Core Principles for Effective Banking Supervision*, which should be implemented in the legislative systems of the participating jurisdictions¹⁸⁸.

The document, first published in 1997, and then revised in 2012, sets out 29 principles regulating multiple profiles: from powers, responsibilities and functions of the supervisory agencies, to the requirements for assessing the compliance with the standards of prudential regulation. To this aim, the paper provides for both bare rules (“Principles”), and their interpretative criteria (“Essential Criteria”).

In particular, Principle 2 affirms the independence and accountability of supervisors, both in the sense of requiring adequate resources and budgetary autonomy, and lack of government or industry interference in the decision-making process.

Therefore, to be granted «full discretion to take any supervisory actions or decisions on banks and banking groups under its supervision», supervisors’ governing body should be «structured to avoid any real or perceived conflicts of interest», as well as provided with specific rules on how to prevent those phenomena to happen¹⁸⁹.

According to the text, these authorities should also be integrated in a fully operational and effective network of cooperation, in which the decision-making processes for adopting measures, such as restructuring, merging and closure of banks, involve all relevant authorities¹⁹⁰.

In such a system, the need for confidentiality is safeguarded by a general restraint in the use of the information received, which is limited only to supervisory purposes, unless a full disclosure is due to law or to a court order¹⁹¹.

The *Core Principles* then outline the typical investigative powers of supervisory regulators, which should include: full access to banks’ and related information, records and personnel at all levels; review of banks’ overall activities, also with regard to those exercised abroad and on- and off-site inspections¹⁹².

Equally, the document considers the necessity to provide supervisory authorities with an «adequate range» of sanctioning powers «to bring about timely corrective actions», including the power to ring-fencing¹⁹³, revoke licences, and apply sanctions both to the financial institution, its organs and the individuals therein¹⁹⁴.

In the exercise of such prerogatives, supervisors should follow an assessing procedure, which provides for some guarantees to the interested subject(s). The latter, in fact, should participate to the proceeding, should be informed «at an early stage», or in any case after the inspections,

¹⁸⁷ Directive 2013/36/EU and Regulation 575/2013, cit.

¹⁸⁸ Cf. Principle 1-Essential Criterion 1, and Principle 8, BCBS, *Core Principles for Effective Banking Supervision*, September 2012, available online at: <http://www.bis.org/publ/bcbs230.pdf>.

¹⁸⁹ Cf. Principle 2-Essential Criteria 1, 4, 5, 6.

¹⁹⁰ Cf. Principle 3-Essential Criterion 1; Principle 11-Essential Criterion 7.

¹⁹¹ Cf. Principle 3-Essential Criterion 4.

¹⁹² Cf. Principle 1-Essential Criteria 5,6,7; Principle 9-Essential Criteria 1,3; Principle 10-Essential Criteria 6,7.

¹⁹³ Ring-fencing occurs when a portion of a company’s assets or profits are financially separated without necessarily being operated as a separate entity. This is done mainly to protect consumers from the risk of open market activities of the parent company.

¹⁹⁴ Cf. Principle 1-Essential Criterion 6; Principle 11-Essential Criteria 2,4,5.

of the concerns raised, and should be given the possibility to address them «in a timely manner»¹⁹⁵.

Clearly, the implementation of such powers and guarantees represents just a basic framework, which is not comprehensive of all the detailed provisions to establish a supervisory model. The impact of such rules into national oversight systems, however, and their compliance with the latter represent a necessary starting point for the analysis of the investigations performed by banking supervisory authorities both in the US and in the EU.

Actually, the main purpose of the Basel *Core Principles* is to achieve a sound prudential regulation and supervision of banks and banking system (and, indirectly, customers), helping countries to identify areas for improvement. This notwithstanding, some of these parameters, such as the independence and accountability of supervisors, or the duty to cooperate, are also crucial when it comes to assessing the *status* of certain fundamental procedural rights in the supervisory proceedings.

Since the *Core Principles* represent a first term for comparison to evaluate the adequacy of all the organs entitled to carry out supervisory banking investigation, their influence goes beyond merely strengthening the banking system as a whole.

Indeed, especially in the EU, after the creation of a new centralized supervisory authority and with the debate over the substantial nature of its powers in the light of the *Engel* criteria, the standards established by the Basel Committee have a direct impact also in shaping the features characterizing the authorities entitled to impose potentially criminal sanctions.

¹⁹⁵ Cf. Principle 9-Essential Criterion 8; Principle 11-Essential Criterion 1.

CHAPTER 3

THE SUBSTANTIAL NATURE OF BANKING SUPERVISION

Summary: 1. Banking supervision. - 2. The EU legal framework on banking supervision. - 2.1. The European Supervisory Authorities. - 2.2. Investigation and Sanctioning Powers in the EU. - 2.3. Banking supervision in the Eurozone: the Banking Union reform. - 2.4. The Single Supervisory Mechanism. - 2.4.1 SSM Investigative Powers. - 2.4.2. SSM Sanctioning Powers. - 2.5. The Single Resolution Mechanism and the Single Resolution Fund. - 2.6. The European Deposit Insurance Scheme. - 3. The US Regulatory Agencies. - 3.1. The Federal Reserve. - 3.2. The Federal Deposit Insurance Corporation. - 3.3. The Office of the Comptroller of the Currency. - 3.4. The Securities Exchange Commission. - 3.5. The impact of the Dodd- Frank Act: OTS, CFPB and FSOC. - 4. Critical analysis of banking supervision. - 4.1. Independence and accountability. - 4.2. The dissemination of the information gathered and investigative overlapping. - 4.3. Sanctioning Powers in the EU: the substantial criminal nature of banking supervision. - 4.3.1. The concept of “tribunal”. - 4.4. The right to an independent and impartial tribunal. - 4.5. The presumption of innocence. - 4.6. The right to a public hearing and to appeal proceedings. - 4.7. Other defence rights. - 4.8. The application of the *ne bis in idem*.

1. Banking supervision.

Banking supervision is a major field in which the rights typical of criminal proceedings are remarkably and increasingly tested in their capability to keep pace with both the development of multi-level systems, and the extension of the formally administrative procedural powers.

In order to identify and analyse the critical issues emerging in the matter of banking investigations, the Chapter proceeds as follows. First, the authorities entitled with banking supervisory tasks in the EU and in the US will be illustrated in their main characteristics. Then a critical analysis will be provided, taking into account the structure of banking regulators, and their investigative and sanctioning powers.

The purpose of the analysis is to show the substantial nature of banking supervision in the EU, and which is the state of play of the guarantees characterizing those proceedings.

In particular, the EU framework will be discussed in the light of the case-law of the European Court of Human Rights and of the Court of Justice, which, as previously described, apply some fundamental guarantees not only to the criminal matter, but also to the punitive administrative one.

2. The EU legal framework on banking supervision.

Until recently, banking supervision in Europe was placed mainly at national level, operating within an extremely fragmented background composed of the 28 legal orders of the EU Member States, among which 19 have also adopted the Euro as their currency (establishing the so-called Eurosystem).

The efficiency of such a model highly relied on National Competent Authorities (NCAs), generally represented by the National Central Banks, and on the implementation of effective forms of cooperation which had their legal bases in the Community Directives replicating the content of the Basel Accords¹⁹⁶.

¹⁹⁶ Chapter 2, paragraph 3. See also M.HAENTJENS, P. DE GIOIA-CARABELLESE, *European Banking and Financial Law*, London & New York, Routledge, 2015, p. 10 *et seq.*

Increasingly in the last decade and particularly after the burst of the 2008 financial crisis, however, this paradigm, founded on a very minimum level of harmonization and centralised enforcement, has been generally considered quite inadequate to face the challenges of a globalized financial market for several reasons.

First and foremost, the EU economic market is operating as a single legal area since the adoption of the Maastricht Treaty. Moreover, as previously mentioned, since the approval of the Second Banking Directive, Community credit institutions are authorized to provide their services throughout the Union, while being licensed and supervised in just one Member State¹⁹⁷.

Aware of these limitations, in the last few years the EU institutions took substantial steps, which changed rather drastically the structure of banking supervision both in its theoretical and practical aspects.

The first notable reform on the matter dealt with the need to increase the efficiency of the decision-making process in the area of financial regulation, according to the analysis elaborated by a group of experts appointed by the EU Council in 2000, the so-called Lamfalussy Group.

Following the Report's conclusions, starting from 2001 the legislative process was structured in a four-step procedure, able to provide for a greater coherence among regulatory texts, with a particular attention to their enforcement, increasing the Commission's role in this phase¹⁹⁸.

A far more relevant reform in this matter, however, occurred under the urgency of the last financial crisis, and led to the creation of the European System of Financial Supervision (ESFS), as recommended in 2009 by the de Larosière Group, designated to improve the institutional fragmented regulatory framework in the Union.

Since its establishment in 2011, the System was conferred the task of improving the functioning of the internal market by ensuring appropriate, efficient and harmonized European regulation and supervisory practices.

To achieve the purpose, the ESFS was structured into three new European Supervisory Authorities (ESAs) with jurisdiction over different financial sectors - the European Banking Agency, the European Insurance and Occupational Pensions Authority, and the European

¹⁹⁷ Cf. Chapter 1, paragraph 1.1. For the concept of "EU passporting" see also M.HAENTJENS, P. DE GIOIA-CARABELLESE, cit., p. 9.

¹⁹⁸ A. LAMFALUSSY (chaired by), *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, Brussels, 15 February 2001, available online at: http://ec.europa.eu/finance/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf. A summary of four steps may be found at: http://europa.eu/rapid/press-release_IP-02-195_en.htm?locale=en: «Level 1 will consist of legislative acts, namely Directives or Regulations, proposed by the Commission following consultation with all interested parties and adopted under the "co-decision" procedure by the Council and the European Parliament, in accordance with the EC Treaty. In adopting each Directive or Regulation, the Council and the Parliament will agree, on the basis of a Commission proposal, on the nature and extent of detailed technical implementing measures to be decided at Level 2.

At Level 2, the European Securities Committee, the future regulatory committee, will assist the Commission in adopting the relevant implementing measures. Such measures will be used to ensure that technical provisions can be kept up to date with market developments.

Level 3 measures will have the objective of improving the common and uniform implementation of Level 1 and 2 acts in the Member States. The Committee of European Securities Regulators will have particular responsibility for this;

At Level 4, the Commission will strengthen the enforcement of Community law».

Securities and Markets Authorities – in addition to the European Systemic Risk Board, entrusted with macro-prudential supervisory tasks¹⁹⁹.

Moreover, this reform represented also the first attempt to strengthen the powers of the European Central Bank towards the integration of national supervisory systems, notably increasing the ECB's consultative role in the decision-making proceedings regarding any draft legislation in its fields of competence²⁰⁰.

Lastly, a massive qualitative leap with regard to banking supervision was carried out by creation of the already mentioned Banking Union (BU) starting from 2012, which directly involved the prerogatives of the ECB and, for the first time, established a level of centralized supervision in the Eurozone.

In the light of these developments, two partially overlapping systems of financial oversight are currently in force in the EU, characterized by similar sanctioning powers, but different enforcing methods.

2.1. The European Supervisory Authorities.

The purpose of the European Banking Authority (EBA) is to ensure effective and consistent prudential regulation and supervision across the European banking sector, in order to maintain the safety and soundness of the system and its financial stability.

Accordingly, the EBA has an extremely relevant role in the context of financial supervision, and foremost it substantially contributed to the creation of prudential rules for financial institutions to be applied in all Member States, as well as to the promotion of supervisory practices and risk-assessment evaluations of the banking sector.

Also after the entry into force of the whole package of the BU reforms, the EBA maintains a significant position.

Specifically, the Authority is still entrusted with ensuring the consistency of supervisory outcomes throughout the Union, monitoring and promoting the implementation of the Basel III Accord, which is now part of the Single Rulebook; in this sense, the EBA has been mandated to produce secondary legislation (Binding Technical Standards-BTS²⁰¹), guidelines and reports for the implementation of the CRD IV/CRR package in the European Union.

¹⁹⁹ J. DE LAROSIÈRE (chaired by), *The High-Level Group on Financial Supervision in the EU-Report*, Brussels, 25 February 2009, available online at: http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf.

²⁰⁰ Such as being consulted for «any proposed Community act and by national authorities regarding any draft legislation in its fields of competence. In addition, the ECB may submit opinions to the appropriate Community institutions or bodies or to national authorities on matters within its fields of competence. In the field of prudential supervision (Article 25 of the Statute of the ESCB), the ECB may offer advice to and be consulted by the Council [...] The action of the ECB is also channelled through its participation in a number of EU committees whose missions encompass a contribution to financial integration [...] the ECB also acts in partnership with the private sector to foster collective action», cf. ECB Monthly Bulletin, *The integration of Europe's financial markets*, October 2003, p. 58 *et seq.*, available online at: https://www.ecb.europa.eu/pub/pdf/other/pp53_66_mb200310en.pdf.

²⁰¹ BTS are «legal acts which specify particular aspects of an EU legislative text (Directive or Regulation) and aim at ensuring consistent harmonisation in specific areas. BTS are always finally adopted by the European Commission by means of Regulations or Decisions. According to EU law, Regulations are legally binding and directly applicable in all Member States. This means that, on the date of their entry into force, they become part of the national law of the Member States and their implementation into national law is not only unnecessary but also prohibited », cf. <http://www.eba.europa.eu/regulation-and-policy/single-rulebook>. The current lists for the calculation of capital requirements for credit risk may be found at: <http://www.eba.europa.eu/supervisory-convergence/supervisory-disclosure/rules-and-guidance>.

Accordingly, even if the ECB, under the new legal framework, has the power to adopt regulations in the field of capital requirements and supervision, the Central Bank's action still has to be in compliance with the Union acts adopted by the Commission on the basis of drafts developed by EBA²⁰².

Lastly, the central role of EBA still remains especially towards those Member States outside the Eurozone, to which the new ECB's powers cannot be applied. There, indeed, the authority remains the only form of Community oversight, at least when it comes to define the parameters according to which national control shall be enforced.

Two bodies govern the EBA: the Board of Supervisors (BoS) and the Management Board. While the latter has essentially mere proposing powers, the BoS represents the real decision-making authority when it comes to the approval of standards and supervisory guidelines.

The Board is composed by the 28 heads of the Member States' supervisory authorities, and by several members with observer *status*, including the Board's Chair²⁰³. This leading office is appointed by the Board itself; however before the Chair takes up her duties, the European Parliament has the authority to object the designation²⁰⁴.

The BoS is also entitled to approve the EBA's budget; under this profile, the Authority is mainly funded by a subsidy from the European Union, which is then integrated by mandatory contributions from the national public supervisory authorities²⁰⁵.

Similarly to the EBA, also the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) are governed by a Board of Supervisors and a Management Board, with a composition equivalent to the Banking Authority; they share a similar funding system too²⁰⁶. Their peculiar prerogatives and tasks will not be illustrated here, since their particular fields of competence are not strictly concerning banking investigations. Nonetheless, their presence in the ESFS will be taken in due account in assessing the overall efficiency of financial supervision in the EU.

Against certain decisions taken by the ESAs a special Joint Board of Appeal has been set up. In order to ensure its independency, the Board is composed of six members and six alternates, appointed by the ESAs among individuals who are not part of the staff of any NCA or EU institutions «involved in the activities of the Authority» and possess «a proven track record of professional experience in the fields of banking, insurance, occupational pensions and securities markets or other financial services, and with the necessary legal expertise to provide expert legal advice in relation to the activities of the Authorities»²⁰⁷.

In particular, with regard to the EBA, this Board is responsible for deciding on appeals against the Authority's decisions concerning the violations of the parameters requested for

²⁰² Cf. art. 132 TFEU, and recitals (7) – (32), Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (SSM Regulation).

²⁰³ Art. 40, Reg. 1093/2010.

²⁰⁴ Art. 48 § 2, Reg. 1093/2010.

²⁰⁵ Art. 62, Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC.

²⁰⁶ Cf. art. 62 Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC; art. 62, Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

²⁰⁷ Cf. articles 58 and 59 of the ESAs Regulations.

prudential capital requirements and supervision within its jurisdiction²⁰⁸. The decisions of the Board of Appeal can themselves be further appealed before the Court of Justice of the European Union²⁰⁹.

2.2. Investigation and Sanctioning Powers in the EU.

Following the reorganization of banking supervision in the EU, Directive CRD IV conferred on National Competent Authorities the power to impose sanctions over credit institutions committing violations.

The proceedings that NCAs should follow in their investigations are not fully described in the Directive. As a minimum level of harmonization, CRD IV requires that national authorities should be entitled all «necessary investigative powers» towards natural and legal persons, and that they should be exercised without prejudice to the rights of the defence of anyone who has been charged²¹⁰.

In particular, the Directive requires NCAs to be capable of requesting all information necessary to carry out their tasks, as well as the submission of documents, the power to conduct inspections at the business premises of the legal persons, and the power to examine the books and records, and take copies or extracts; judicial authorization to perform those measures shall be requested if so provided at national level.

NCAs should also be able to obtain written or oral explanations from the subjects of the investigation, and to interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation²¹¹.

In their evaluation process, national authorities should take into account all relevant circumstances, and should always guarantee the right of appeal²¹². In this context, the EBA is entrusted to maintain a central database, containing details of administrative penalties, including any appeals in relation thereto, accessible to competent authorities only in order to support an efficient system of exchange of information among the latter²¹³.

CRD IV also provides for sanctions to be applied in case of ascertained violations; being included in a directive, the penalties – established by articles 66 and 67 - need to be transposed to be enforced, both through State legislation and specific regulations issued by National Competent Authorities.

The Directive provides for a core of behaviours which should be sanctioned at national level. They mainly concern: the violation of the requirements necessary to obtain the licence for exercising credit activity, and the use of false statements or other irregular means to obtain it²¹⁴; the violation of the requirements to acquire qualifying holdings and dispose of them, as well as the failure to inform the competent authorities about it and to report other relevant information required²¹⁵; as well as the violation to implement the governance arrangements and capital requirements requested²¹⁶.

²⁰⁸ Cf. articles 1§ 2 and 60, EBA Regulation.

²⁰⁹ Cf. art. 61, ESAs Regulations.

²¹⁰ CRD IV Directive, recital (40).

²¹¹ Articles 52 and 65 § 3.

²¹² Recital (37) and art. 72.

²¹³ Recital (39).

²¹⁴ Art. 66 § 1 lett. a, b; art. 67 § 1 lett. a

²¹⁵ Art. 66 § 1 lett. c, d; art. 67§ 1 lett. b, c, f, g, h, i, m.

²¹⁶ Art. 67§ 1 lett. d, j, k, l, n, o, p.

Due to the use of a directive as legal basis, Member States are bound to sanction these conducts only as a minimum level of implementation; which lets them free to provide for additional irregularities at national level. In this sense, may also decide to confer NCAs sanctioning powers of criminal nature, with the obligation, in such case, to communicate to the Commission the relevant criminal law provisions²¹⁷.

Irrespective of the national qualifications, however, the Directive requires Member States to confer sanctioning powers to the NCAs, so as to make them able to impose «effective, proportionate and dissuasive» administrative pecuniary penalties or other administrative measures, «sufficiently high to offset the benefits that can be expected and to be dissuasive even to larger institutions and their managers [...] to ensure the greatest possible scope for action following a breach and to help prevent further breaches»²¹⁸.

The targets of the sanctions include a broad category of subjects, consisting of the financial institutions under control, and of the subjects who effectively rule the business of an institution and the members of its management body²¹⁹.

The type of sanctions varies too. They range from the suspension of the voting rights of the liable shareholders; to the temporary ban against responsible members of the institution's management body; the withdrawal of the authorization; the issue of a public statement which identifies the nature of the breach and the subject responsible; and orders requiring the latter to cease the conduct and to desist from repetitions of the latter²²⁰. In any case, the Directive requires as essential that all sanctions imposed are followed by the publication of the decision applying them, in order to enhance their dissuasive effect²²¹. According to CRD IV, NCAs may also apply notable pecuniary penalties.

Specifically, financial institutions may be fined up to 10 % of the total annual net turnover or of up to twice the amount of the benefit derived from the breach where that benefit can be determined; while, in the case of a natural person, administrative pecuniary penalties may range up to EUR 5 million²²².

The extent of such penalties, as will be discussed further below, assumes quite a critical role in determining the real nature of the formally administrative penalties provided for by CRD IV.

2.3. Banking supervision in the Eurosystem: the Banking Union reform.

In 2012, the European Commission officially presented A Roadmap towards a Banking Union, a proposal to ensure that policy on prudential supervision and rules for financial services were implemented throughout the participating Member States in a coherent and effective manner²²³.

The idea at the basis of the reform relied on the awareness that «mere coordination is not enough, in particular in the context of a single currency», as clearly shown by the last financial crisis²²⁴.

²¹⁷ Recital (41) and art. 65.

²¹⁸ Recitals (35)-(36)-(41).

²¹⁹ Recital (35).

²²⁰ Art. 66 § 2, lett. a, b, f; art. 67 § 2, lett. a, b, c, d.

²²¹ Recital (38).

²²² Art. 66 § 2, lett. c, d, e; art. 67 § 2, lett. e, f, g.

²²³ European Commission, *A Roadmap towards a Banking Union* (COM (2012)510), September 12, 2012.

²²⁴ Recital (5), EU Council Regulation No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (SSM

The Banking Union project has been structured on several progressive steps, aiming first at the creation of a shared legal framework, and then at the establishment of new European institutions with competence in the management of the whole banking system, including banking supervision.

Under the first perspective, it was necessary to create a set of common rules and principles that all interested financial institutions must comply with, especially concerning banks' capital requirements and risk management. In this sense, the Commission proposed the adoption of a new directive and regulation on bank capital requirements, the already mentioned CRD IV - CRR package, which has replaced the old Capital Requirements framework²²⁵. Together with the 2014 Directives on the protection for depositor guarantees²²⁶, and on bank recovery and resolution in case of failure²²⁷, these legislative texts compose the corpus of common rules better known as the Single Rulebook, which applies in all EU Member States.

Under the second profile, the Banking Union required the establishment of new institutions with competence over three main legal areas, representing the three BU structural Pillars: banking supervision (with the Single Supervisory Mechanism-SSM), the management of bank crises and failure (with the Single Resolution Mechanism-SRM, and the Single Resolution Fund-SRF), and the protection of depositors (with the European Deposit Insurance Scheme-EDIS). While the two latter have jurisdiction over all EU Member States, the new supervisory regulator is exercising its activity only within the Eurosystem.

2.4. The Single Supervisory Mechanism.

With the establishment of the SSM, the Eurozone finally provided itself with a centralised supervisory authority, placed within the European Central Bank, which was already the single entity responsible for the Euro monetary policy²²⁸.

The new Mechanism officially entered into force in November 2014, even if the ECB was already conferred some of its supervisory powers since the previous year²²⁹.

The new body's activity finds its legal bases on two fundamental texts: the 2013 EU Council Regulation No 1024, better known as the SSM Regulation (SSM R), and the 2014

Regulation).

²²⁵ Previously, the original CRD package (Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions and Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions) had already been revised two times, in 2009 (CRD II) and 2010 (CRD III), cf. http://ec.europa.eu/finance/bank/regcapital/repealed-legislation/index_en.htm.

²²⁶ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes.

²²⁷ Cf. the Bank Recovery and Resolution Directive (BRRD), Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

²²⁸ Cf. recital (13), SSM Regulation.

²²⁹ «From 3 November 2013, the ECB may start carrying out the tasks conferred on it by this Regulation other than adopting supervisory decisions», cf. art. 33 §3, SSM Regulation.

See also ECB SSM Quarterly Report - *Progress in the operational implementation of the Single Supervisory Mechanism Regulation* n. 4/2014, November 3, 2014, available online at: <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmqr20144.en.pdf> (accessed 20 November 2015).

Regulation No 468 of the European Central Bank, the so-called SSM Framework Regulation (SSM FR)²³⁰.

The essence of the reform was to confer the ECB a substantial and single role in the ordinary supervisory proceeding for “significant” credit institutions, financial holding companies, mixed financial holding companies, or branches of the above.

The “significance” of the institution shall be assessed according to the criteria established in the SSM R, as specified by the SSM FR. In particular, they concern the institution’s size, its importance for the economy of the Union or of any participating Member State, and the relevance of its cross-border activities²³¹. Irrespective of their absolute size, the SSM anyway supervises the three most significant credit institutions in each of the participating Member States. According to those criteria, currently the SSM exercises its supervision on 131 significant banking groups, representing almost 85% of total banking assets in the Eurozone²³². The ECB may also, on its own initiative, consider an institution to be of significant relevance whether the latter has established banking subsidiaries in more than one participating Member State, and its cross-border assets or liabilities represent a significant part of its total assets; or when it is necessary to ensure consistent application of high supervisory standards²³³.

Minor credit institutions, on the contrary, together with the macro-prudential tasks not explicitly assigned to the ECB (such as the provision of investment and payment services, or the issuance of electronic money²³⁴) remain under the oversight of national authorities²³⁵.

In the new supervisory system, NCAs are also still competent in some sensitive matters, such as the compliance of financial institutions with AML/CFT Programs, the referral of relevant information to judicial authorities, and the consumer protection policy²³⁶.

²³⁰ See EU Council Regulation No 1024/2013 of 15 October 2013, cit., and Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation).

²³¹ The institution shall not generally be considered less significant if: the total value of its assets exceeds EUR 30 billion; the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20 %, unless the total value of its assets is below EUR 5 billion; the ECB takes a decision confirming such significance following a comprehensive assessment by the ECB, following a notification by its national competent; and for those for which public financial assistance has been requested or received directly from the EFSF or the ESM, cf. art. 6 §4 *et seq.* SSM R, and art. 57 *et seq.* SSM FR.

²³² Cf. ECB, *Legal Framework for Banking Supervision*, Volume I, December 2014, p. X available online at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmlegalframeworkforbankingsupervision_voll_en.pdf. The ECB has published a final list of significant credit institutions in September 2014, see: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/list_sse_lsi_en.pdf?0ca6b710966e9f8621d648c0ba5d0afc.6dfe13ea9224b4f2f313c8c9dd05bc96.

²³³ Art. 6 §4, SSM R.

²³⁴ Cf. art. 1 SSM R and recital (28) according to which: «Supervisory tasks not conferred on the ECB should remain with national authorities. Those tasks should include the power to receive notifications from credit institutions in relation to the right of establishment and the free provision of services, to supervise bodies which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law, to supervise credit institutions from third countries establishing a branch or providing cross-border services in the Union, to supervise payment services, to carry out day-to-day verifications of credit institutions, to carry out the function of competent authorities over credit institutions in relation to markets in financial instruments, the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and consumer protection».

²³⁵ Art. 5, SSM R; and SSM FR, recital (5) and art. 7.

²³⁶ SSM R, recital (28).

Within their competence, national authorities may begin a proceeding on their own initiative; may be requested by the ECB to start a proceeding or may ask the ECB to be requested to start a proceeding within their jurisdictions²³⁷.

The ECB, however, maintains the responsibility for the oversight on the functioning of the entire SSM system. In this sense, effective cooperation with the SSM is strongly supported and national authorities are generally obliged to assist the Central Bank and to follow its instructions within its area of competence²³⁸. On the other side, recognizing the importance of the long-established supervisory expertise reached by NCAs with regard to their own national contexts, the Regulations allow national and Community experts to operate together through the creation of Joint Supervisory Teams (JST)²³⁹.

Being located within the ECB, the SSM falls under the general management of the Governing Council, the highest decision-making body of the European Central Bank. The Council is composed of the six members of the Executive Board of the ECB and of the 19 Governors of the National Central Banks of the Member States whose currency is the Euro.

The Executive Board is composed of the ECB President, a vice-president and four other members, all appointed by the European Council acting by a qualified majority. These members are responsible for the current business of the ECB, and hold permanent voting rights in the Governing Council for all their mandate²⁴⁰.

The attribution of voting rights among national Governors is quite complicated. In fact, according to the Treaties, as soon as the number of Euro area countries exceeded 18, a rotation voting system shall be implemented; a situation which occurred in 2015, when Lithuania acceded to the Euro²⁴¹.

Participating States have thus been divided into two groups depending on their economies and their financial sectors' size. Following such ranking, which shall be reviewed at least every five years, Governors are divided: the first fifth— currently DE, FR, IT, ES and NL— share four voting rights; all the others share 11 voting rights. Within each group votes are exercised in monthly turns. The SSM supervisory tasks are paid by the controlled credit institutions established in the participating Member States, through annual fees²⁴².

In the ECB's framework, the SSM supervisory tasks are then actually undertaken by an internal special body, called Supervisory Board.

The Board is composed of a Chair, with a non-renewable mandate of five years, a vice-chair, chosen from among the members of the Executive Board, four ECB representatives and one NCA representative for each participating Member State²⁴³.

2.4.1. SSM Investigative Powers.

²³⁷ Art. 134§2 SSMFR.

²³⁸ Art. 6 § 3 SSM R.

²³⁹ Articles 3 to 5, and 115 SSM FR.

²⁴⁰ Art. 11, Statute of the European System of Central Banks (ESCB) and of the European Central Bank, which represent Protocol No 4 to the TFEU.

²⁴¹ Art. 10 § 2, Statute of the ESCB and of the ECB. The original decision provided for the mechanism to be enforced when there were more than 15 Euro area countries, but the option to postpone that until they reach the number of 18 has been used.

²⁴² Cf. recitals (77)-(78), SSM R.

²⁴³ The Board is operational since the approval of the Decision of the European Central Bank of 6 February 2014 on the appointment of representatives of the European Central Bank to the Supervisory Board (ECB/2014/4). From April 2014, the activity of the Board is also regulated by the Rules of procedure of the Supervisory Board of the European Central Bank, 31 March 2014.

In case of suspicious breaches emerged while carrying out the SSM supervisory tasks, the ECB allocates the investigation to an internal Investigating Unit, which «shall perform its function independently»²⁴⁴. The system also provides for a sort of whistle-blower program, which guarantees the protection of the identities of persons providing information, unless such disclosure is required by a court order in the context of further investigations or subsequent judicial proceedings²⁴⁵.

The investigative powers of the Unit, as single supervisory regulator, are those typical of banking oversight: request for information and for the submission of documents; examination and copying of books and records; and the right to obtain written or oral explanations from informed subjects²⁴⁶. On-site inspections are also coming under the prerogatives of the Unit, but the SSM investigators need to previously obtain a judicial authorization if so required by the national applicable legislation²⁴⁷.

In particular, these inspections shall be carried out by a designated team (the so-called on-site inspection team) established on purpose²⁴⁸. While in principle the ECB has to previously notify the competent NCA and the legal person subject to the on-site inspection, the Central Bank may also proceed without informing the legal entity involved if «the proper conduct and efficiency of the inspection so require»²⁴⁹.

If evidence of facts potentially relevant to criminal offences emerges during supervisory investigations, the SSM cannot refer it directly to the judicial authorities, but shall request the competent NCA to do so in accordance with national law²⁵⁰.

The procedural rules that must be complied with during investigations are specified in the SSM Regulations, according to which due process rights shall be guaranteed in all ECB proceedings²⁵¹. Besides the theoretical affirmation of this principle however, an adequate protection of these fundamental rights is not always achieved by the approved Regulations, as will be discussed further below.

2.4.2. SSM Sanctioning Powers.

In line with the sanctioning powers provided for at the EU level, also within the Eurozone it is possible to impose effective, proportionate and dissuasive penalties²⁵²; considering the sanctions effective whether they are «capable of ensuring compliance with EU law, proportionate when they adequately reflect the gravity of the violation and do not go beyond what is necessary for the objectives pursued, and dissuasive when they are sufficiently serious to deter the authors of violations from repeating the same offence, and other potential offenders from committing such violations»²⁵³.

²⁴⁴ Art. 123 SSM FR.

²⁴⁵ Art. 37 SSM R.

²⁴⁶ Articles 10, 11 SSR R; art. 125 SSM FR.

²⁴⁷ Articles 12-13 SSM R; articles 143 to 146 SSM FR.

²⁴⁸ Articles 12 § 1 SSM R and 144 § 1 SSM FR.

²⁴⁹ Art. 145 § 2 SSM FR.

²⁵⁰ Art. 136 SSM FR.

²⁵¹ Cf. recitals (52)-(54)-(58)-(86) and art. 22 SSM R; articles 22 to 32 SSM FR.

²⁵² Art. 18 § 3 SSM R.

²⁵³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Reinforcing sanctioning regimes in the financial services sector*, Brussels, 8 December 2010 COM(2010) 716 final, available online at: http://ec.europa.eu/internal_market/consultations/docs/2010/sanctions/COM_2010_0716_en.pdf.

Notwithstanding this general interpretation, however, any assessment regarding the “gravity of the violation” and the consistence of the penalty with the “objective pursued” generally remains in the sole discretionary evaluation of the authority entitled to exercise such powers; which, in case of violations perpetrated by credit institutions within the Eurosystem, has been identified by articles 16 and 18 SSM R in the Single Supervisory Mechanism.

In particular, under art. 16 § 2 SSM R, the ECB has the power to apply several supervisory measures, such as requiring the reduction of the risk inherent in the activities, products and systems of credit institutions, and removing members from the management board.

According to art. 18 SSM R, the ECB may also impose pecuniary penalties that amount «of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10 % of the total annual turnover [...] of a legal person in the preceding business year»²⁵⁴. Where the sanctioned entity is a subsidiary of a parent undertaking, the percentage are going to be calculated on a consolidated basis²⁵⁵.

The legal basis, however, is not specifically defining all aspects of the SSM sanctioning powers. Above all, it is not quite clear whether the ECB may impose sanctions over all banking institutions or only upon those which are under its direct supervision²⁵⁶.

Consequently, the Regulations have been interpreted in two different, opposite ways, both theoretically in compliance with the Basel Agreement, and in particular with Core Principles 1 and 11²⁵⁷.

With regard to the subjects involved in the supervisory process, in fact, there is a discrepancy between art. 6, which circumscribes the ECB’s competence to the significant supervised entities, and art. 18 SSM R, which instead extends the scope of application of sanctioning powers to all credit institutions, financial holding companies, or mixed financial holding companies which «intentionally or negligently, breach a requirement»²⁵⁸.

The ambiguity, however, may be solved considering the extent of the whole ECB legal bases in the field of banking supervision.

First of all, art. 127 § 6 TFEU contemplates only the possibility to «confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings».

Keeping that in mind, one may even wonder if the whole SSM Regulations, which provide an entire framework of supervisory tasks instead of just some specific ones, are compatible with the Treaty at all.

Even without getting to such an extreme conclusion, however, this provision seems to suggest quite a clear preference in adopting a restrictive interpretation when it comes to the SSM powers, at least where there is space for ambiguity.

A similar approach is also in line with the content of articles 4 and 6 SSM R, as well as to art. 124 § 1(a) SSM FR, according to which the violations relevant within the SSM sanctioning competence are only those committed by «significant supervised entities». In the light of the

²⁵⁴ Recitals (36) - (53) and art. 18 § 1, SSM R; recital (24) and articles 120, 122, 129, 130-132 SSM FR.

²⁵⁵ «The relevant gross income shall be the gross income resulting from the consolidated account of the ultimate parent undertaking in the preceding business year » cf. art. 67, § 2, let. g, CRD IV, and art. 18 § 2 SSM R.

²⁵⁶ On these aspects cf. K. LACKHOFF, *Which Credit Institutions will be Supervised by the Single Supervisory Mechanism?*, in *Journal of International Banking Law and Regulation*, 2013, p. 454.

²⁵⁷ On these interpretations, see R. D’AMBROSIO, *Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings*, in *Banca d’Italia - Quaderni di Ricerca Giuridica*, 74, December 2013, p. 31-32, available online at: <https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2013-0074/Quaderno-74.pdf>.

²⁵⁸ Cf. art. 18 § 1 SSM R.

above, less significant credit institutions shall be sanctioned only by National Competent Authorities.

The only explicit exception to this restrictive interpretation is provided for by art. 18 § 7 SSM R, according to which the SSM may impose sanctions both on significant and less significant financial institutions for any failure by an undertaking to fulfil an obligation arising from ECB regulations or decisions and for any obstruction of the investigations carried out by the latter. Therefore, in this case, that finds its legal basis in Regulation (EC) No 2532/98, the ECB may impose fines of up to twice the amount of the profits gained or losses avoided because of the infringement, or 10 % of the total annual turnover of the undertaking; the Central Bank may also apply periodic penalty payments of 5 % of the average daily turnover per day of infringement to obtain the cease and desist of the obstructing conduct²⁵⁹.

Within these limitations, the SSM has direct and indirect sanctioning powers.

While the sanctions included in the first category, provided for by article 18 §§ 1 and 7, may be applied only by the ECB, and thus appealed only before the European Court of Justice, the penalties belonging to the second one, described in the same article, at § 5, can be requested by the SSM, but imposed exclusively by national authorities. Accordingly, in this case, the jurisdiction for getting a review falls before national courts²⁶⁰.

The direct sanctioning competence of the SSM concerns the infraction of the obligations established by the «relevant directly applicable acts of Union law in relation to which administrative pecuniary penalties shall be made available to competent authorities under the relevant Union law»²⁶¹.

In coherence with the restrictive interpretation mentioned above, it seems preferable to understand this expression as circumscribing the direct sanctioning powers only to the violations described in the minimum content provided by CRD IV, and in particular by articles 66 and 67. That is to say that the SSM should not be allowed to directly apply further sanctions, even in case Member States are extending the list of irregularities during the national transposition of the Directive.

Moreover, even if the irregularities for which it may proceed are the same, conversely to the NCAs the SSM can only apply penalties over legal entities, thus excluding natural persons from its jurisdiction²⁶².

Lastly, the SSM may exercise indirect sanctioning powers in all other circumstances where it is necessary to carry out the tasks conferred by the SSM Regulations.

In this case, however, the SSM may only ask to the NCAs to impose effective, proportionate and dissuasive penalties, both pecuniary and not pecuniary, as established according to the relevant Union law and national legislation. The NCAs then enjoy full discretion in carrying out investigations on the alleged breaches, and in deciding if and which sanctions to apply.

The violations which may be affected by these indirect powers concern «breaches of national law transposing relevant Directives» committed by significant credit institutions, financial holding companies or mixed financial holding companies, and by members of the

²⁵⁹ Cf. art. 4(a), Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions, as amended by Council Regulation (EU) 2015/159 of 27 January 2015.

²⁶⁰ Judgement *Hans-Martin Tillack v Commission of the European Communities*, T-193/04, ECLI:EU:T:2006:292.

²⁶¹ ECB, Explanatory Memorandum, Recommendation for a Council Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, available online at: https://www.ecb.europa.eu/ecb/legal/pdf/en_rec_ecb_2014_19.pdf.

²⁶² Recital (53) SSM R.

management board of the above, as well as by «any other individuals who under national law are responsible for a breach by a credit institution, financial holding company or mixed financial holding company»²⁶³.

The SSM may impose sanctions through a complex proceeding.

It starts with the Investigating Unit submitting a draft decision to the Supervisory Board, together with the file of the investigation. Following that submission, the Board may discretionally decide to request further investigations, to close the case, or, if it agrees with the conclusions reported, to further submit the decision to the Governing Council²⁶⁴.

The relation between the Supervisory Board and the Governing Council is regulated by what goes under the name of “non-objection procedure”. According to it, the Board’s decisions are to be considered approved by the Governing Council, unless the latter is opposing in writing within a period not exceeding a maximum of ten working days.

The Governing Council may oppose the draft decision on its own initiative, or following an objection presented by a Member State which is participating to the SSM but whose currency is not the euro²⁶⁵.

In both cases, another newly established body, called Mediation Panel, takes the final decision, possibly achieving a balance between the position of Governing Council and of the Supervisory Board²⁶⁶.

This Panel is composed of one member per participating Member State, appointed at national level. Having chosen for a model in which banking supervision and monetary policy are centralized in the same institution, the Mediation Panel has also been entrusted with the task of ensuring the separation between these two functions. Under this perspective, it thus shall act to preserve the independence of the supervision from the influence of the financial policy, and to prevent conflicts of interests within the same ECB²⁶⁷.

If a sanction is approved, the Regulations allows the affected credit institutions to challenge the decision before an internal independent body, the Administrative Board of Review, composed of five individuals with «sufficient experience in the fields of banking and other financial services»²⁶⁸.

The body is entitled to conduct internal administrative reviews, pertaining to the procedural and substantive conformity with the Regulations, and without prejudice to the right to bring proceedings before the European Court of Justice in accordance with the Treaties.

Unless differently disposed for the single case, the request for review does not have suspensory effect. The opinion expressed by the Administrative Board of Review shall be taken into account by the Supervisory Board, which then promptly submit a new draft decision, replacing the initial one, to the Governing Council for the non-objection procedure.

2.5. The Single Resolution Mechanism and the Single Resolution Fund.

²⁶³ Art. 18 § 5 SSM R and art. 134 §1 SSM FR.

²⁶⁴ Art. 127 SSM R.

²⁶⁵ Articles 7§ 8, and 26 SSM R.

²⁶⁶ Recital (76) SSM R, and art. 25§ 5 SSM FR. From June 2014, the Panel’s composition and powers are provided for by articles 3-4, Regulation (EU) No 673/2014 of the European Central Bank of 2 June 2014 concerning the establishment of a Mediation Panel and its Rules of Procedure (ECB/2014/26).

²⁶⁷ Cf. also Decision of the European Central Bank of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank (ECB/2014/39).

²⁶⁸ Cf. art. 24 SSM R. See also Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (ECB/2014/16).

Even if the management of bank crises falls out of the scope of this work, and thus will not be illustrated in all its details here, a quick overview on the new mechanism is provided to understand the extent of the Banking Union, and the context in which the SSM is currently operating.

Gradually entered into force in 2014-2015, the Single Resolution Mechanism (SRM) and Fund (SRF) have become fully operational in all Member States since January 1, 2016²⁶⁹.

The purpose of the SRM is to guarantee an efficient resolution in case banks covered by the SSM are failing in spite of the centralized supervision, especially to reduce negative effects on depositors and taxpayers, and to put the burden of a bank crisis on shareholders and creditors.

In order to achieve so, the EU has adopted common rules on the management of banking crises, and required Member States to establish an ex-ante resolution fund (the SRF), paid for by contributions from banks according to fixed premiums, which can be used to financially support resolution measures²⁷⁰. The SRF will have to be built up over a period of eight years, and the rules for Member States' contributions have been agreed at Community level through an Inter-Governmental Agreement (IGA), which currently has been ratified by most EU countries, and thus entered into force²⁷¹.

The fund is managed by the central decision body of the SRM: the Single Resolution Board (SRB), which is responsible for ensuring that cases are processed with minimal costs for taxpayers and to the real economy²⁷². The Board is composed of 28 members, one for each participating Member State, plus a Chair, a vice-chair and other four full-time members, appointed by the European Council on the basis of an open selection procedure, after the European Parliament had approved a shortlist proposed by the Commission²⁷³.

Under the SRB supervision, the execution of the resolution scheme in a certain country will be left in charge of designated National Resolution Authorities (NRAs)²⁷⁴.

Granted with investigating powers similar to the SSM to fulfil its tasks, the Board is entrusted to decide whether a bank is failing or likely to fail, when it is necessary to place it into resolution, and whether and how to use the SRF, which, in any case, can contribute to the resolution only if at least 8% of the total liabilities of the failed bank have been already bailed-in.

²⁶⁹ The SRM and SRF's implementation relies on several legislative acts: the Bank Recovery and Resolution Directive (BRRD) - Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council; Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending regulation (EU) No 1093/2010; and Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund.

²⁷⁰ Council Implementing Regulation (EU) 2015/81, recital (2).

²⁷¹ Cf. Single Resolution Board press release, 30 November 2015, available online at: http://srb.europa.eu/sites/srbsite/files/20151130-press-release_en.pdf.

²⁷² Decision of the Plenary Session of the Single Resolution Board on adopting the Financial Regulation of the Single Resolution Board (Board), Brussels, 25 March 2015, available online at: .

²⁷³ Recital (31) and art. 43, Regulation No 806/2014.

²⁷⁴ To be identified at national level, in most cases it corresponds to the national authority competent for banking supervision.

The resolution scheme prepared by the Board shall then be approved or rejected by the Commission or, in certain circumstances, by the Council within 24 hours²⁷⁵.

To preserve the sensitivity of the matter, the Regulation requires the decisions concerning the use of those funds to be carried out independently from the ECB; a statement which is supported by the provision of separated budgets²⁷⁶.

2.6. The European Deposit Insurance Scheme.

To safeguard depositors whose bank has failed, the Banking Union project also provides for Deposit Guarantee Schemes (DGS), which may be used to reimburse limited amounts of deposits²⁷⁷.

Since national DGS may remain vulnerable to large local shocks, the European Deposit Insurance Scheme (EDIS) has been established for ensuring equal protection of deposits, regardless of the State where they are located.

In order to achieve so, the coverage of national deposit guarantee has been harmonized at the EU level on the sum of €100,000 per depositor, per institution. That means that - when the EDIS will be fully implemented - if a bank is placed into insolvency or resolution, and it is necessary to pay out deposits under that threshold, the national Deposit Guarantee Schemes and the EDIS will intervene.

DGS however, are not aiming only at protecting depositors: they may be also useful to maintain the financial stability of the market in case of bank failures; in particular, they should avoid depositors from making panic withdrawals, and thus prevent such a behaviour to bring on a wide dimension its tragic economic consequences.

3. The US Regulatory Agencies.

The shape of the model of banking supervision in the US has changed quite drastically in the last few decades.

Since the early 1980s, the US banking system headed for a progressive and increasing deregulation, which has not found significant changes in its direction until the burst of the last financial crisis (and, as will be illustrated further on, in many aspects not really even after that). In particular, as already mentioned, for a long time the main legislative text regulating banking supervision was represented by the Glass-Steagall Act, which provided for a clear separation of the activities that may be exercised by financial institutions, and prohibited banks to engage in proprietary trading or in the securities market.

In the following years, under the Reagan administration, with a Secretariat of Treasury ruled from 1981 to 1985 by the former Chairman and CEO of Merrill Lynch, NOME, and the Federal Reserve chaired from 1987 to 2006 by Alan Greenspan, involved at the beginning of his career in the notorious Keating Five corruption case²⁷⁸, the government opted for a series of deregulating measures which weakened the public control over private companies.

²⁷⁵ Art. 18 § 7, Regulation No 806/2014.

²⁷⁶ Art. 47, Regulation No 806/2014. See also SRB, *Budget 2015*, available online at: http://srb.europa.eu/docs/2015-srb-budget_en.pdf.

²⁷⁷ Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on Deposit Guarantee Schemes, recently reviewed.

²⁷⁸ «In 1984, Mr. Keating, then a 61-year-old Phoenix real estate millionaire, bought Lincoln Savings & Loan, of Irvine, Calif., for \$51 million, double its net worth. Lincoln, with 26 branches, made small profits on home loans, but under new state and federal rules it could make riskier investments, and Mr. Keating began pouring depositors’

That was the context in which, in 1998 two of the main global financial institutions, Citicorp and Travelers Group, merged together, giving birth to the colossus Citigroup. In the following year, the operation, that was not allowed under the Glass-Steagall legal framework, was legitimized with the repeal of the statute by the Gramm-Leach-Bliley Act, according to which banks, investment banks, securities firms, and insurance companies were allowed to cooperate and trade together, and investment banks' holding companies were exempted from direct federal regulation.

This trend did not change under the Clinton administration, which in 2000 enacted the Commodity Futures Modernization Act (CFMA), authorizing banks to trade in financial products like swaps – which too, with the same law, were barred from federal regulation²⁷⁹. In 2002, under the Bush administration, the Treasury Department allowed banks to hold less capital in reserve when trading securitized mortgages with high investment grade in credit ratings²⁸⁰. As happened with the Citigroup case, such a legal framework led to the growth and the reinforcement of a number of “Too-Big-Too-Fail” financial institutions, whose most notorious representatives in the US include Bank of America, Citigroup, Goldman Sachs, JP Morgan Chase, Morgan Stanley, Wells Fargo, and, until 2008, Bear Stearns and Lehmann Brothers²⁸¹.

Federal supervisory agencies also played their role in the deregulation process. For instance, in 2004, the Securities and Exchange Commission weakened the capital requirements for large broker-dealers²⁸²; the Federal Reserve, on the other hand, notwithstanding its

savings into real estate ventures, stocks, junk bonds and other high-yield instruments [...] The Federal Home Loan Bank Board, fearing wide collapses in a shaky industry, finally imposed a 10 percent limit on risky S.&L. investments. By 1987, its investigators found that Lincoln had \$135 million in unreported losses and was more than \$600 million over the risky-investment ceiling. Soon, the F.B.I., the Securities and Exchange Commission and other agencies were homing in.

Mr. Keating hired Alan Greenspan, soon to be chairman of the Federal Reserve, who compiled a report saying Lincoln's depositors faced “no foreseeable risk” and praising a “seasoned and expert” management. Mr. Keating soon called on five senators who had been recipients of his campaign largess — Alan Cranston of California, Donald W. Riegle Jr. of Michigan, John Glenn of Ohio and Dennis DeConcini and John McCain of Arizona — to pressure the bank board to relax its rules and kill its investigation [...] Bond buyers were not told the condition of American Continental, or that its bonds were uninsured, prosecutors said [...] American Continental went bankrupt in 1989, and an insolvent Lincoln was seized by the government. Some 23,000 customers were left holding \$250 million in worthless bonds, the life savings of many, and taxpayers paid \$3.4 billion to cover Lincoln's losses. It was the largest of 1,043 S.&L. failures from 1986 to 1995. Authoritative studies show that they cost the savings and loan industry \$29 billion and taxpayers \$124 billion. The government sued Mr. Keating for \$1.1 billion, but he said he was broke», cf. R.D. MC FADDEN, *Charles Keating, 90, Key Figure in '80s Savings and Loan Crisis, Dies*, in *NYT*, April 2, 2014, available online at: [http://www.nytimes.com/2014/04/02/business/charles-keating-key-figure-in-the-1980s-savings-and-loan-crisis-dies-at-](http://www.nytimes.com/2014/04/02/business/charles-keating-key-figure-in-the-1980s-savings-and-loan-crisis-dies-at-90.html?ref=collection%2Ftimestopic%2FKeating%20Five&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&r=0)

[90.html?ref=collection%2Ftimestopic%2FKeating%20Five&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&r=0](http://www.nytimes.com/2014/04/02/business/charles-keating-key-figure-in-the-1980s-savings-and-loan-crisis-dies-at-90.html?ref=collection%2Ftimestopic%2FKeating%20Five&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&r=0).

²⁷⁹ Enacted as a title of the Consolidated Appropriations Act of 2001, P.L. 106-554.

²⁸⁰ See, e.g., Department of Treasury, *Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Capital Treatment of Recourse, Direct Credit Substitutes and Residual Interests in Asset Securitizations; Final Rules*, in *Federal Register*, Vol. 66, No. 230, November 29, 2001 available online at: <http://www.federalregister.gov/articles/2001/11/29/01-29179/risk-basedcapital-guidelines-capital-adequacy-guidelines-capital-maintenance-capital-treatment-of>.

²⁸¹ Cf. Chapter 1, paragraph 1.1.

²⁸² SEC, *Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities*, RIN 3235-AI96, 17 C.F.R. Parts 200 and 240 (8/20/2004). When the same agency tried to strengthen again the controls over hedge funds, that was then impeded by a Federal Court of Appeal, see *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006).

competence in supervising the mortgage loans market, did not adopt the regulations that would have allowed its enforcement until July 2008²⁸³.

The impact of such a policy needs to be assessed also taking into account the development, in the same years, of the derivative financial products²⁸⁴, the market of which was de facto not regulated by any federal agency, notwithstanding the Commodity Futures Trading Commission's concerns and proposal²⁸⁵.

In 2010, facing the consequences of the crisis, the already-mentioned Dodd-Frank Act tried to bring part of banking activities back under a stricter and more efficient public oversight, restricting securities trading with the so-called "Volcker Rule"²⁸⁶, removing the CFMA prohibition for all federal supervisors to regulate or ask financial institutions for the registration (and subsequent disclosure) of any type of swap²⁸⁷, and partially modifying the wide panorama of financial regulators, as will be discussed below.

Indeed, the first and most evident feature of the US system of banking supervision is represented by the high number of competent regulators, which are carrying out their tasks according to competence criteria related to the type of activities of the controlled financial institutions; the authority that granted them the permission to commence business (commonly

²⁸³ Regulation Z (Truth in Lending) was adopted under the 1994 Home Ownership and Equity Protection Act, Title I, Subtitle B of the Riegle Community Development and Regulatory Improvement Act of 1994, P. L. 103-325 §§ 151-158 (1994), codified in 12 CFR 226.32, cf. <https://www.federalreserve.gov/newsevents/press/bcreg/20080714a.htm>.

The delay of the adoption was in line with the view of the Fed. Chairman, Mr. Greenspan, who in the years before the burst of the crisis, affirmed several times that «It is, of course, possible for home prices to fall as they did in a couple of quarters in 1990. But any analogy to stock market pricing behavior and bubbles is a rather large stretch. [...] Thus, any bubbles that might emerge would tend to be local, not national, in scope [...] A sharp decline, the consequences of a bursting bubble, however, seems most unlikely [...] the five-year old home building and mortgage finance boom is less likely to be defused by declining home prices than by rising mortgage interest rates», cf. *Home Mortgage Market*, Remarks by Chairman Alan Greenspan at the Annual Convention of the Independent Community Bankers of America, Orlando, Florida, March 4, 2003, available online at: <http://www.federalreserve.gov/BOARDDOCS/SPEECHES/2003/20030304/default.htm>; and also «In recent years, banks and thrifts have been experiencing low delinquency rates on home mortgage and credit card debt, a situation suggesting that the vast majority of households are managing their debt well [...] Some homeowners drawn by large capital gains do sell and rent. And certainly in recent years some homebuyers fearful of losing a purchase have bid through sellers' offering prices. But these market participants have probably contributed only modestly to overall house price speculation» cf. *The mortgage market and consumer debt*, Remarks by Chairman Alan Greenspan at America's Community Bankers Annual Convention, Washington, D.C., October 19, 2004, available online at: <http://www.federalreserve.gov/boardDocs/speeches/2004/20041019/default.htm>.

²⁸⁴ « A financial instrument whose value depends on or is derived from the performance of a secondary source such as an underlying bond, currency, or commodity» cf. *Black's Law Dictionary*, cit., p. 509.

²⁸⁵ «The CFTC's last major regulatory actions involving OTC derivatives, adopted in January 1993, were regulatory exemptions from most provisions of the Commodity Exchange Act for certain swaps and hybrid instruments. Since that time, the OTC derivatives market has experienced significant changes - dramatic growth in both volume and variety of products offered, participation of many new end-users of varying degrees of sophistication, standardization of some products, and proposals for central execution or clearing operations. While OTC derivatives serve important economic functions, *these products, like any complex financial instrument, can present significant risks if misused or misunderstood. A number of large, well-publicized financial losses over the last few years have focused the attention of the financial services industry, its regulators, derivatives end-users and the general public on potential problems and abuses in the OTC derivatives market. Many of these losses have come to light since the CFTC's last major OTC derivatives regulatory actions in 1993*», CFTC, *Issues Concept Release Concerning Over-The-Counter Derivatives Market*, May 7, 1998, available online at: <http://www.cftc.gov/opa/press98/opa4142-98.htm>.

²⁸⁶ Section 619 of the Dodd-Frank Act.

²⁸⁷ Title VII of the Dodd-Frank Act.

referred to as a “Charter”), and the constant interaction among federal and local authorities, laws and regulations.

Banks that are chartered by a State government are referred to as “State banks”; those which are chartered at federal level, by the Department of the Treasury (through the Office of the Comptroller of the Currency), are referred to as “national banks”.

Federal regulatory agencies include: the Federal Reserve (Fed. Res.), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Securities Exchange Commission (SEC), the Bureau of Consumer Financial Protection (BCFP), and, until 2010, the Office of Thrift Supervision (OTS).

In general terms, all banks are supervised either by the Federal Reserve or by the Federal Deposit Insurance Corporation. In addition to the Fed. Res./FDIC oversight, State banks are also supervised by their chartering State, while national banks are regulated by the OCC²⁸⁸.

The statutes of federal regulators usually provide them a list of potential irregularities, extensive investigating and sanctioning powers, and systems for reviewing the decisions taken. In assessing potential violations committed by their controlled entities, supervisory agencies are granted a high degree of discretion.

Normally, federal supervisory examinations are organized around a set of shared parameters, which is used by all bank regulators to rate the safety and soundness of financial institutions. With regards to this profile, since 1979 the Federal Financial Institutions Examination Council (FFIEC) has established a Uniform Financial Institutions Rating System (UFIRS), which has been periodically revised, concerning in particular certain areas: Capital adequacy, Asset quality, Management, Earnings, Liquidity, and Sensitivity to market risk (from which the acronym “CAMELS” under which the system is commonly known). CAMELS examinations produce ratings on a scale of 1 to 5, in which 1 represents no cause for supervisory concern, 3 signifies an institution with supervisory concerns in one or more areas, and 5 shows an unsafe and unsound bank with severe supervisory concerns.

3.1. The Federal Reserve.

The Federal Reserve (Fed. Res.) is the agency competent for the supervision over the safety and soundness of State-chartered banks that are part of the Fed. Res. System (State-chartered member banks), national banks, all Bank Holding Companies (BHC), and US branches and agencies of foreign banks.

With regard to State-chartered member banks and foreign banks’ branches, the Federal Reserve operates also as a supervisor for the financial institutions’ compliance with the AML Program prescribed by the Bank Secrecy Act, especially as modified by the 2001 USA PATRIOT ACT²⁸⁹. Indeed, even if the Department of the Treasury maintains primary responsibility for issuing and enforcing regulations to implement these statutes, most of supervisory responsibility has been delegated to the federal financial regulatory agencies.

²⁸⁸ Cf. Fed. Res., *The Federal Reserve System: Purposes and Functions*, 5. *Supervision and Regulation*, Library of Congress, Washington D.C., IX Ed., 2005, p. 60, available online at: http://www.federalreserve.gov/pf/pdf/pf_5.pdf.

²⁸⁹ Federal Crime of Money Laundering and Federal Crime of Operating an Unlicensed or Unregistered Money Transmitting Business - Title 18, U.S.C., Crimes and Criminal Procedure, Part I, Chapter 95, as modified by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, better known as “USA PATRIOT Act”, P. L. 107–56–OCT. 26, 2001. See also *The Fed. Res. System, Purposes and Functions*, 5. *Supervision*, cit., p. 66.

Moreover, the Fed. Res., in coordination with the Securities Exchange Commission and the State insurance authorities, serves as an “umbrella supervisor” for BHCs subsidiary broker-dealer or insurance activities.

In all cases in which banks trade in securities and own subsidiary broker-dealer or insurance companies, the agency is responsible for the review and assessments over the consolidated structure of the holding company, while the exercise of the single activities by controlled companies is falling under the supervision of the other specialized regulators²⁹⁰.

Lastly, while the Federal Reserve shares its supervisory tasks with other agencies, it also represents the single US authority responsible for the issuing and the retirement of notes, combining the typical supervisory powers with the monetary functions of traditional central banks²⁹¹.

The Board of Governors and its Chair represent the ruling bodies of this agency, and are both appointed by the President of the United States²⁹². The Board is composed of seven members that have to be confirmed by the Senate for a non-renewable mandate of 14 years, during which they cannot be removed for the opinions expressed within their functions²⁹³.

Among the members of the Board, the Chair and her deputy serve term of four years, which may be prolonged until their term as Governors expired, again with the Senate confirmation. The Chair is the public spokesperson of the Board and its representative; she also has to report twice a year to the Congress on the Fed. Res. policy, and, on demand, to the Treasury Secretariat²⁹⁴.

The Federal Reserve is mainly financed by public funding, and in particular from the interest on US government securities acquired through open market operations, as well as from the interest of the Fed. Res. System’s investments on foreign currency. Net of its expenses, the rest of the Fed. Res. earnings is turned over to the US Treasury²⁹⁵.

The agency has a broad range of investigative powers.

As all regulators, the Fed. Board is entitled to examine accounts, books and affairs of the overseen institutions at its discretion, as well as to organize off-site surveillance and monitoring. The Board may also examine any other depository institution, and any affiliates, in connection with any institution under its jurisdiction. In case of major banks, the examination results of on-site inspections have to be presented at least each year, while for the smaller banks the deadline is every eighteen months²⁹⁶. Once a proceeding is established, the hearings are generally public, and so it is all the used evidentiary material. Lastly, the Fed. Res. possesses also the prerogative to issue a subpoena in order to force a bank to conform to its requests²⁹⁷.

²⁹⁰ Id., p. 65.

²⁹¹ Cf. Sec. 11. Powers of Board of Governors of the Federal Reserve System, Issue and retirement of Federal Reserve notes (d): «To supervise and regulate through the Secretary of the Treasury the issue and retirement of Federal reserve notes», Federal Reserve Act of 1913, P.L. 63-43, codified at: 12 U.S.C. Ch. 3, as modified by the 1933 Banking Act, cit., and by the Banking Act of 1935, P.L. 74-305.

²⁹² Cf. Banking Act of 1935, Title II, Sec. 201.

²⁹³ While if a Governor was appointed to complete the balance of an unexpired term, she may be reappointed to a full 14-year term, cf. the Banking Act of 1935, Title II, Sec. 203.

²⁹⁴ Federal Reserve Act, Sec. 10 - 11.

²⁹⁵ Fed. Res., *The Federal Reserve System: Purposes and Functions, 1. Overview of the Federal Reserve System*, Library of Congress, Washington D.C., IX Ed., 2005, p. 11, available online at: http://www.federalreserve.gov/pf/pdf/pf_1.pdf#page=4.

²⁹⁶ Federal Reserve Act, Section 11 “Powers of Board of Governors of the Federal Reserve System”.

²⁹⁷ See 12 U.S.C. 1818 (n), and Section 2110.0.2.8.3 “Subpoena Power”, Board of Governor of Fed. Res., *Bank Holding Supervision Manual*, cit.

Coming to the sanctioning powers, if the results of a Federal Reserve's examination reveal critical situations, the Board may apply a range of informal and formal corrective measures to make the bank comply with the given recommendations, including cease and desist orders, written agreements, suspensions, non-bank activity termination, civil money penalties and criminal fines²⁹⁸. If the measures imposed by the Board are not accomplished, the latter may apply to a US District Court in order to have them enforced; a similar prerogative is conferred to the affected institution, which may appeal against the measures before a Federal Court of Appeal²⁹⁹.

3.2. The Federal Deposit Insurance Corporation.

Established by the 1933 Banking Act, and then reformed in 1935, the FDIC is the federal agency that insures the deposits of State-chartered banks which are not part of the Fed. Res. System, in order to guarantee both the safety and soundness of the market and consumer protection. In particular, the FDIC examines bank institutions' compliance with consumer protection laws³⁰⁰, and the Community Reinvestment Act (CRA) which requires banks to help meet the credit needs of the communities they were chartered to serve³⁰¹.

The Corporation is also the back-up supervisor for the remaining insured banks and thrift (or savings) institutions, up to certain limits fixed by the law³⁰². In this sense, the agency has the authority to determine the conditions, for insurance purposes, to be applied on insured banks and saving associations.

The FDIC is led by a Board of Directors, composed of five members, all of whom are appointed by the President of the United States, and confirmed by the Senate for a mandate lasting six years. Among the Directors, no more than three may belong to the same political party; one shall be the Comptroller of the Currency, and another the Director of the new Consumer Financial Protection Bureau³⁰³. The Chair of the Board is appointed by the President, with the Senate's confirmation, for a term of five years.

FDIC possess investigative powers comparable to the Fed. Res.' and has the discretion to apply sanctions to its controlled entities in case of violations of the requested parameters³⁰⁴.

For institutions with assets starting from \$10 billion, in addition to the CAMELS standards the FDIC is also providing a further rating evaluation of quarterly risk, using a scale of A to E, with A being the best rating and E the worst³⁰⁵.

²⁹⁸ See Section 2110.01, Board of Governor of Federal Reserve, *Bank Holding Supervision Manual*, Supplement 45, January 2014, available online at: <http://www.federalreserve.gov/boarddocs/supmanual/bhc/bhc.pdf>; see also Section 5040, Board of Governor of Federal Reserve, *Commercial Banks Examination Manual*, Supplement 41, April 2014, available online at: http://www.federalreserve.gov/Boarddocs/SupManual/supervision_cbem.htm.

²⁹⁹ Cf. Section 2110.0.2.6 "Violations of Final Orders and Written Agreements", and Section 2110.0.2.1 "Cease and Desist Orders", Board of Governor of Fed. Res., *Bank Holding Supervision Manual*, cit.

³⁰⁰ Such as the Fair Credit Billing Act, the Fair Credit Reporting Act, the Truth-In-Lending Act, and the Fair Debt Collection Practices Act.

³⁰¹ The CRA Regulation has been codified in the US Code, title 12 Chapter 30.

³⁰² «The FDIC directly examines and supervises more than 4,500 banks and savings banks for operational safety and soundness, more than half of the institutions in the banking system [and...] insures approximately \$9 trillion of deposits in U.S. banks and thrifts - deposits in virtually every bank and thrift in the country», cf. FDIC, *Who is the FDIC?*, available online at: <https://www.fdic.gov/about/learn/symbol/> (last access April 2016).

³⁰³ Cf. Banking Act of 1935, Title II, Sec. 12B.

³⁰⁴ Sec. 8(i), Federal Deposit Insurance Act of 1950, P.L. 81-797, 64 Stat. 873.

³⁰⁵ Under the Large Insured Depository Institutions (LIDI) Program, cf. <http://www.fdicog.gov/reports07/07-011-508.shtml>.

The Corporation's funding is partially public, since it receives earnings from the investments in the US Treasury securities, as well as premiums from the banks and thrift institutions under its oversight.

Contrary to the Fed. Res., the agency's decisions may be appealed within 30 calendar days from the date of the determination only before an internal Board of Review, called the Supervision Appeals Review Committee³⁰⁶.

3.3. The Office of the Comptroller of the Currency.

As already mentioned, the Office of the Comptroller of the Currency has the task to charter, regulate and supervise national banks and federal savings associations, making sure that they are operating in safety and soundness. Within its jurisdiction, the OCC is also entitled to oversee the implementation of the BSA requirements, with the prerogative of instructing a bank to file a Suspicious Activity Report (SAR) in case of unreported suspected criminal violations³⁰⁷.

Similarly to the other federal agencies, it is the President of the United States, with the confirmation of the Senate, that appoints the Comptroller of the Currency, for a five-year term.

The OCC is an independent bureau of the US Department of Treasury, but it does not receive federal grant from the Congress; on the contrary, its funding derives entirely from the fees paid by the financial institutions under its control.

The Office possesses incisive investigative powers: the agency can examine all of the affairs of the institutions under its jurisdiction, and interview their officers and agents under oath. If the information requested are denied, the OCC may forfeit all the rights, privileges, and franchises of the bank, as well as impose a penalty of not more than \$5,000 for each day that such refusal shall continue³⁰⁸.

In performing its tasks, the OCC examination model is organized with a flexible and decentralized structure that, in the case of large banks, provides for a full-time on-going program, with periodically rotated personnel³⁰⁹.

Contrary to the Fed. Res. and the FDIC, the Office's administrative proceedings are not public; this secrecy, however, does not imply that the information so obtained cannot be shared with other authorities. Indeed, especially if the facts may be relevant to criminal investigations, there are no legal constraints as far as the dissemination of the elements is concerned³¹⁰.

Lastly, the Comptroller has the power to impose corrective measures, including civil money penalties, also if the supervised entities are not complying with the established requirements.

³⁰⁶ Sections B and G, FDIC, *Guidelines for Appeals of Material Supervisory Determinations*, revised version of March 23, 2012, available online at: <https://www.fdic.gov/regulations/laws/sarc/sarcguidelines.html>.

³⁰⁷ OCC, *Bank Supervision Process, Comptroller's Handbook*, September 2007, last update September 2012, p. 48 *et seq.*, available online at: <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/pdf/banksupervisionprocess.pdf>.

³⁰⁸ In accordance with Sections 2 and 21.1-2 "Banking examination", Federal Reserve Act (U.S.C., title 12, and Secs. 141, 222-225, 281-286, and 502).

³⁰⁹ OCC, *Large Bank Supervision, Comptroller's Handbook*, January 2010 (last update May 2013), available online at: <http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/lbs.pdf>.

³¹⁰ See, e.g., OCC, *Interagency Examination Coordination Guidelines*, Banking Bulletin, 93-38, p. 1 *et seq.*, stating that examination materials «may be sent to the directors of other entities that have a need for the information», available online at: <http://www.occ.gov/static/news-issuances/bulletins/pre-1994/banking-bulletins/bb-1993-38.pdf>.

These sanctions may be appealed, in the same terms of the FDIC's, only before the OCC Ombudsman, a body which is formally acting independently from the Office's bank supervisory functions, but which reports directly to the Comptroller of the Currency³¹¹.

3.4. The Securities Exchange Commission.

The Securities Exchange Commission operates with the purpose of protecting the investors and the fairness of the market.

Established after the Great Depression of 1933-1934 to restore the investors' confidence in the financial market³¹², the SEC is governed by five Commissioners, again appointed by the President of the United States for a term of five years, among which no more than three may belong to the same political party. The President also designates the Chair of the Commission in that number, who acts as Chief and representative for the agency.

Contrary to all the agencies already described, the Commission and its Divisions are funded exclusively by public money, granted with the authorization of the Congress.

Correspondingly to the ESMA, this agency has competence over all broker-dealer and financial intermediation activities, upon which it can impose several disclosure duties and regulations, enforcing several legislative Acts³¹³. In addition, the SEC has also the task to enforce brokers and dealers compliance with the BSA requirements³¹⁴. In exercising both tasks, the SEC enjoys powers equal to those possessed by the Federal Reserve.

Lastly, similar to the other supervisory agencies, the SEC may impose sanctions too, both through civil proceedings, with a possibility to appeal before a US District Court, and administrative proceedings, which may be reviewed before an internal administrative judge³¹⁵.

3.5. The impact of the Dodd- Frank Act: OTS, CFPB and FSOC.

Following the 2010 reform, some changes have been made in the panorama of federal regulators, with the aim of strengthening the position of consumers within the financial system and the control over high-risk and potentially criminal behaviours perpetrated by financial institutions.

Firstly, the Dodd-Frank reform brought to the abolition of the Office for Thrift Supervision, a bureau of the Department of Treasury entrusted for charting and overseeing federal savings associations, and corporations owing or controlling them (Thrift Holding Companies).

Established in 1989 as a response to the saving and loan crisis, and, as the other examined bodies, governed by a presidentially-appointed Director, the OTS was financed with a premium mechanism at the expense of its controlled entities.

³¹¹ OCC, *Bank Supervision Process*, cit., p. 48 *et seq.*

³¹² Cf. Securities Act of 1933, as amended through P.L. 112-106, approved on April 5, 2012, and Securities Exchange Act of 1934 ("Exchange Act"), as amended through P.L. 112-158, approved on August 10, 2012, codified as 15 U.S.C. § 78d.

³¹³ SEC - Division of Enforcement, *Enforcement Manual*, October 9, 2013 p. 47 *et seq.*, available online at: <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

³¹⁴ Such as the Securities Act of 1933, the Trust Indenture Act of 1939, the Investment Company Act and the Investment Advisers Act of 1940, the Sarbanes-Oxley Act of 2002, and the Dodd-Frank Act of 2010, cf. Sec.17(a) of the Exchange Act and Rule 17a-8; see also SEC - Division of Enforcement, *Enforcement Manual*, October 9, 2013, p. 10 *et seq.*, available online at: <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

³¹⁵ Cf. Section 19(c) of the Securities Act; Section 21(b) of the Exchange Act; Section 209(b) of the Advisers Act, and Section 42(b) of the Investment Company Act. See also SEC, *Enforcement Manual*, cit., p. 47.

Together with most of the other federal regulators, the Office was numbered during the last financial crisis for its failure in carrying out its tasks³¹⁶. Notably, however, in the following years the OTS was the only agency to be actually shut down and, starting from July 2011, its tasks are exercised by the Office of the Comptroller of the Currency³¹⁷.

The 2010 reform also introduced two new supervising authorities at federal level.

The Consumer Financial Protection Bureau (CFPB)'s goal is to ensure that consumers get all the information needed for their financial decisions, especially as far as prices and risks are concerned. Under the lead of a presidentially-appointed Director, the CFPB has been granted multiple competences, such as regulating and supervising companies, enforcing federal consumer financial protection laws, restricting unfair, deceptive, or abusive acts or practices, and promoting financial education among consumers³¹⁸.

The Dodd-Frank Act also promoted the creation of the Financial Stability Oversight Council (FSOC), a new body operational from 2011, and charged with the task of identifying and responding to systematic emerging financial risks³¹⁹. The Council put together most of the Chairs and Directors of the above-mentioned federal agencies, and an independent insurance expert, also appointed by the President; it is chaired by the Secretary of the Treasury, for a total of ten voting and five non-voting members³²⁰, and it is the first institution whose competence covers comprehensively the whole US federal financial system³²¹.

4. Critical analysis of banking supervision.

As already mentioned, the structural organisation of regulators and the extent of their investigative and sanctioning prerogatives are extremely significant features in evaluating a model of banking oversight, and are among of the first parameters capable to assess if a supervisory model is effective in the way requested by Basel Core Principles.

In addition, the inefficiency of a national enforcement or, anyway, the difficulties created by the extreme variety of the sanctioning systems applied at local level, has perhaps also represented the most powerful factor of “federalization” of supervisory tasks both in the EU and in the US.

At the same time, though, in Europe sanctions are also a fundamental element to determine the whole perspective from which banking supervision should be analysed.

Both in the EU and in the US, in fact, this matter is clearly regulated under the label of administrative law. In the Union, however, as will be illustrated below, the case law of the ECtHR, following the Engel case, leads to a partially different classification of the system under discussion, taking into account the substantial nature of the proceedings before supervising authorities.

³¹⁶ Cf. U.S. Senate Permanent Subcommittee on investigations, cit., *Regulatory Failure: Case Study of the Office of Thrift Supervision*, p. 164.

³¹⁷ See Dodd-Frank Act, Title III.

³¹⁸ Cf. CFPB, *Consumer Response Annual Report January 1 – December 31, 2015*, March 2016, available online at: http://files.consumerfinance.gov/f/201604_cfpb_consumer-response-annual-report-2015.pdf.

³¹⁹ See Dodd-Frank Act, Title I, Subtitle A.

³²⁰ The other regulators represented are: the Fed. Res., the OCC, the CFPB, the SEC, the FDIC, together with the CFTC, the Federal Housing Finance Agency, and the National Credit Union Administration.

³²¹ See FSOC, *2015, Annual Report*, available online at: <https://www.treasury.gov/initiatives/fsoc/studies-reports/Documents/2015%20FSOC%20Annual%20Report.pdf>.

4.1. Independence and accountability.

The independence of banking regulators represents a fundamental feature according to the standards developed by the Basel Committee. Indeed, the relations with other powers, especially the political and the industry ones, is of a major relevance for bodies that have to act independently in a sensitive field such as the financial market one.

In particular, the absence of conflicts of interest in banking supervisors is a first major issue in determining the “quality” of the information gathered, and thus the level of reliability that should be applied in case the latter is disseminated in other proceedings.

Both in the US and in the EU, the need for independence and accountability has to comply with the already-mentioned Principle 2 of the Basel Core Principles, which requires that «the supervisor possesses operational independence, transparent processes, sound governance, budgetary processes that do not undermine autonomy and adequate resources, and is accountable for the discharge of its duties and use of its resources». Essential Criteria to Core Principle 2 further prescribe that supervisors should be independent from any government or industry disturbance.

According to the Basel parameters, this aim has to be achieved through the implementation of transparent rules for the appointment and removal of the heads of these authorities, that should «avoid any real or perceived conflicts of interest». The possibility for the latter to influence the supervisor’s activity should also be reduced by specific rules on the matter.

In addition, a supervisory regulator should be adequately financed «in a manner that does not undermine its autonomy or operational independence», and supported by «staff in sufficient numbers and with skills commensurate with the risk profile and systemic importance of the banks and banking groups supervised»³²².

Taking these parameters into account, the paradigms of banking supervision in the EU and in the US present quite substantial lacunas in their basic structures, most of which are notably common to both systems.

While the EU and the US models have plenty of codes and specific rules affirming the importance of keeping banking supervisors and their staff independent from any undue influence, these good intents risk to be substantially downgraded by the very structural rules shaping the organization of the regulatory authorities.

That concerns first the recruitment procedure of the heads of the supervisory agencies, which also means, in most cases, of their decision-making bodies.

In the US, all Chairpersons are directly appointed by the President with the confirmation of the Senate. The Chairs have then substantial powers in appointing the boards actually governing the regulators.

In the EU, the situation is slightly more differentiated, even if every assessment about the lack of direct political mandate in Community institutions needs to take into account the politically fragmented structure of the Union in all its sectors. As far as the EU institutions are involved, while the European Parliament has a voice in the choice of most Chairpersons of EU authorities, it is the European Council that determines the composition of the SSM and SRM’s Executive Boards.

³²² Cf. BCBS, *Core Principles for Effective Banking Supervision*, Principle 2 - Essential Criteria 1,2,4,5,6. The importance of independence and absence of conflict of interests has been reaffirmed also in the Financial Stability Oversight Council, *2011 Annual Report*, p. 118, available online at: <https://www.treasury.gov/initiatives/fsoc/Documents/FSOCAR2011.pdf>.

The majority of the components of the governing bodies of all supervisors, however, are appointed at national level, thus according to 28 (or 19 for the Eurozone) potentially different set of rules, for instance as far as requirements and length of terms are concerned.

At first glance, such a clear political origin of supervisory authorities may rise some worries, since the latter should act independently (also) from the political power. Nonetheless, the appointment by executive is generally permissible in most legal orders, where it is usually kept under control by “check and balance” mechanisms, and justified with the need to confer some democratic coverage over technical bodies with enormous powers to interfere in the citizens’ life.

A far more relevant and critical issue concerns the independence of supervisory decision-making bodies from the banking industry.

Most of the statutes of the US and the EU regulators contains provisions which affirm the general duty of the supervisors to perform their tasks independently. Still, notwithstanding the role played by conflicts of interest in the last financial crises, none of the examined systems provide for specific mechanisms to avoid so³²³.

That is particularly evident when it comes to the analysis of the supervisors’ funding systems. The majority of regulators, in fact, rely on financing paradigms according to which the incomes of these authorities derive from the periodical fees paid by their controlled entities. Of course, the implementation of such a model, in itself, is not automatically creating problems in all legal systems. Nonetheless, private premiums have tangibly proved to be critical in contexts characterized by a high concentration of financial power in the hands of relatively few financial groups.

In the US post-crisis analyses, underlying conflicts of interest have been recognized as one of the main reasons for a “culture of deference to bank management”, and a light-handed approach by supervisors that did not efficiently opposed (when if not even authorized) an uncontrolled growth of high-risk operations, and financial institutions’ speculations to the detriment of both the investors and the market.

Quintessential examples of these phenomena may be clearly showed by the already-mentioned short sales realized by Goldman Sachs³²⁴, or, analysing the position of federal regulators, by the OTS performances over the mortgage market in the years preceding the burst of the crisis, which have been authoritatively described as «a regulatory approach with disastrous results»³²⁵.

In the specific case of Washington Mutual Bank (WaMu), for instance, the heads of the former Office for the Thrift Supervision, in fact, did not take any significant action against the risks undertaken by WaMu in over a five-year period, notwithstanding the frequent, numerous and substantial red flags pointed out by its own examiners.

Among some minor collateral structural deficiencies, post-crisis inquiries found out that the main cause for the OTS lax and obstructive conduct relied on its dependence on the «semi-annual fees assessed on the institutions it regulated, with the fee amount based on the size, condition, and complexity of each institution’s portfolio. Washington Mutual was the largest thrift overseen by OTS and, from 2003 to 2008, paid at least \$30 million in fees annually to

³²³ Cf. J.R. BARTH, G. CAPRIO JR., D.E. NOLLE, *Comparative International Characteristics of Banking*, in *OCC Economics Working Paper*, 2004-1, January 2004, p. 43-45.

³²⁴ Chapter 1, paragraph 1.2.

³²⁵ Cf. 2011 U.S. Senate Permanent Subcommittee on investigations, cit., p. 162 *et seq.* See also the U.S. Senate Permanent Subcommittee on Investigations, *Wall Street and the Financial Crisis: Role of the Regulators*, S.Hrg. 111-672, April 16, 2010, available online at: <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg57320/pdf/CHRG-111shrg57320.pdf>.

the agency, which comprised 12-15% of all OTS revenue»³²⁶. As explicitly summarized by the WaMu's former Chief Risk Officer: «Washington Mutual made up a substantial portion of the assets of the OTS, and one wonders if the continuation of the agency would have existed had Washington Mutual failed»³²⁷. And again: «OTS provided “by far the softest” oversight of any federal bank regulator. [...] Evidence of OTS’ unusually deferential approach can be found in its internal documents»³²⁸; an approach that eventually led to the abolition of the Office.

The 2010 reform, however, left open the very core problem related to the OTS, since the Office was not the only federal banking regulator to be in a high-risk position of conflict of interests with its own controlled subjects. In particular, the OTS’ successor was identified in the OCC, notwithstanding the fact that also the Comptroller of the Currency’s funding structure relies on fees paid by its regulated entities, and appears to share a “self-restrictive” policy quite similar to the OTS’ one³²⁹.

Another big hotbed of conflict of interests which has not been touched by the Dodd-Frank Act is the relation between regulators and credit rating agencies’ funding, even if the role played by the latter in increasing the tragic consequences of the crisis had been proved substantial.

Indeed, credit rating agencies helped build an active market for securities related to home loans, and continued to do so despite signs of a deteriorating mortgage market, providing top rating (AAA) for most of those financial products. Nonetheless, the vast majority of RMBS and CDO securities with AAA ratings incurred substantial losses and were downgraded to junk securities starting from mid 2008. The tragic consequences of such conducts were highly exacerbated by the fact that, since the AAA score generally implies a less than 1% probability of incurring defaults, these are also the only investments allowed to certain entities with public relevance, like pension funds, and insurance companies.

The causes of such inaccurate rating results have been carefully analysed in the years following the financial collapse, the most significant of which was identified in the «inherent conflict of interest arising from the system used to pay for credit ratings.

Credit rating agencies were paid by the Wall Street firms that sought their ratings and profited from the financial products being rated. The rating companies were dependent upon those Wall Street firms to bring them business and were vulnerable to threats that the firms would take their business elsewhere if they did not get the ratings they wanted.

Rating standards weakened as each credit rating agency competed to provide the most favorable rating to win business and greater market share. The result was a race to the bottom»³³⁰.

³²⁶ Cf. 2010 U.S. Senate Permanent Subcommittee on investigations, cit., p. 164 and 230 *et seq.*: «When asked why OTS senior officials were not tougher on Washington Mutual Bank, several persons brought up the issue of fees – that WaMu supplied \$30 million or nearly 15% of the fees per year that paid for OTS’ operating expenses».

³²⁷ James Vanasek testimony before the U.S. Senate, cf. US Senate Permanent Subcommittee on Investigations, *Wall Street and the Financial Crisis: The Role of High Risk Home Loan*, S.Hrg. 111-671, April 13, 2010, p. 10, available online at: <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg57319/pdf/CHRG-111shrg57319.pdf>.

³²⁸ 2011 U.S. Senate Permanent Subcommittee on investigations, cit., p. 209 *et seq.*: «It seemed as if the regulator was prepared to allow the bank to work through its problems and had a higher degree of tolerance that I had ... seen with the other two regulators. ... I would say that the OTS did believe in self- regulation. [...]».

³²⁹ «Because banking is essentially a business of managing risk, supervision is centred on the accurate evaluation and management of risks. The OCC believes that bankers, and not regulators, should manage their banks», in OCC, *A Guide to the National Banking System*, April 2008, p. 17, available online at: <http://www.occ.gov/publications/publications-by-type/other-publications-reports/nbguide.pdf>.

³³⁰ «Additional factors responsible for the inaccurate ratings include rating models that failed to include relevant

In the light of the above, the Dodd-Frank Act does not seem to have really fixed one of the more serious issue concerning the independence of federal regulators, since no structural changes have been implemented to avoid similar phenomena to occur again in the future.

An equally careful approach needs to be adopted also when looking to the funding system adopted in the EU.

Indeed, some of the more recent financial scandals in Europe, such as the Libor/Euribor and the Fortis Bank's found their origins exactly on the existence of hidden conflicts of interest and poor regulatory supervision³³¹. Certainly, in the last few years, a lot has changed with the creation of the double level of European supervision, one for the EU and one for the Eurozone. Nonetheless, it would be wise not to ease down on the idea that all the structural deficiencies have been effectively and promptly reformed after the last financial crisis: even in the new system, conflicts of interest still maintain a high potential in affecting the efficiency of supervisory regulators' activity³³².

On one side, the overview on credit rating agencies appears to be more institutionally controlled in Europe than in the US, since they fall under the jurisdiction of the ESMA³³³. On the other side, however, the SSM and the SFR have adopted the same premium fee system used by the OTS and the OCC, apparently without any serious reservation: a choice which could be considered quite worrisome in the light of the American experience³³⁴.

It is true that defining an optimal level of controls is not an easy task, and that, so far, no empirical evidence has shown that the choice among different supervisory models is a main factor in determining the efficiency of the banking industry³³⁵.

For instance, the SEC, the only regulator completely paid by public funding, did not have a particularly efficient performance in the years preceding the crisis, starting from the already mentioned failure to intercept Madoff's operations. Indeed, due to its form of financing, the Commission repeatedly suffered from the drastic cuts in its budget decided by the Congress, which certainly and substantially affected its efficiency³³⁶.

mortgage performance data, unclear and subjective criteria used to produce ratings, a failure to apply updated rating models to existing rated transactions, and a failure to provide adequate staffing to perform rating and surveillance services, despite record revenues. Compounding these problems were federal regulations that required the purchase of investment grade securities by banks and others, thereby creating pressure on the credit rating agencies to issue investment grade ratings. Still another factor were the Securities and Exchange Commission's (SEC) regulations which required use of credit ratings by Nationally Recognized Statistical Rating Organizations (NRSRO) for various purposes but, until recently, resulted in only three NRSROs, thereby limiting competition », cf. 2011 U.S. Senate Permanent Subcommittee on investigations, cit., p. 244 *et seq.*

³³¹ For an analysis of the Fortis Bank case, see J.A.E. VERVAELE, *European Criminal Justice in the Post-Lisbon Area*, cit., p. 61 *et seq.*

³³² See, e.g., ECB Monthly Bulletin, *Comparing the Recent Financial Crisis in the United States and the Euro Area with the Experience of Japan in the 1990s*, May 2012, p. 95, available online at: https://www.ecb.europa.eu/pub/pdf/other/art2_mb201205en_pp95-112en.pdf?83cb7037d4b11ad7bab69a4dd31e0c06.

³³³ For the technical standards in force, see https://www.esma.europa.eu/sites/default/files/library/technical_standards_in_force.pdf.

³³⁴ Cf. SSM Regulation, recitals (77)-(78): «The costs of supervision should be borne by the entities subject to it. Therefore, the exercise of supervisory tasks by the ECB should be financed by annual fees charged to credit institutions established in the participating Member States».

³³⁵ Cf. J.R. BARTH, D.E. NOLLE, T. PHUMIWASANA, G. YAGO, *A Cross-Country Analysis of the Bank Supervisory Framework and Bank Performance*, in *OCC Economic and Policy Analysis Working Paper*, 2002-2, September 2002.

³³⁶ The extent of the budget cuts is clearly exemplified by the Senate interview of Lynn E. Turner, former Chief accountant of the SEC, which took place in October 7, 2008:

In the light of the above, however, mixed funding models, which combine both public investments and premium fees from controlled entities, as those adopted by the Fed. Res. and the ESAs, appear to be a more balanced option. Being funded from different sources, these models seem to make the supervisor less likely to be unduly influenced. Therefore, they seem able to confer the supervisor some independence from the banking industry, as required by the Core Principles and, at the same, not to burden the efficiency of the entire regulatory system to the public expenses.

4.2. The dissemination of the information gathered and investigative overlapping.

A further critical profile, as underlined by Core Principle 3, concerns the relationships among banking regulators, and in particular their capacity of operating within an «effective network of cooperation», established through «laws, regulations or other arrangements». In this sense, a high number of regulators within the same financial system - all equipped with sanctioning and investigative powers to be exercised within their limited competence, and often over jurisdictions partially overlapping to each other - may pose substantial issues.

The problems arising from having several federal regulatory agencies to control similar (and sometimes the same) financial institutions have been long-debated overseas.

At first glance, the US system appears more fragmented than the European one, presenting not only the distinction – and sometimes the duplication – between local and federal level, but also an organization that distributes competences among different agencies according to the type of the activities exercised by the controlled entity (deposit funds, bank holding companies, credit unions, commercial and investment banks, and so on), perhaps without taking in due account that, following the deregulatory reforms of the 80s and 90s, this criterion has lost most of its adequacy in classifying financial institutions.

Therefore, to enforce the efficiency of the system and regulate the dissemination of information among supervisory agencies, several Memoranda of Understanding have been implemented, according to which, in case a criminal offence is reasonably suspected, that piece of information may freely circulate among administrative and criminal agencies, without any possibility to oppose restraints such as privacy protection.

This notwithstanding, most of financial institutions active in the market of subprime mortgages and their derivate financial products in the early 2000s, were banks (such as Bank of America, Citigroup, J.P. Morgan-Chase, Wells Fargo), thrifts (for instance Countrywide Financial Corporation, IndyMac Bank, Washington Mutual Bank) and security firms (like Bear Stearns, Goldman Sachs, Lehman Brothers, Merrill Lynch, Morgan Stanley, but also asset management arms of large banks, as Citigroup, Deutsche Bank, and again J.P. Morgan-Chase) which were actually under the constant oversight of federal supervisory regulators

«Rep. Peter Welch: A hundred and forty six people were cut from the enforcement division of the e-, SEC; is that what you also testified to?

Lynn E. Turner: Yes. Yeah, I, I think there has been a, a, a systematic gutting, or whatever you want to call it, of the agency and its capability, through cutting back of staff. [...]

Rep. Peter Welch: The SEC Office of, uh, Risk Management was reduced to a staff, did you say, of one?

Lynn E. Turner: Yeah. When that gentleman would go home at night, he could turn the lights out» reported in C. FERGUSON (Written by), *Inside Job - Transcript*, Sony Pictures, September 2010, p. 27, available online at: http://www.sonyclassics.com/awards-information/insidejob_screenplay.pdf. See also J.B. STEWART, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, in *NYT*, July 15, 2011, available online at: http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html?_r=0.

while engaging in the increasing high risk financial operations and potentially criminal conducts that led to the burst of the crisis.

As reported by the US Senate, «in the area of high risk mortgage lending, for example, bank regulators allowed banks to issue high risk mortgages as long as it was profitable and the banks quickly sold the high risk loans to get them off their books.

Securities regulators allowed investment banks to underwrite, buy, and sell mortgage backed securities relying on high risk mortgages, as long as the securities received high ratings from the credit rating agencies and so were deemed “safe” investments. No regulatory agency focused on what would happen when poor quality mortgages were allowed to saturate U.S. financial markets and contaminate RMBS and CDO securities with high-risk loans.

In addition, none of the regulators focused on the impact derivatives like credit default swaps might have in exacerbating risk exposures, since they were barred by federal law from regulating or even gathering data about these financial instruments»³³⁷.

In general terms, however, at academic level the multiplicity of supervisory authorities has been differently interpreted, giving rise to opposite orientations.

While some scholars consider the overlapping of regulatory agencies as a detrimental fragmentation that is weakening the public oversight on matters that will require a sharper and coordinated response, others believe it to be a fruitful abundance, necessary and needing to be further developed to encourage a virtuous competition able to make regulators more responsive to the proliferation of financial malpractices and crimes³³⁸. The desirability of such a competition, however, may lose some of its charm taking again the OTS’ conduct as an example.

As discovered in the course of the investigations, in fact, the Office policy did not limit itself to a guilty indulgence towards its controlled entities, but resulted also in such a positive obstructive behaviour against the FDIC examiners, with whom the OTS was sharing its oversight, that the relationship between the two agencies has been formally targeted as a «turf war», which ended with a «hasty seizure and sale»³³⁹. Substantial improvements concerning

³³⁷ All references may be checked in the result of the investigations carried on by the 2011 U.S. Senate Permanent Subcommittee on investigations, cit., p. 41.

³³⁸ In favour of a reduction of the number of regulators see, e.g., 2011, U.S. Senate Permanent Subcommittee on investigations, cit., p. 36; R.E. MYERS II, *Complex Time Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 2011; on the opposite view a consistent part of the US scholars: R. ROMANO, *The Need for Competition in International Securities Regulation*, Yale International Center for Finance (June 2001); E.J. KANE, *Regulatory Structure in Futures Markets: Jurisdictional Competition between the SEC, the CFTC, and Other Agencies*, *Journal of Futures Markets*, 4, 1984; P.H. KUPIEC, A.P. WHITE, *Regulatory Competition and the Efficiency of Alternative Derivative Product Margining Systems*, Finance and Economics Discussion Series, Board of Governors of the Federal Reserve System, no. 96-11, June 1996, also to avoid that a single regulator monopoly may be affected by excessive power, cf. D.T. LLEWELLYN, *Introduction: the Institutional Structure of Regulatory Agencies*, in N. Courtis (ed), *How Countries Supervise Their Banks, Insurers, and Securities Markets*, (London: Central Bank Publications), p. xi-xix, 1999; C. BRIAULT, *The Rationale for a Single National Financial Services Regulator*, Financial Services Authority Occasional Paper, series 2, 1999.

³³⁹ Cf. 2011 U.S. Senate Permanent Subcommittee on investigations, cit., p. 177 and 198 *et seq.*: «Beginning in 2006, OTS management expressed increasing reluctance to allow FDIC examiners to participate in WaMu [...] OTS officials employed a variety of tactics to limit the FDIC oversight of the bank, including restricting its physical access to office space at the bank, its participation in bank examinations, and its access to loan files. In July 2008, tensions between the FDIC and OTS flared after the FDIC sent a letter to OTS urging it to take additional enforcement action [...] OTS not only rejected that advice, but also expressed the hope that the FDIC would refrain from future *unexpected letter exchanges*. In a separate email, Scott Polakoff, a senior OTS official called the FDIC letter *inappropriate and disingenuous* [...] OTS even went so far as to limit the FDIC’s physical access to office space, as well as to needed information, at WaMu’s new headquarters. [...] OTS also restricted the FDIC’s access to an important database that all examiners used to review WaMu documents [...] from July until

agencies overlapping cannot be found even in the Dodd-Frank Act, which on the point appears quite inconclusive. And indeed whilst it, from one side, abolished an ineffective regulator as the OTS; on the other the statute potentially boosted the overlapping phenomenon, increasing the number of competent federal supervisory agencies.

On the contrary, the European supervisory system resulting from the 2011-2015 reforms may appear more straightforward, seeking for a single, centralized oversight; certainly achieving an improvement if compared to the previous highly-fragmented national regulations.

Nonetheless, also in the new legal framework there are several lacunas and discrepancies, which are raising the very same critical questions described for the US supervisory model.

First of all, while the ESFS and the apparatus for bank crises management (SRM, SRF, EDIS and DGS) apply over all the 28 EU Member States, the new centralized regulatory supervision operates only over the banking sector of 19 States, and thus will have to cooperate with the ESFS authorities for what exceeds its competences.

Moreover, even within its narrowed jurisdiction, the SSM will have to heavily rely on the cooperation with national authorities, which retain some fundamental powers, especially when it comes to phenomena with a critical weight in the management of banking supervision, such as the enforcement of AML/CFT programmes.

Lastly, being included in a Directive, the penalties imposable by the SSM in the Eurozone will not even be granted a certain uniformity among Member States when it comes to sanction the same violations committed in different geographical and legal contexts.

In such a still highly fragmented arena, it is thus not surprising neither that a great deal of the new SSM Regulations is precisely aimed at reinforcing forms of cooperation among the national and the European levels, nor that the EBA role has been maintained in order to facilitate the inter-agency relations through a central database containing all relevant information, accessible only to competent authorities.

Lastly, in the EU the issue of cooperation may be also seen as problematic under a different and opposite point of view.

A short-term perspective, in fact, sees the SSM system still under construction, while the oversight on major banking groups is no more exercised by NCAs.

Indeed, taking into account the recent establishment of the whole supervisory system, beginning only from 2011, and the long time frame necessary to make it fully operational, banking supervision in Europe has also to face the risk of a temporary lack of effective control de facto which should not be underestimated, to avoid the whole SSM system to be torn to shreds from its very outset.

At the moment thus, in Europe perhaps even more than in the US, the efficiency of the overall system still heavily relies on the existence of a successfully and effective cooperation among several supervisory agencies.

4.3. Sanctioning Powers in the EU: the substantial criminal nature of banking supervision.

November 2006, a period of about four months, the FDIC examiners were denied access to both office space on the bank's premises and the examiner's library. At the same time OTS was withholding office space and database access from the FDIC examination team, it also, for the first time, refused an FDIC request to participate in an OTS examination of WaMu»; see also p. 208: «The WaMu case history demonstrates how important it is for our federal regulators to view each other as partners rather than adversaries in the effort to ensure the safety and soundness of U.S. financial institutions».

The analysis of the sanctioning powers of supervisory authorities in the EU raises several critical issues, starting from their legal basis.

First of all, within this context, the very choice of using a directive to determine the typology of the penalties and their range contributes to further complicate the overall legal framework.

The directive as a legal tool, in fact, generally needs to be transposed at national level to be enforced, and establishes only minimum standards, thus causing its content to potentially highly vary from country to country in its implementation.

Indeed, Member States, thanks to the use of a directive-tool, have been left free to establish any kind of sanctions in the national transposition of CRD IV, as long as they result effective, dissuasive and proportionate. On the other side, however, according to the SSM Regulations, the ECB is not allowed to impose criminal penalties, not even over the credit institutions under its jurisdiction. Therefore, in case Member States opt for a set of criminal sanctions also towards significant financial institutions, the ECB would be prevented to use its direct sanctioning powers as provided by art. 18 § 1 SSM.

At first glance, such a conclusion would appear as quite a strong obstacle to the enforcement of the ECB's powers; nonetheless, this profile has a lower importance in practice, since so far none of the Member States has made this choice during the transposition of the Directive. Moreover, the type of sanctions applicable by the ECB needs to be completely reassessed in the light of the substantial nature of the matter, as will be illustrated shortly.

Another unprecedented issue originated by the use of a directive-tool is that, in any case, when the SSM imposes a sanction, it is not applying EU law, but actually the national transposed legislations. That is because the ECB shall apply all relevant Union law and, where this is composed of directives, that implies the applicability of the national legislation transposing them.

The ECB is the first European authority allowed to do so, while this feature finds a similar result in the draft of the EPPO Regulation: a parallelism which is indicative of the common idea of "federal" European institutions shared by both projects³⁴⁰.

Whilst further critical issues deriving from the choice of the legal basis will most likely emerge in the next future, especially with regard to the different interpretations of national law given at the EU and at the domestic level, what can be already stated even at this early stage of the BU implementation - which also represents the reason why regulatory systems have been included in this research - concerns the nature of banking supervision.

As already mentioned, the case law of the ECtHR has long established that the criminal nature of sanctions shall not be determined following national classifications, but rather according to the substantial *Engel* criteria³⁴¹.

In particular, taking into account the criterion about the nature of the offence, the jurisprudence of the Strasbourg Court recognized the *coloration pénale* of a sanction if the rule containing it «prescribes conduct of a certain kind and makes the resultant requirement

³⁴⁰ As frequently stated by the ECJ, this new feature may be read as a relevant step in the European integration project towards the acknowledgement of a single integrated legal system, composed indifferently of European and national law; in this sense, cf., e.g., A. WITTE, *The Application Of National Banking Supervision Law By The ECB: Three Parallel Modes Of Executing EU Law?*, in 21 *MJ* 1, 2014, p. 109.

Such an interpretation may be confirmed considering that also the EPPO, which has been proposed precisely with the idea of strengthening the European integration under a criminal procedure point of view (like the SSM in its field) will, if the project will be approved, have to apply not only European, but also and above all national relevant law.

³⁴¹ Chapter 1, paragraph 2.3.2.

subject to a sanction that is punitive», in practice, when it «seeks to punish as well as to deter»³⁴².

Under this perspective, the Directive and its national transpositions request banks to adopt certain prudential conducts in the management of their activities, and require to sanction the violations of those rules with a minimum level of penalties.

It shall be also noticed that all the sanctioning provisions included in CRD IV have a generally binding character, since they are directed towards all credit institutions in the EU. In addition, supervisory authorities may exercise their sanctioning powers on a finding of a neglect to comply with the obligations required, all clues identified by the Court in its case law as symptoms of criminal nature³⁴³. Thus, following the interpretation of the second *Engel* criterion to the CRD IV, it is possible to infer that the sanctions provided for by the Directive have a substantial punitive nature.

A similar conclusion may be drawn taking the third *Engel* criterion into consideration.

Indeed, at least when considering art. 18 §§ 1 and 7 SSM R, the severity of CRD IV's penalties is clearly revealed by the level of monetary fines that may be imposed, and considering how relevant their amounts upon the controlled entities' budget might be³⁴⁴.

In the light of the above, it emerges how the matter of banking supervision possesses all the requirements to be classified as “punitive” in its substance according to the ECtHR criteria.

This conclusion needs of course to be put in the perspective of the working method of the Court, which is proceeding with a case-by-case approach and it is not formulating general principles able to be applied regardless of the context.

Precisely in its case law, however, the ECtHR has already recognized the criminal nature of administrative sanctions that characterize proceedings analogous to the one carried out by the SSM.

That is, for instance, what happened in *Dubus S.A. v. France*, where the Court affirmed the substantial criminal nature of the proceeding before the *French Commission bancaire*³⁴⁵, or the more recent decision *Grande Stevens v. Italy*, where similar conclusions were drafted with regard to the Italian authority for securities supervision (CONSOB).

In the latter in particular, the Court explicitly stated its conclusions with arguments that seem to fit quite well also in the case of banking supervision «as to the nature and severity of the penalty which was “likely to be imposed” on the applicants [...] the fine which the CONSOB was entitled to impose could go up to EUR 5,000,000 [...], and this ordinary maximum amount could, in certain circumstances, be tripled or fixed at ten times the proceeds or profit obtained through the unlawful conduct [...] Imposition of the above-mentioned pecuniary administrative sanctions entails the temporary loss of their honour for the representatives of the companies involved, and, if the latter are listed on the stock exchange, their representatives are temporarily forbidden from administering, managing or supervising listed companies for periods ranging from two months to three years. The CONSOB may also prohibit listed companies, management companies and auditing companies from engaging the services of the offender, for a maximum period of three years, and request professional associations to suspend, on a temporary basis, the individual's right to carry out his or her

³⁴² *Öztürk v. Germany*, cit., § 53.

³⁴³ *Benham v. the United Kingdom*, cit., § 56.

³⁴⁴ On the possibility of considering the sanction *pénale* depending on the «nature, as significant or less significant, of the bank concerned», see R. D'AMBROSIO, *Due process and safeguards*, cit., p. 27.

³⁴⁵ *Affaire Dubus S.A. v. France*, cit., §§ 36-38: «La Cour est d'avis que la Commission bancaire, lorsqu'elle a infligé à la requérante la sanction du blâme, devait être regardée comme un «tribunal» au sens de l'article 6 § 1 de la Convention».

professional activity [...] In the light of the above, and taking account of the severity of the fines imposed and of those to which the applicants were liable, the Court considers that the penalties in question, though their severity, were criminal in nature»³⁴⁶.

The recognition of the *coloration pénale* of supervisory sanctions implies the application of the guarantees provided in art. 6 ECHR also to the SSM procedures and, at national level, to the NCAs' when assisting the ECB in the preparation of its final decisions³⁴⁷. However, since the NCAs' proceedings still highly differ from country to country, their detailed analysis falls out of the scope of this research.

What will be discussed, on the other hand, is the impact that art. 6 ECHR, and its CFREU correspondents (articles 47-50 of the Charter), shall have on the procedural rules of the Single Supervisory Mechanism with regard to some of their main fundamental profiles: the right to an independent and impartial tribunal, the right of access to the files, the right of defence and the presumption of innocence, the right to express one's view on the proceeding, the right to a public hearing, and the right to have an effective remedy³⁴⁸.

In this respect, it is important to underline how some of the safeguards pertaining to the rights of defence, and especially to the right to be heard and to the right of access to files are always required by the jurisprudence of the European Courts when it comes to proceedings «initiated against a person which are liable to culminate in a measure adversely affecting that person», irrespective of its administrative or criminal nature (even if not necessarily with the same degree of protection)³⁴⁹. The other rights mentioned above, on the contrary, are required only in case the applicable sanctions are recognized to be substantially criminal.

4.3.1. The concept of “tribunal”.

A first major issue concerning the application of art. 6 ECHR to the SSM proceeding is whether the supervisor's structure is in compliance with the principles of independence and impartiality requested for a tribunal. Of course that may be assessed only by implying that the decision-making body of an officially administrative authority can be actually recognized as “tribunal”.

The jurisprudence of the Strasbourg Court under this profile opted for a quite extensive interpretation. Indeed, according to its case law, an administrative body can fall under the

³⁴⁶ *Grande Stevens and others v. Italy*, cit., §§ 97-99.

³⁴⁷ Cf. R. D'AMBROSIO, *Due process and safeguards*, cit., p. 85.

³⁴⁸ The right to be promptly informed in a language which the suspects understand will not be dealt with here, since the ECB proceedings are carried out in any of the EU official languages, as agreed between the SSM and the competent NCA, cf. articles 23-24 SSM FR. The other fundamental rights contained in art. 6 ECHR will not be taken into account in this work, notwithstanding their importance, because this analysis mainly focuses on investigation rather than on trial, and even in the first phase, it is considering the most critical profiles of an administrative investigative body with substantially criminal competences.

³⁴⁹ Cf., e.g., Judgement in *G.J. Dokter, Maatschap Van den Top and W. Boekhout v Minister van Landbouw, Natuur en Voedselkwaliteit*, Case C-28/05, 15 June 2006, ECLI:EU:C:2006:408, § 74. On this issue, see also A. DE MOOR-VAN VUGT, *Administrative sanctions in EU law*, in *Review of European Administrative Law*, Volume 5, 1, Spring 2012, p. 40-41, according to which «the adoption of the Charter as part of the Lisbon Treaty has stimulated the further clarification and specification of safeguards in administrative sanctioning procedures for both measures (of a reparatory nature) and penalties (of a punishing nature). The difference in approach” between the two types of sanctions “is gradual, which makes the reluctance of the CJ to qualify a sanction as criminal even more questionable. Most procedural safeguards that have been implemented apply to both categories. The penalties demand a more restrictive approach in the sense that the authorities need to respect the guarantees that have been set by the ECHR and the Charter, when it comes to a criminal charge».

definition of “tribunal”, even without being identified as such in its domestic system³⁵⁰. The decisive criterion in this matter is rather given by the acknowledgement of a judicial function, described by the ECtHR as the capability of «determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner»³⁵¹, together with the power to issue binding decisions which may not be altered by a non-judicial authority³⁵². According to the Court, then, also authorities which are not labelled as judicial at national level may be considered tribunals.

Insomuch as this “equalization” may appear critical, since only judicial authorities are actually obliged to follow highly-guaranteed procedures, and benefit from a guaranteed appointment, the interpretation of the Court at least allows to extend some fundamental safeguards also to authorities which otherwise would hardly be requested to grant a similar level of protection. Therefore, here the word “tribunal” can be used to indicate the decision-making bodies of an administrative authority too, and in particular of the SSM.

That being so, any tribunal must satisfy a series of requirements, such as independence, impartiality, duration of its members’ terms of office, and guarantees afforded by its procedure³⁵³. However, as will be illustrated below, in case the administrative authority is not complying with all these elements, the ECtHR still recognized the legitimacy of the decisions taken by such a body as long as they might be subject to subsequent review by a «judicial body that has full jurisdiction»³⁵⁴.

4.4. The right to an independent and impartial tribunal.

Independence and impartiality are regarded as central principles by the Convention; nonetheless, according to the jurisprudence of the Strasbourg Court, they are also the features which are mostly lacking when examining administrative decision-making bodies³⁵⁵.

According to the case law of the ECtHR: «in determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the case [...] the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence»³⁵⁶. Specifically, a tribunal is considered shielded by outside pressures when its members are protected from removal during their term of office, either by law or in practice³⁵⁷.

Moreover, according to art. 6 ECHR and art. 47 CFREU, everyone is entitled to a judgment before an impartial tribunal established by law, and free from any prejudice. In order to verify the compliance with this principle, the Court has developed a subjective and an objective test³⁵⁸.

³⁵⁰ ECtHR, *Guide on Article 6. Right to a Fair Trial (criminal limb)*, 2014, § § 44, available online at: http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

³⁵¹ *Belilos v. Switzerland*, 29 April 1988, Application no. 10328/83, § 64.

³⁵² *Findlay v. the United Kingdom*, 25 February 1997, Application no. 22107/93, 25 February 1997, § 77.

³⁵³ *Id.*, see also *Coëme and Others v. Belgium*, 22 June 2000, Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 99; *Richert v. Poland*, 25 October 2011, Application no. 54809/07, § 43.

³⁵⁴ *Umlauft v. Austria*, 23 October 1995, Application no. 15527/89, § 37.

³⁵⁵ *Barberà, Messegué and Jabardo v. Spain*, 13 June 1994, Application nos. 10588/83; 10589/83; 10590/83.

³⁵⁶ *Campbell and Fell v. UK*, *cit.*, §78; *Kleyn and Others v. the Netherlands [GC]*, 6 May 2003, nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 190.

³⁵⁷ *Engel v. Netherlands*, *cit.*, § 33.

³⁵⁸ *Hauschildt v. Denmark*, 24 May 1989, Application no. 10486/83.

Under the subjective test, it is necessary to show that the members of the decision-making body did not act with personal bias against the applicant³⁵⁹.

Under the objective test, the tribunal should not offer any legitimate chance to doubt, even just in the appearances, of its impartiality³⁶⁰. In particular, a major criterion affirmed by the Court to test this parameter, which is especially relevant in case of administrative bodies, regards the separation between the investigative body and the entity responsible for the judgement and the imposition of the penalties.

In this respect, while some financial regulations, like those concerning credit rating agencies, or Over-the-counter (OTC) derivatives³⁶¹, explicitly affirm the principle of separation between investigative and decision-making powers, the SSM does not provide for such a specific rule to be applied on all its activities. Accordingly, it appears that the ECB is obliged to implement this feature only in those cases where the guarantees of the fair trial may apply thanks to the *coloration pénale* of the sanctions (which is not the case, e.g., of cease-and-desist order and the suspension of voting rights³⁶²).

In the light of the above, the picture concerning the SSM might appear quite critical indeed, especially when comparing the principle of impartiality with the structure of the SSM decision-making procedure, which briefly goes as follows.

Whether any reason to suspect a breach emerges, the ECB refers it to the Investigating Unit; the Unit undertakes investigations, and, if that is the case, elaborates a draft proposal of penalty to the Supervisory Board. The latter then passes a complete draft proposal to the Governing Council, which indirectly approves it and thus takes the final decision.

Interestingly, a similar decision-making process was examined by the ECtHR in *Grande Steven* with referral to the CONSOB structure of the time, according to which «the accusation is drawn up by the IT Office, which also carries out the investigations; the results are then summarized in the Directorate's report, which contains conclusions and proposed penalties. The final decision on imposing penalties lies solely with the Commission [CONSOB]»³⁶³.

In that case, although the Court recognized the existence of a «certain separation between the investigative entities and the entity with responsibility for determining whether an offence had been committed and imposing penalties»³⁶⁴, the overall proceeding was not considered to be in compliance with the Conventional principles.

In fact, as affirmed by the ECtHR, if the investigation, accusation and decision on the penalties are exercised by «branches of the same administrative body, acting under the authority and supervision of a single chairman [...] this amounts to the consecutive exercise of investigative and judicial functions within one body; in criminal matters such a combination of functions is not compatible with the requirements of impartiality set out in Article 6 § 1 of the Convention»³⁶⁵.

Applying the same parameters to the SSM, also the different bodies composing the new supervisory mechanism – the Investigating Unit, the Supervisory Board, the Administrative

³⁵⁹ Id. § 47.

³⁶⁰ Id. § 48; *Sramek v. Austria*, 22 October 1984, Application no. 8790/79, § 42.

³⁶¹ Cf. art. 23e, Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, and art. 64, Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

³⁶² R. D'AMBROSIO, *Due process and safeguards*, cit., p. 64.

³⁶³ *Grande Stevens and others v. Italy*, §136.

³⁶⁴ Idem.

³⁶⁵ Idem, §137.

Board of Review, and the Mediation Panel – should be considered as acting under the authority and supervision of the same leading body.

In fact, it is the Governing Council which appoints four of the members of the Supervisory Board, and proposes the appointment of the other two to the European Council; again, it is the Governing Council that takes the decisions on whether to apply sanctions or not. Lastly, according to art. 123 SSM FR, the Investigating Unit's members are appointed by the ECB.

On this issue, the text of the Regulation does not specify which body of the Central Bank is entrusted with this task. It is of course desirable that the gap will be filled by a following regulation, as it has happened with regard to the Administrative Board of Review.

Actually, it might be interesting to notice that in the latter, which presented a formulation equivalent to the Investigating Unit's one («designated by the ECB» and «shall be appointed by the ECB»³⁶⁶), the issue has been solved giving that competence precisely to the Governing Council³⁶⁷.

4.5. The presumption of innocence.

As already mentioned, the defence rights of the parties concerned shall be fully respected during the ECB supervisory procedures³⁶⁸. Notwithstanding this general statement, however, not all the guarantees provided for by art. 6 ECHR and art. 48 CFREU find an explicit rule in the SSM Regulations. This issue appears particularly thorny when it comes to some of the core principles of fair trial, such as the presumption of innocence and the privilege against self-incrimination.

The lack of regulation concerning these fundamental rights might be already regarded as a violation of the parameters requested by the Convention: in fact, in the absence of any specific rule on the matter, administrative bodies are not usually providing for a sufficient level of protection.

Even taking into consideration the few provisions of the Regulations actually dealing with these principles, however, their content appears quite inadequate.

According to those rules, the ECB may investigate over all financial institutions under its jurisdiction, all persons belonging to them, and third parties to whom the same entities have outsourced functions or activities³⁶⁹. Secrecy law plays a very restricted role in this field, since it neither exempts banks from their duty, nor represents a cause for invoking a breach of professional secrecy.

In particular, as already mentioned, the SSM may obtain written or oral explanations from any of these persons, or their representatives or staff; as well as «interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation»³⁷⁰. Under this profile, whilst the interview of third persons requires their consent, insomuch as the party subject to an investigation is concerned, the picture looks quite different.

First, art. 28 SSM FR requires the parties to participate in an ECB supervisory procedure, and to provide assistance to clarify the facts, if asked to do so. In addition, upon request, all the

³⁶⁶ Cf. art. 123 § 1, SSM FR with art. 24 SSM R.

³⁶⁷ Cf. art. 4 § 1, Decision of the European Central Bank of 14 April 2014 concerning the establishment of the Administrative Board of Review and its Operating Rules (ECB/2014/16).

³⁶⁸ Cf. art. 32 § 1 SSM FR and art. 22 SSM R.

³⁶⁹ Art. 10 SSM R.

³⁷⁰ Art. 11 § 1 (c) - (d) SSM R.

above-mentioned persons are compelled («shall») to provide any information that «is necessary in order to carry out the tasks conferred on it by this Regulation»³⁷¹.

These rules need to be carefully interpreted to assess their compliance with the case law of the European Courts.

According to most their jurisprudence, in fact, freedom from self-incrimination is not an absolute right, since it includes only strictly self-incriminating circumstances, and not factual questions³⁷².

The prevailing interpretation, however, has been accepted also in several legislative texts at the EU level, starting from Competition law, where it is clearly stated that: «when complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement»³⁷³.

The very same case-law, however, decisively ruled in favour of preventing investigating authorities from exercising «improper compulsion», and in particular «under any circumstances» from using the non-cooperation of the interviewed against herself, not even when the latter has been informed in advance that, under certain conditions, his silence may be so used³⁷⁴.

Under this profile, the ECtHR has further specified that improper compulsion may derive not only by the use of physical force, but also from the request to give evidence at her own trial, especially when done under threat or imposition of a criminal sanction for failure to do so³⁷⁵.

Also the recently approved Directive 2016/343 on the presumption of innocence adopted a similar interpretation, even if the text approved did not contain any exclusionary rule for the elements gathered in violation of the principle, as it had been previously drafted in the Commission proposal³⁷⁶.

Therefore, in order to avoid severe clashes with the principles expressed by the Convention, the duty to cooperate established in the SSM Regulations shall be interpreted as obliging the undertakings just to cooperate in the examination of pre-existing documents, and to answer questions only as long as they are exclusively factual, and not turning into a concealing way to force admissions of responsibility.

4.6. The right to a public hearing and to appeal proceedings.

Articles 6 ECHR and 47 CFREU also guarantees the right to a public hearing, meant as hold in public and in oral form. Under this perspective, the SSM suffers from the typical structure of an administrative investigating body.

³⁷¹ Art. 10 §§ 1-2 and art. 29 §2, SSM R.

³⁷² The case law has been partially recently reconsidered in *Chambaz v. Suisse*, 5 April 2012, Application no. 11663/04, §§ 50-58.

³⁷³ Cf. Recital (23), Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

³⁷⁴ *Murray v. The UK*, 28 October 1994, [GC] Application no. 18731/91, § 46.

³⁷⁵ *Saunders v. The UK*, 17 December 1996, Application no. 19187/91, § 65; *Heaney and McGuinness v. Ireland*, 21 December 2000, Application no. 34720/97, §§ 48-49.

³⁷⁶ Cf. art 7, Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, with art. § 4, Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, Bruxelles, 27.11.2013 COM(2013) 821 final.

First, the possibility of establishing an oral hearing is left to the mere discretion of the ECB, through a decision of the Investigating Unit. In addition, the SSM Framework Regulation explicitly states that «oral hearing shall not be held in public»³⁷⁷.

This violation of the content of art. 6 ECHR and its Charter correspondent, however, has been partially downsized by the case-law of the Strasbourg Court, which allows this lacuna to be remedied if the decision of the administrative body is subject to review on points of law and on the facts by a judicial body³⁷⁸.

According to such jurisprudence, that circumstance shall be considered as able to provide the right to a judicial review beyond a “formal” control of legality, which includes also autonomous evaluations on the appropriateness and proportionality of the penalty imposed by the administrative authority³⁷⁹.

Even in the light of the above, however, the compliance of the SSM with these fundamental rights remains highly questionable.

National judicial authorities play a marginal role in the review of the decision-making process. Indeed, even if they are directly involved in conferring prior authorizations to on-site inspections, domestic judicial authorities possess a quite limited jurisdiction.

In primis, they may intervene in the ECB proceeding only when so required at national level³⁸⁰.

This provision could be criticized in the light of some ECtHR decisions, according to which such a control should be made available in any case, and not only if provided for by the national law³⁸¹. The solution of art. 13 SSM FR, however, has been properly considered as a «fair compromise between the values involved, since it preserves the effectiveness of the ECB’s supervisory powers without prejudice to the protection of business premises to the extent that it is recognized in the relevant national law»³⁸².

Moreover, similarly to what has been affirmed in Competition law under the ECJ *Roquette Frères* case, the judicial assessment of an inspection is shared between the Union and the national level³⁸³. Following this interpretation, according to the SSM Regulations national judges are entrusted only with the control on the proportionality of the measures adopted, just in order to assess whether the ECB decisions are arbitrary or excessive.

The specification between national and European competences results however quite blurred, since local judicial authorities are excluded from any review on the matter, that is on the necessity to apply the aforementioned measures with regard to the subjects involved and the aims pursued, which is reserved to the ECJ.

In this sense, whilst national judges may ask the ECB for detailed explanations relating to the grounds for suspecting that an infringement has occurred, to the seriousness of the suspected infringement and to the nature of the involvement of the person subject to the coercive measures, the same authorities are not entitled to review any of these parameters, nor allowed to be shown the ECB’s files on the matter³⁸⁴.

³⁷⁷ Cf. articles 24 §2 and 126 § 3 SSM FR.

³⁷⁸ *Riepan v. Austria*, 14 November 2000, Application no. 35115/97.

³⁷⁹ *A. Menarini Diagnostics S.R.L. v. Italy*, 27 September 2011, Application no 43509/08, §§ 59-63-67; see also *Schmautzer v. Austria*, 23 October 1995, Application no 15523/89, §36; *Gradinger v. Austria*, 23 October 1995, Application no 15963/90, §44.

³⁸⁰ Art. 13 SSM FR.

³⁸¹ *Société Colas Est and others v. France*, 16 April 2002, Application no. 37971/97, §§ 45-50.

³⁸² R. D’AMBROSIO, *Due process and safeguards*, cit., p. 54.

³⁸³ Judgement in *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes*, and *Commission of the European Communities*, C-94/00, ECLI:EU:C:2002:603.

³⁸⁴ Art. 13 § 2 SSM FR.

It is true that neither the Board of Appeal established for the ESAs is provided with a jurisdiction extended to the merit of the assessment, since it may only «confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority»³⁸⁵. However, as reasonably pointed out, an unlimited review of the decisions of the ESAs is less necessary, since they cannot enjoy a broad discretionary sanctioning; on the contrary, considering the margin of discretion afforded to the ECB in the adoption of the supervisory decisions here a different solution would have been required³⁸⁶.

Second, neither the Administrative Board of Review may be really considered as a judicial body granted with the full jurisdiction requested by the ECHR.

This conclusion derives primarily from the fact that the Board is merely expressing an opinion on the matter, which the Supervisory Board shall take into account when submitting a new draft decision to the Governing Council. The latter, however, according to the SSM Regulation, is not bound by the decision of the Administrative Board of Review, but maintains a discretionary power to decide differently from the Supervisory Board draft³⁸⁷.

The only judicial authority which, on paper, is conferred full jurisdiction on the lawfulness of the acts adopted by the ECB is the European Court of Justice³⁸⁸.

Notwithstanding those provisions, it is still uncertain whether an appeal before the ECJ could be considered in compliance with the duty to guarantee a full jurisdiction review.

According to the Treaty, natural or legal persons may appeal to the ECJ «against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures». However, even after the implementation of the Lisbon Treaty, the new wording of art. 263 § 4 TFEU is not yet considered to have effectively enhanced private individuals' access to justice. The strict interpretation of the notion of “implementing measures” given by the ECJ, thus, is still confirming a quite limited access to the Court for third-parties³⁸⁹, even if compliance with art. 6 ECHR is satisfied as long as the individual affected by the measure has the right to appeal against the decision.

On the other side, the extension of the Court's jurisdiction carried out by the Lisbon Treaty has already increased the workload of the ECJ, raising multiple concerns about the capability of the Court to deal with a constantly increasing number of cases pending before it in a reasonable time³⁹⁰. Especially in a context as delicate as banking supervision, in which the stability of the financial market may not be able to survive the slowness of a review processes, the ECJ, as it is currently structured, risks to be seriously prevented from

³⁸⁵ Cf. art. 60 § 5 of the ESAs Regulations.

³⁸⁶ R. D'AMBROSIO, *Due process and safeguards*, cit., p. 84.

³⁸⁷ Art. 24 § 7 SSM R; that possibility is also provided the Statute of the European System of Central Banks, cf. art. 35, Statute of the ESCB.

³⁸⁸ Art. 13 and 24, § 11 SSM FR.

³⁸⁹ Cf., e.g., R. MASTROIANNI, A. PEZZA, *Access of individuals to the European Court of Justice of the European Union under the new text of article 263, para 4, TFEU*, in *Riv. it. dir. pub. comunitario*, 5, 2014, p. 947.

³⁹⁰ See, e.g., House of Lords, European Union Committee, *Workload of the Court of Justice of the European Union: Follow-Up Report*, 29 April 2013, available online at: http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/united_kingdom/own_initiative/oi_workload_of_the_court_of_justice_follow_up_report/oi_workload_of_the_court_of_justice_follow_up_report_lords_opinion_en.pdf, following a first report in 2011 and still maintaining some concerns about the capability of the new structure to deal with its workload.

A worries which led to multiple reforms to be adopted on the Statute of the Court, see, finally, the Regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, Brussels, 18 November 2015, available online at: <http://data.consilium.europa.eu/doc/document/PE-62-2015-INIT/en/pdf>.

effectively exercising in practice a full jurisdiction in the sense required by the ECHR. This aspect is relevant also because the review provided by art. 263 TFEU is subject to strict time limitations.

In fact, if no proceeding is instituted within the two-month period established by art. 263 § 6, the challenged decision is held to be valid and cannot be contested anymore as far as its merit is concerned³⁹¹.

However, the main critical issue concerning the ECJ review under the ECHR parameters is rooted in the ambiguity of the SSM Regulations on the matter.

Indeed, according to the SSM R, aside from for the review of on-site inspections, also the Court's review appears to be confined only to the legality of the acts adopted by the ECB, and to this aim, following the general rules of art. 263 TFEU, exclusively limited to the possibility of nullify the examined decision when it is manifestly wrong (since the ECB is enjoying some margin of discretion), without any power to substitute it with one of its own³⁹².

This conclusion, however, would be in contrast with the level of guarantees requested by the case-law of the European Courts when it comes to penalties with a substantial criminal nature, which requires at least one judicial unlimited forum of jurisdiction.

Actually, art. 261 TFEU acknowledges the opportunity of conferring the ECJ «unlimited jurisdiction with regard to the penalties» applied by an EU institution. That however, according to the same rule, may occur only when the relevant EU regulations are so providing. Since a similar provision is not explicitly expressed in the SSM Regulations, it is not clear whether the ECB direct sanctioning powers may be covered. Thus, apparently the supervisor's decisions should be reviewed only under the parameter of mere legality contained in art. 263 TFEU, in violation of art. 6 ECHR.

At interpretative level, the only way to recognize full jurisdiction to the ECJ in this field would be to consider the SSM R powers of art. 18 §§ 1 and 7 as subject to the already-mentioned Council Regulation 2532/98.

Indeed, art. 5 of this legislative text affirms that «the Court of Justice of the European Communities [now Union] shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty [now Article 261 TFEU] over the review of final decisions whereby a sanction is imposed». However, as has been pointed out, it is not clear whether art. 5 applies to the SSM sanctioning powers.

In fact, art. 18 § 4 SSM R requests to interpret the provisions of the whole art. 18 only in the light of the «procedures contained in Regulation (EC) No 2532/98, as appropriate». Since art. 5 «is not strictly speaking a rule of procedure that ECB is bound to apply»³⁹³ the question about the applicability of the unlimited ECJ jurisdiction to the SSM decisions appears debatable.

Lastly, since according to art. 261 TFEU only «Regulations adopted jointly by the EU Parliament and the Council or by the Council pursuant of the provision of the Treaties» may opted for extending the oversight of the ECJ, it is currently unlikely that further rules adopted at the ECB level (such as the SSM FR) may provide adequate legal bases to achieve such a result.

³⁹¹ Cf., e.g., Judgment in *LVM v Commission*, Case T-84/89 (Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89, T-104/89) and Judgment in *Dow Benelux NV v Commission of the European Communities*, C-85/87, ECLI:EU:C:1989:379.

³⁹² Cf. Rectial (60) SSM R, according to which: «Pursuant to Article 263 TFEU, the CJEU is to review the legality of acts of, inter alia, the ECB, other than recommendations and opinions, intended to produce legal effects vis-à-vis third parties».

³⁹³ R. D'AMBROSIO, *Due process and safeguards*, cit., p. 74

As a consequence, given the current state of the relevant legislation, the issue concerning the compliance of the SSM with the requirements of art. 6 ECHR and art. 47 CFREU from this standpoint remains quite debatable, notwithstanding the duty of interpretation in conformity with the principles of the CFREU.

4.7. Other defence rights.

With regard to most of the other defence rights requested by art. 6 ECHR and Chapter VI CFREU, the SSM framework results generally in better compliance with the Convention and the Charter.

First, according to art. 6 §§ 1 and 3(b), starting from the ECtHR case *Borgers v. Belgium*, the defence has the right to have all the material evidence used for the accusation disclosed in order to guarantee the equality of arms³⁹⁴.

As repeatedly affirmed also by the ECJ in *Solvay* with regard to the investigation carried out within the EU institutions, the purpose of this right «is to enable the addressees of statements of objections to examine evidence in the [...] file so that they are in a position effectively to express their views on the conclusion reached [...] on the basis of that evidence»³⁹⁵.

The right of access to files in the SSM procedure is provided by art. 32 SSM FR, according to which «the parties shall be entitled to have access to the ECB's file, subject to the legitimate interest of legal and natural persons other than the relevant party, in the protection of their business secrets»³⁹⁶. Notably, however, «confidential information» is excluded from the scope of application of this rule; a derogation which may heavily affect the level of protection for the legal entities under investigation.

Nonetheless, according to the case-law of the ECtHR, the right of access to files is not absolute, as it may be restricted for national security reasons³⁹⁷. In this sense, the need to maintain the confidentiality of the information may well fall under this provision, and thus be considered in line with the provisions of the Convention and of the Charter.

Moreover, art. 6 § 3(c) and art. 47 § 3 CFREU provide for the right to be assisted with legal counselling.

This faculty is recognized by the SSM FR, where it is provided that parties may be represented or assisted «by lawyers or other qualified persons at the hearing»; thus allowing also forms of representations which do not have a legal background»³⁹⁸.

Further, art. 6 § 3(d) and art. 41 § 2 CFREU require to guarantee the right to express one's view. As affirmed by the ECJ in *Lisrestal*, the right to be heard shall be recognized in all proceedings for all individual measure capable to adversely affect the addressee³⁹⁹.

³⁹⁴ *Borgers v. Belgium*, 30 October 1991, Application no. 12005/86.

³⁹⁵ Judgment in *Solvay SA v Commission of the European Communities*, T-30/91, ECLI:EU:T:1995:115, § 59. See also Judgment in *Imperial Chemical Industries plc v Commission of the European Communities*, T-36/91, ECLI:EU:T:1995:118, §§ 69.

³⁹⁶ Cf. articles 22 and 32 § 1 SSM FR.

³⁹⁷ *Moiseyev v. Russia*, 9 October 2008, Application no 62936/00; *Edwards and Lewis v. UK*, 27 October 2004, Applications nos 39647/98 and 40461/98.

Restricting provisions due to business secrecy protections or other confidential information have also been implemented by some EU legal acts, cf. Commission Notice on the rules for access to the Commission files in cases pursuant to Articles 81 and 82 of the EC treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) 139/2004. See also M. LEVITT, *Access to the file: the Commission's Administrative Procedures in Cases under Articles 85 and 86*, in *Com. Mark. L. Rev.*, 1997, 1424.

³⁹⁸ Cf. art. 126 § 3 SSM FR. Similarly to what is provided also in other administrative investigating bodies such as OLAF, cf. XX

Under this profile, the SSM R requires that all entities potentially affected by the ECB decisions shall be previously given the opportunity of commenting on the facts; accordingly, the ECB shall base its decisions only on those objections that the parties concerned have been able to comment⁴⁰⁰. Normally within the SSM this chance is granted in writing, unless the ECB is deciding to do so in a meeting.

Due to the limited scope of art. 22 SSM R, however, this right does not apply to macro-prudential decisions. This notwithstanding, in order to be in compliance with the ECHR and the CFREU, also the latter should be granted the right to be heard at least when they are not general but addressed to a single credit institution. This right applies also to the case of supervisory measures adopted under Article 16 § 2 SSM R in order to ensure compliance with macro-prudential decisions⁴⁰¹.

In case «an urgent decision appears necessary in order to prevent significant damage to the financial system», art. 22 SSM FR allows the ECB to proceed and take a decision without granting the possibility to previously comment on the facts; consequently, the interested parties shall be given the opportunity to do so «without undue delay after its adoption»⁴⁰².

Representing an exception to a fundamental right, this provision should be interpreted strictly⁴⁰³.

4.8. The application of the *ne bis in idem*.

Finally, since the pecuniary penalties imposed by the ECB present substantial criminal nature, new dimensions emerge with regard to the application of the prohibition of the *bis in idem*, which applies to all sanctions considered criminal according to the *Engel* criteria.

As already mentioned, from this perspective banking supervision was already problematic in those countries where it is allowed to undertake parallel administrative and criminal investigations⁴⁰⁴, or where the decision on which sanction – criminal or administrative – shall be applied is not definitive and subject to be reconsidered during the development of the proceedings (and possibly according to their results)⁴⁰⁵.

In the new SSM legal framework, the same critical issues are maintained and extended, since they will not concern anymore only a domestic dimension.

Indeed, as far as less significant credit institutions are concerned, potential violations of *ne bis in idem* are undiminished, and endure between national judicial authorities and national banking supervisors.

However, with an operational SSM, it will be possible to register even further profiles of conflict.

First, with regard to significant credit institutions, critical issues concerning the *bis in idem* may arise between the ECB and the national administrative authorities acting in their residual competence. That, for instance, might be the case of an ECB sanction imposed for violation of the prudential requirements, and a NCA penalty for a violation of the AML Programme based on the same factual behaviour.

³⁹⁹ Cf. Judgment in *Commission of the European Communities v. Lisrestal*, C-32/95P, ECLI:EU:C:1996:402, § 21.

⁴⁰⁰ Articles 22 § 1 and art. 24 § 7 SSM R.

⁴⁰¹ R. D'AMBROSIO, *Due process and safeguards*, cit., p. 58.

⁴⁰² Cf. art. 31§§ 1-4-5, SSM FR.

⁴⁰³ R. D'AMBROSIO, *Due process and safeguards*, cit., p. 55.

⁴⁰⁴ Cf., e.g., IT, with *Grande Stevens and others v. Italy*.

⁴⁰⁵ Such as NL.

Second, with regard to all credit institutions, violations of this fundamental principle may be determined also by the concurrent application of ECB's punitive penalties and criminal sanctions imposed at national level by the domestic judicial authorities.

Lastly, this frame is further complicated by the interactions among Member States and among credit institutions operating in different countries with a single licence mechanism, in a context such as the EU where, as already illustrated, a clear transnational dimension of *ne bis in idem* is still lacking⁴⁰⁶.

In addition, since the ECB may apply sanctions only on legal persons, the picture in this case will be very diverse, due to the fact that is only some Member States admit a criminal liability of the legal persons, while others provide exclusively for an "indirect" administrative liability based on organizational failures.

Currently, the SSM Regulations do not provide any remedy to avoid accumulation of sanctions in the Eurozone, leaving open the debate on a very critical issue, especially when the Mechanism will become fully operative in practice, quite likely increasing the already-existing infighting among the European and the national courts⁴⁰⁷.

⁴⁰⁶ Cf. Chapter 1, paragraph 2.3.2.

⁴⁰⁷ Under this perspective, some author has affirmed that the role of supremacy of the EU law as established in *Walt Wilhelm* will apply, cf. Judgment in *Walt Wilhelm and others v Bundeskartellamt*, C-14-68, ECLI:EU:C:1969:4, in R. D'AMBROSIO, *Due process and safeguards*, cit., p. 81.

CHAPTER 4

REAL-TIME MONITORING OF FINANCIAL RECORDS

Summary: 1. The new frontiers of investigating financial transactions. - 2. The residual role of bank secrecy law. - 3. Real-time monitoring in the US. - 4. The legal framework on real-time monitoring in Europe. - 4.1. Non-binding legal framework. - 4.2. Binding legal framework. - 5. Some proposals on the introduction of real-time monitoring in the EU domestic legal orders. - 5.1. The fundamental right(s) affected by real-time monitoring. - 5.2. A solution in line with the ECHR and the EUCFR. - 5.3. The authority in charge for real-time monitoring. - 5.4. Defining the procedural rules.

1. The new frontiers of investigating financial transactions.

Financial transactions have always been a crucial element in the undertaking of criminal investigations, especially (but not exclusively) against financial crimes in their increasingly globalized dimension.

Access to banking data has thus become imperative to effectively combat quite an extended range of offences, starting from the very core from which financial investigative techniques have been developed - mainly money laundering, organised crime and terrorist financing – and progressively involving also other forms of serious crimes such as corruption, fraud, obstruction of public procurement or grant procedures, market abuse and cybercrime.

In order to achieve so, improving the transparency of the financial system, and the capability of monitoring the sectors where financial transactions are carried out is of primary importance; including in the number not only the official banking sector, but also those “grey” areas where financial non-banking credit activities took place (the so-called “shadow banking”), which assets, at the end of 2012, have been «accounted for EUR 53 trillion, representing about half the size of the regulated banking system and mainly concentrated in Europe (around EUR 23 trillion) and in the United States (around EUR 19.3 trillion)»⁴⁰⁸.

The development of investigative techniques concerning financial transactions, however, is still far from being characterized by an adequate level of regulation, which is highly varying from country to country, and still far from the average level of harmonization which may be found in more traditional fact-finding investigative sectors.

Within this general frame, measures applicable to banking transactions represent the most advanced frontier of financial investigations, this being the field which so far has come across the most significant degree of discussion and elaboration both at academic, legislative and judicial level. In particular, investigative powers of access to banking data have been divided into four main categories, according to their level of coercion, the fundamental rights affected and, consequently, the safeguards they require.

Such a classification has been first developed within the context of the Council of Europe, and then also adopted into the EU legislation⁴⁰⁹; this notwithstanding, its systematisation

⁴⁰⁸ European Commission, *Explanatory Memorandum* - Proposal for a Regulation of the European Parliament and of the Council on reporting and transparency of securities financing transactions, Brussels, 29.1.2014 COM(2014) 40 final, p. 1. The Financial Stability Board (FSB) defines the shadow banking system as «credit intermediation involving entities and activities (fully or partially) outside the regular banking system», cf. FSB, *Transforming Shadow Banking into Resilient Market-based Financing, an Overview of Progress and a Roadmap for 2015*, 14 November 2014, available online at: http://www.fsb.org/wp-content/uploads/r_121118.pdf.

⁴⁰⁹ Cf. J. TRICOT, A.N. MARTIN, cit.

remains mostly unknown at national level, where these investigative techniques are still rarely or poorly regulated⁴¹⁰.

Following the supranational approach, on a scale of increasing intrusiveness, investigations targeting banking data may encompass measures granting access to banking information in a strict sense; measures granting access to past banking transactions; those allowing a continuous monitoring of bank accounts, and lastly those aimed at the freezing of the latter.

The first two categories are the less intrusive and controversial.

They mainly consist in requests for information, to which a bank is compelled to reply providing details to identify the owner or the holder of specific bank accounts (the so-called “banking identity”), or to reconstruct banking transactions carried out in a specified time in the past (e.g. disclosing the sending or recipient account). Production orders in this sense represent the original core of investigating techniques in the matter of banking data, and generally do not raise any substantial issue in their implementation, being available to all national and federal (where provided) competent authorities (law enforcement agencies, prosecutors or investigating judges, according to the different legal systems).

The level of agreement over those measures can be acknowledged also at the EU level, where these prerogatives have been recognized among the few transnational rules approved in the more recent legislative texts in the matter of criminal procedure, namely the EIO Directive⁴¹¹, and the draft of the EPPO Regulation⁴¹². Similar conclusion may be also drawn with regard to the fourth category of measures, which has been the subject of several legislative efforts during the last decade, recently culminated in the approval of a new Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union⁴¹³.

⁴¹⁰ Id.

⁴¹¹ Cf. art. 7(2), Directive 2014/41: «Without prejudice to paragraph 1, each Party shall adopt such legislative and other measures as may be necessary to enable it to:

a) determine whether a natural or legal person is a holder or beneficial owner of one or more accounts, of whatever nature, in any bank located in its territory and, if so obtain all of the details of the identified accounts;
b) obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account».

⁴¹² For the last consolidated version of the EPPO Regulation, cf. Council of the EU, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office - *Report on the State of Play*, Brussels, 22 December 2015, available online at: <http://data.consilium.europa.eu/doc/document/ST-15100-2015-INIT/en/pdf>, according to which art. 25(1)(bb), the European Prosecutor is entitled to «obtain the production of stored computer data, encrypted or decrypted, either in original or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to Article 15(1), second sentence, of the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector».

⁴¹³ Cf. articles 2 and 7, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. For the previous relevant legislative texts at the Community level, see Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (consolidated version of March 2009); Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.

Of major interest for the purposes of this research is the third category of measures, concerning real-time monitoring, a particularly intrusive form of surveillance over banking operations to be carried out in the future.

The national, federal and supranational solutions to implement this specific investigative technique are indeed one of the most debated issue in the evolution of the fight against financial crimes, and currently represent the (uncertain) new frontier of banking investigations both in the US and in the EU.

2. The residual role of bank secrecy law.

For a long time, bank secrecy law has been one of the most relevant obstacles in banking investigations, both in criminal and in tax matters.

In the last two decades, however, awareness at the international level has considerably grown concerning the need to allow judicial authorities to overcome such a barrier, inasmuch as the ability to obtain information has become a crucial element for the successful implementation of a country's main policies.

Under this urgency, starting from exclusively tax purposes, and then extended also to the fight against an increasing number of crimes, all major jurisdictions with bank secrecy regulations have been forced to introduce disclosing rules at least when dealing with transnational forms of cooperation. For most cases, the dividing line in the policy approach to this issue may be identified in the 2005 review of the OECD Income and Capital Model Convention, and particularly in its art. 26(5), which has been frequently reproduced in numerous subsequent legislation⁴¹⁴.

Even before that date, however, the European policy on bank secrecy law underwent some fundamental evolutionary steps.

Within the Council of Europe, since 1990 all participating Member States accepted not to invoke bank secrecy as a ground to refuse any cooperation at least in the area of AML, and to allow judicial authorities to lift it when acting in relation to criminal offences⁴¹⁵.

In the EU, the necessity «to improve the cooperation programme in the field of action against organised crime, the laundering of the proceeds of criminal offences, and financial crime by abolishing barriers to criminal investigations for tax reasons» has been acknowledged since the late 2000, when the European Council explicitly stated «its position that bank secrecy in particular should not be invoked against judicial authorities, a basic principle enabling criminal investigations of financial institutions to provide useful evidence under national provisions»⁴¹⁶. And indeed, since the 2000 Convention on Mutual Assistance in Criminal Matters⁴¹⁷ - with a formulation then replicated also in the 2011 Administrative Cooperation

⁴¹⁴ «In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person», cf. art. 26(5), OECD, Articles Of The Model Convention With Respect To Taxes On Income And On Capital [as they read on 15 July 2005], available online at: <http://www.oecd.org/tax/treaties/35363840.pdf>.

⁴¹⁵ Art. 18 § 7, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, CETS 141, cit.

⁴¹⁶ Conclusion no. 6, 2298th Council meeting- ECOFIN and JUSTICE and HOME AFFAIRS, Luxembourg, 17 October 2000, 200012128/00 (Presse 381), available online at: http://europa.eu/rapid/press-release_PRES-00-381_en.htm.

⁴¹⁷ Comment to art. 7, Explanatory report to the Protocol to the 2000 Convention on mutual assistance in criminal matters between the Member States of the European Union (Text approved by the Council on 14 October 2002).

Directive⁴¹⁸ and in the 2010 Tax Recovery Directive⁴¹⁹ - the EU legislation prevents Member States from invoking bank secrecy as a ground for refusal in transnational cooperation, without a referral to any specific crime.

Of course, this trend does not imply that bank secrecy has lost all its impeding character on a global dimension.

From one side, also within the same European jurisdictions, some countries, such as Luxembourg, still resist in their attempt to avoid the disclosure of financial records through the establishment of mechanisms of review against the requests of information which are substantially impeding any kind of disclosure.

On the other side, while some States traditionally known for their non-cooperation policy, such as Switzerland, have substantially reduced the extent of their bank secrecy law in the last few years⁴²⁰, some other tax heavens, such as the UK Crown Dependency of Jersey, Delaware in the US, or the Caribbean Islands, still maintain an extremely strict policy when it comes to disseminate financial records.

Nonetheless, the reaffirmation at the international level of the necessity to exchange banking information has drastically changed the general perception over the right to confidentiality of financial institutions, and it is increasingly leading, also thanks to a “naming and shaming” policy, to a progressive reduction of the use of bank secrecy law when it comes to financial investigations, both for administrative and criminal purposes⁴²¹.

For all these reasons, generally speaking, the main problematics related to banking investigations are no longer represented by secrecy laws, but have rather shifted towards another relevant profile, namely the balance between the need to contrast increasingly globalized forms of criminality (financial and not) also with intrusive forms of electronic surveillance, and the duty to protect customers’ privacy in a context in which most of sensitive information are in the form of digital data.

In this perspective, the establishment of measures of real-time monitoring in national and supranational legal orders stays at the very core of the future development of banking investigations.

3. Real-time monitoring in the US.

In the past, US prosecutors and law enforcement investigators (hereinafter “the Government”) have routinely relied upon administrative and grand jury subpoenas to obtain records from banks and financial institutions.

In principle, the Government should not have access to citizens’ financial records without a special authorization for doing so. Such an authorization may be granted directly by the customer affected by the request⁴²² or by a competent authority. In the second case, financial

⁴¹⁸ Cf. art. 18(2), Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the field of Taxation and repealing Directive 77/799/EEC.

⁴¹⁹ Cf. art. 5, Council Directive 2010/24/EU of 16 March 2010 concerning Mutual Assistance for the recovery of claims relating to taxes, duties and other measures. Interestingly, however, a similar provision has not been included in the EIO Directive.

⁴²⁰ M. HESS, *Exchange of Information: The Swiss Perspective*, in A. Rust, E. Fort (ed. by), *Exchange of Information and Bank Secrecy*, Wolters Kluwer, The Netherlands, 2012, p. 169-173.

⁴²¹ Currently bank secrecy receives less protection than commercial, industrial or professional secrets at the EU level, cf. K.-D. DRÜEN, *The Mutual Assistance Directives*, in A. Rust, E. Fort (ed. by), *Exchange of Information*, cit., p. 80.

⁴²² 12 U.S.C. § 3404.

records may be disclosed in response to a search warrant; an administrative subpoena or summons; a judicial subpoena or a formal written request.

These investigative techniques differ one from each other on several parameters, and particularly on the involvement of the judiciary.

In particular, search warrants may be issued only by judges if there is probable cause, under the Fourth Amendment, to believe that the search or the installation and use of a tracking device⁴²³ is justified, which occurs when financial records can be considered as evidence of a crime; contraband, fruits of crime, or other items illegally possessed; or also property designed for use, intended for use, or used in committing a crime⁴²⁴.

Pursuant to Rule 41, Federal Rules of Criminal Procedure (Fed. R. Crim. P.), the prosecutor or a federal law enforcement officer, authorized by the Attorney General, may request the magistrate judge geographically competent for the interested district⁴²⁵.

When the warrant concerns stored information to be sought electronically with a tracking-device, it shall identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used, which must not exceed 45 days from its issuing and may be extended for a reasonable period not to exceed 45 days each⁴²⁶. No later than ninety days after the search warrant has been served, the customer shall be notified a copy of the warrant, unless a delay is granted by the court⁴²⁷.

An administrative summons or subpoena may be issued if there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry. It consists of «a judicially enforceable demand for records issued by a government authority which is authorized by some other provision of law to issue such process»⁴²⁸.

On the contrary, judicial subpoenas are orders directly authorized by a court.

Also in this case, the Government may obtain financial records if: authorized to do so by law, there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry, and the customer did not file a sworn statement and motion to quash the subpoena in an appropriate court⁴²⁹.

Judicial and non-judicial subpoenas differ also in term of their binding force. If a person fails to comply with a judicial subpoena, without having challenged it, she is running the risk of being held in contempt based directly on that failure; this result may be reached for a non-

⁴²³«Tracking device” is defined by 18 U.S.C. §3117 (b) as «an electronic or mechanical device which permits the tracking of the movement of a person or object».

⁴²⁴ 12 U.S. Code section 3406; see also CRM 407. Search Warrants, US Attorneys’ Manual, Criminal Resource Manual, available online at: <https://www.justice.gov/usam/criminal-resource-manual-407-search-warrants>.

⁴²⁵ Cf. Fed. R. Crim. P., Rule 41 (b)(c)(d).

⁴²⁶ Cf. Fed. R. Crim. P., Rule 41 (e)(2)(C), «1. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 days;
(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and
(iii) return the warrant to the judge designated in the warrant».

⁴²⁷ According to 12 U.S. Code § 3406 (b)(c) the warrant shall be served together with the following notice: «Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by this (agency or department) on (date) for the following purpose:… You may have rights under the Right to Financial Privacy Act of 1978 et seq.].»

⁴²⁸ 12 U.S.C. § 3405; see also CRM 408. Definitions of Judicial Subpoena, Administrative Summons and Formal Written Request and 409. Customer Notice Requirements for Judicial Subpoenas, Administrative Process and Formal Written Requests, US Attorneys’ Manual, Criminal Resource Manual,

⁴²⁹ 12 U.S.C. § 3407; see also CRM 408-409, cit.

judicial subpoena only subsequently to its issuance, if a court is required to release a specific compelling order, which has been then be disobeyed by the addressee.

In any case, the financial institution requested by a subpoena may always be forced to supply the information required⁴³⁰.

Lastly, the Government may also use a formal written request; in this case, however, the proceeding is not coercive, and thus it is not compelling the financial institution to comply with⁴³¹.

According to 12 U.S.C. § 3410, customers can file a motion to quash subpoena, summons, or formal written requests in the appropriate United States district court, within ten days of service or within fourteen days from their notification. The court rejects the motion if the applicant is not the customer to whom the records are pertaining, or if there is a demonstrable reason to believe that the records sought are relevant to that inquiry. In case of the contrary, as well as if there has not been substantial compliance with the due procedural provisions, the motion shall be granted⁴³². The requests are granted the right to judicial review, subject to a statute of limitation of three years from the date on which the violation occurs or the date of discovery of such violation, whichever is later⁴³³.

This notwithstanding, according to § 3414, the rules provided above shall not apply whether the access to financial records is necessary to conduct foreign counter- or foreign positive-intelligence activities, carried out by the Prosecutions service or other Government authorities or by the Secret Service, especially if related to international terrorism⁴³⁴. When those powers, are exercised by the FBI, its Director is required to certify in writing to the financial institution that such records are sought for the purposes illustrated, in order to provide that the investigation is not conducted solely upon the basis of activities protected by the First amendment to the Constitution⁴³⁵. Notably, a similar protection is not extended to all people targeted by an investigation, but it is reserved only to United States nationals⁴³⁶.

Further exceptions are also provided in case obtaining financial records is urgent due to imminent danger of physical injury to any person; serious property damage; or flight to avoid prosecution⁴³⁷.

In all such circumstances, the Government may acquire the records after the submission of a certificate signed by a supervisory official of a designated rank, together with the specific identification of the customer, entity, or account to be used as the basis for the production and disclosure⁴³⁸.

All the above-illustrated investigative techniques allow the Government access to banking data, and could be used to request both information that already exist and, if containing an

⁴³⁰ 12 U.S.C. § 3411.

⁴³¹ 12 U.S.C. § 3408(2); see also CRM 408-409, cit.

⁴³² see also CRM 415. Customer Challenge Proceedings.

⁴³³ 18 U.S.C. § 3511 and 12 U.S. Code § 3416.

⁴³⁴ 12 U.S.C. § 3414(a) (1) (A)(B)(C).

⁴³⁵ «Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances».

⁴³⁶ 12 U.S.C. § 3414(a)(5)(A). The information so gathered may be shared by the FBI only following the cases provided in the the Attorney General's guidelines for foreign intelligence collection and foreign counterintelligence investigations, and only if such information is clearly relevant to the authorized responsibilities of such agency. Such activity shall be periodically reported to the competent Congressional Committees by the Attorney General

⁴³⁷ 12 U.S.C. § 3414(b)(1).

⁴³⁸ 12 U.S.C. § 3414(b).

ongoing disclosure order, also financial records just after they come into being; while Grand Jury subpoenas may be used only with regard to past banking transactions.

However, recently prosecutors and law enforcement agencies appear to have increasingly implemented a different tool to obtain real-time financial records which allows a practically immediate transmission of data.

Indeed, through the so-called *Hotwatch* orders, the investigators may directly compel financial institutions to monitor in real-time the ongoing and future banking transactions involving their own customers, in order to obtain details concerning the date, time and location of account transactions, as they occur. In particular, thanks to these orders, the US Department of Justice (DOJ) may directly force a credit card or other service payment issuer to disclose each subsequent financial transaction carried out by a suspect.

The use of this method by the DOJ has been discovered in the last few years after a private filing of a claim for releasing information on the Government's procedure of tracking individuals via real-time surveillance⁴³⁹.

The limited information contained in the DOJ presentation disclosed in 2010 revealed a strengthened practice in conducting these forms of electronic monitoring over the citizens' financial records, and in particular on credit card transactions, retail shopping member cards, calling cards, cell phones, travel agencies (e.g. rental car, airlines) and travel reservations⁴⁴⁰.

According to such document, the DOJ is using both administrative subpoenas and search warrants to obtain *Hotwatch* orders, with a preference to the first option.

Indeed, in that case, to initiate the orders, all that federal agencies have to do is contact the credit card security department, explain why the information is relevant to the criminal investigation, and then send an administrative subpoena with a court order for nondisclosure addressed to the financial institutions, «preventing them from telling their customers that the government has spied on their financial transactions»⁴⁴¹.

The use of such surveillance measures raise several critical issues.

First, even if real-time monitoring appears to be a prosecutorial prerogative, in some cases, especially at State level, it has been reported of law enforcement investigators allowed to go directly to the court to obtain *Hotwatch* orders without previously discussing or vetting the application with a prosecutor⁴⁴².

⁴³⁹ The claim has been filed by Christopher Soghoian, a cyber-security and privacy researcher, under the Freedom of Information Act, 5 U.S.C. § 552 (2006), and was answered almost a year later, in 2010, see C. SOGHOIAN, *DOJ's 'Hotwatch' Real-Time Surveillance of Credit Card Transactions*, December 4, 2010, available online at: <https://www.lewrockwell.com/2010/12/christopher-soghoian/dojs-hotwatch-real-time-surveillance-of-credit-card-transactions/>.

⁴⁴⁰ Cf. DOJ, Powerpoint Presentation on Hotwatch Surveillance Orders of Credit Card Transactions, issued on December 2, 2010, available online at: <http://www.scribd.com/doc/44542244/DOJ-powerpoint-presentation-on-Hotwatch-surveillance-orders-of-credit-card-transactions>. This notwithstanding, «the US Department of Justice found 10 relevant documents in response to the author's Freedom of Information Act request, but has refused to deliver them», cf. C. SOGHOIAN, *Privacy and Law Enforcement: Caught In The Cloud: Privacy, Encryption, And Government Back Doors In The Web 2.0 Era*, in 8 *J. on Telecomm. & High Tech. L.* 359, Spring, 2010, note 193.

⁴⁴¹ Cf. DOJ, Powerpoint Presentation on Hotwatch Surveillance, cit. and C. SOGHOIAN, *DOJ's 'Hotwatch' Real-Time Surveillance*, cit.

⁴⁴² «In *Freedman v. America Online*, 303 F.Supp.2d 121 (7th Cir. 2005), over-zealous law enforcement officers presented a search warrant application to America Online ("AOL") which had been reviewed or signed by a judge. AOL complied with the invalid warrant, and the person whose email account information had been disclosed sued the law enforcement officers as well as AOL. The claims against AOL were dismissed pursuant to a forum selection clause in the plaintiff's subscription agreement with AOL. The claims against the law enforcement officers survived summary judgment», cf. C. DENNEY, C. PARKER, *Bankers Beware of So-Called "Hotwatch" Orders – Are They Even Legal?*, in *White Collar Crime Committee Newsletter*, Winter/Spring 2015, ABA-

Secondly, the role played by the court in obtaining these orders results anyway quite limited. Indeed, the use of an administrative subpoena allows the judge only to intervene as far as the nondisclosure order that prevents financial institutions from revealing their customers that the government has spied on their transactions is concerned. The court, however, is not entitled to conduct any Fourth Amendment analysis on the existence of a probable cause to enforce the surveillance measure⁴⁴³. Moreover, since the relatively new development of these measures, also the procedural mechanisms to challenge them in court are currently somewhat unclear⁴⁴⁴. These problems concerning real-time monitoring of banking transactions in the US derive from the lack of a clear federal or local case-law on the matter, as well as of appropriate legal bases supporting the use of this investigative technique.

Currently, the Government appears to seek *Hotwatch* orders mainly pursuant to the All Writs Act, a very broad piece of legislation of still quite uncertain application, which allows courts to issue «all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law»⁴⁴⁵.

Due to its wide scope, for instance, that has been the legal basis claimed in the recent and notorious case in which the US Government tried to force Apple to grant the access to the data contained in the iPhone of the St. Bernardino's terrorist attacker⁴⁴⁶.

While generally what is sought under this statute is pre-existing evidence, some case-law also supports its application towards future records⁴⁴⁷. So far, however, the DOJ has not been allowed to use it for real-time surveillance since that would «grant the executive branch authority to use investigative techniques either explicitly denied it by the legislative branch, or at a minimum omitted from a far-reaching and detailed statutory scheme that has received the legislature's intensive and repeated consideration»⁴⁴⁸.

Accordingly, even if the All Writs Act is increasingly applied on the matter of financial transactions, so far no court has explicitly confirmed the possibility to use it as a proper legal basis for obtaining digital banking data.

Real-time monitoring has been also ordered using other federal statutes, none of which however appears fully satisfactory to such purpose.

For instance, regulating this form of electronic surveillance under the Wiretap Act would bring undeniable advantages, since it requires both probable cause and a detailed and strict

Criminal Justice Section's White Collar Crime Committee, p. 1, note 4, available online at: http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc_newsletter_hotwatch.authcheckdam.pdf.

⁴⁴³ See, e.g., B. DAVIS, *Prying Eyes: How Government Access to Third-Party Tracking Data May Be Impacted by United States v. Jones*, in *46 New Eng. L. Rev.* 843, Summer, 2012.

⁴⁴⁴ C. DENNEY, C. PARKER, *Bankers Beware of So-Called "Hotwatch" Orders*, cit., p. 4. See also R. SINGEL, *Feds Warrantlessly Tracking Americans' Credit Cards In Real Time*, 12 February 2010, available online at: <https://www.wired.com/2010/12/realtime/>.

⁴⁴⁵ The All Writs Act, originally established as part of the Judiciary Act of 1789 (1. Stat. 73), then repeatedly modified starting from 1911, is codified at 28 U.S.C. § 1651.

⁴⁴⁶ Cf., e.g., D. LEWIS, *What the All Writs Act of 1789 Has to Do With the iPhone. How a law signed by George Washington is being applied to Apple*, in *Smithsonian.com*, February 24, 2016, available online at: <http://www.smithsonianmag.com/smart-news/what-all-writs-act-1789-has-do-iphone-180958188/>.

⁴⁴⁷ Cf., e.g., *United States v. Doe*, 537 F. Supp. at 839, ordering the disclosure of phone calls records for the following six months; In re *Application of the U.S.A. For an Order Directing X To Provide Access to Videotapes*, 2003 WL 22053105, No. 03-89 (Aug. 22, 2003 D. Md.), concerning the subsequent production of videotapes from a camera installed in an apartment hallway.

⁴⁴⁸ Cf. In re *Authorizing Use of a Pen Register*, 384 F.Supp.2d 562 (E.D.N.Y. 2005), concerning an order reaffirming denial of government's phone tracking request, available online at: http://www.eff.org/files/filenode/USA_v_PenRegister/celltracking_decision.pdf.

procedure for its application⁴⁴⁹. In addition, according to this Act, law enforcement agents are compelled to submit their request to a prosecutor; the latter is then required to obtain a judicial authorization before starting the monitoring procedures, and interceptions may be used only as *extrema ratio*, that is after the exhaustion of traditional investigative tools.

It is then clear that the current procedures adopted for obtaining *Hotwatch* orders, could not be possibly authorized as they are under the Wiretap Act. On the other side, it appears not likely that the statute will be able to raise the level of controls over the current investigative practice concerning those orders, since all the safeguards provided by this regulation are strictly connected to the communicative content of the data, the application of which to financial records is actually pretty questionable.

Indeed, also other federal statutes concerning electronic communication have been proposed to serve for real-time monitoring, and they equally appear not able to provide an adequate legal basis to this purpose.

That is the case, for instance, of the Stored Wire and Electronic Communications and Transactional Records Access Act (SCA), the scope of which is limited to the tracking of electronic communication service providers concerning wire or electronic communications⁴⁵⁰.

According to § 2510(12), however, financial transactions are specifically excluded from the definition of an electronic communication, and that lays a substantial obstacle in applying provisions drawn for communicative contents to banking transactions⁴⁵¹.

The SCA, moreover, is limited only to “stored records” and not to future ones, and it is hardly applicable to financial institutions, since banks are not electronic communication service providers.

Finally, neither the Pen Register and the Trap and Trace Device statutes seem able to support *Hotwatch* orders⁴⁵².

These regulations provide for a strict use of surveillance tools from private parties to telephone lines and computer network communications, but they do not allow the collection of information on real-time, nor the disclosure of the actual contents of the calls or the location of a person making or receiving calls⁴⁵³. Moreover, here too it is questionable whether banking data may be considered communications⁴⁵⁴.

⁴⁴⁹ The Wiretap Act was first passed as Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351), and is thus generally known as "Title III", codified at 18 U.S.C. § 2510-2522.

⁴⁵⁰ Enacted as Title II of the Electronic Communications Privacy Act (ECPA) of 1986, codified at 18 U.S.C. § 2701 *et seq.*

⁴⁵¹ Cf. 18 U.S.C. § 2510(12), according to which: «“electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—[...] (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds».

⁴⁵² Enacted as Title III of the ECPA, P.L. 99-508, codified at 18 U.S.C. § 3121 *et seq.*

⁴⁵³ 47 U.S.C. § 102(a)(2); *United States v. Espudo*, 954 F.Supp.2d 1029, 1039 (S.D. Cal. 2013).

⁴⁵⁴ «The term “pen register” means a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business; the term “trap and trace device” means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information

In the light of the above, the current situation on real-time monitoring in the US appears very controversial. While the documents disclosed by the Government, and the scarce existing case-law reveal that US law enforcement agencies and prosecutors «routinely seek and obtain real-time surveillance of credit card transaction»⁴⁵⁵, serious questions exist as to the legal validity of those proceeding for obtaining sensitive data, such as financial information, in the lack of any serious legal framework regulating the matter.

4. The legal framework on real-time monitoring in Europe.

Conversely to the US, the possibility to real-time monitoring banking transactions has been foreseen by several legislative acts within the European legal framework, strictly connected with the development of harmonized rules of criminal procedure, even if only few of them do create a positive obligation to establish such an investigative measure at domestic level.

The analysis that will be illustrated hereinafter relies on the combination from different sources, all institutionally supported, but differently structured for the purposes they are serving, in the lack of any specific official report or study on the matter.

In particular, these sources are: the official information provided to the EU Council and to the COE by the Member States concerning the implementing status of the Acts respectively adopted⁴⁵⁶; the comparative analyses elaborated by MONEYVAL⁴⁵⁷; and the studies developed by a group of research in Luxemburg to support the drafting process of the EPPO regulation⁴⁵⁸.

4.1. Non-binding legal framework.

The possibility to monitor banking accounts on real-time bases was first taken into account by the European Evidence Warrant (EEW), even if just with the purpose of excluding it from the its scope of application.

One of the main weak spots of the EEW was indeed represented by the fact that it could be applied only to obtain already existing piece of evidence, which is not the case of real-time monitoring; a limitation which substantially contributed to the failure of the Framework Decision⁴⁵⁹. Under this profile, art. 4 EEW explicitly states that the Warrant shall not be

reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any communication», cf. 18 U.S.C. § 3127(3)(4).

⁴⁵⁵ C. SOGHIOAN, *DOJ's 'Hotwatch' Real-Time Surveillance*, cit.

⁴⁵⁶ The official available data are available online: for the European Council at: <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/ratification/?v=decl&aid=2001090&pid=B>; for the Council of Europe at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=198&CM=8&DF=12/03/2015&CL=ENG>.

⁴⁵⁷ MONEYVAL, *The postponement of financial transactions and the monitoring of bank accounts*, April 2013, available online at: [https://www.coe.int/t/dghl/monitoring/moneyval/Activities/MONEYVAL\(2013\)8_Postponement.pdf](https://www.coe.int/t/dghl/monitoring/moneyval/Activities/MONEYVAL(2013)8_Postponement.pdf).

⁴⁵⁸ The research has been summarized in K. LIGETI, *Toward a Prosecutor for the European Union - Volume 1 and 2*, cit.

⁴⁵⁹ For an analysis on the EEW see, e.g., L. BACHMAIER WINTER, *Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law*, in *Utrecht Law Review*, Volume 9, Issue 4, September 2013, 127; P. DE HERT, K. WEIS, N. CLOOSEN, *The Framework Decision of 18 december 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters - a critical assessment*, in *0 New J. Eur. Crim. L.* 55, 2009; J.R. SPENCER, *The Green Paper on obtaining evidence from one Member State to another and securing its admissibility: the Reaction of one British Lawyer*, in *ZIS*, 9/2010, 602.

issued for the purpose of requiring the executing authority to obtain information in real-time, such as through the interception of communications, covert surveillance or monitoring of bank accounts⁴⁶⁰.

Following the massive non-implementation of the EEW by most Member States, another legislative tool characterized by mutual recognition has been approved in the EU by Directive 2014/41: the European Investigative Order (EIO), which will enter into force in May 2017⁴⁶¹. The EIO Directive considers real-time monitoring under a perspective partially different from the EEW's one, even if not necessarily more effective.

Under this legislation, in fact, this investigative measure is recognized in its transnational application, but only in case real-time monitoring is already provided for at national level.

In particular, article 28 recognizes that an EIO may be issued for the purpose of «executing an investigative measure requiring the gathering of evidence in real time, continuously and over a certain period of time, such as the monitoring of banking or other financial operations that are being carried out through one or more specified accounts».

According to the same article, however, in this case the execution of an EIO may be refused, in addition to the general grounds for non-recognition provided for by the Directive, also if performing such measure «would not be authorised in a similar domestic case»⁴⁶².

Therefore, neither under the EIO legislation Member States can found a binding legal framework compelling them to provide such a form of surveillance.

Lastly, an attempt to introduce a limited obligation to allow the use of real-time monitoring in the EU has been put into practice during the negotiations regarding the EPPO regulation.

With this aim, the original draft, proposed by the Commission in July 2013, clearly supplied the European Public Prosecutor with the power to request or to order the monitor of banking transactions, by ordering any financial or credit institution to inform the Office in real time «of any financial transaction carried out through any specific account held or controlled by the suspected person or any other accounts which are reasonably believed to be used in connection with the offence»⁴⁶³.

This provision, even if limited to the prosecution of the crimes within the EPPO jurisdiction, would at least have implied an obligation, for all the Member States participating to the Regulation, to make this measure available in the prosecution of the so-called PIF crimes⁴⁶⁴.

⁴⁶⁰ Art. 4§ (c), Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

⁴⁶¹ Cf. art. 28 § 1 (a) Directive 2014/41. For an analysis on the EIO Directive see, e.g., I. ARMADA, *The European investigation order and the lack of European standards for gathering evidence Is a Fundamental Rights-Based Refusal the Solution?*, in *New Journal of European Criminal Law*, Vol. 6, Issue 1, 2015, 8; A. MANGIARACINA, *A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order*, in *Utrecht Law Review*, Vol. 10, Issue 1, January 2014, 113; S. ALLEGREZZA, *Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality*, in S. Ruggeri (ed. by), *Transnational Evidence in Multicultural Inquiries in Europe Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*, 2014; L. BACHMAIER WINTER, *European investigation order for obtaining evidence in the criminal proceedings Study of the proposal for a European directive*, in *ZIS*, 9/2010, 580.

⁴⁶² Art. 28 § 1, Directive 2014/41.

⁴⁶³ Art. 26 § 1 (g), European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office {SWD(2013) 274 final} Brussels, 17.7.2013.

⁴⁶⁴ Which should be based on the new PIF Directive, currently under negotiations as well, for the last draft see Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law[First reading]-Preparation of the next trilogue, Brussels, 7 May 2015, available online at: <http://www.statewatch.org/news/2015/may/eu-council-fraud-dir-trilogue-8604-15.pdf>.

In the light of the evolution of the negotiations, however, so far this attempt did not meet the consensus of the Member States.

Due to the pressure of several delegations, which considered it as an excessive step toward the harmonization of criminal procedure at the EU level, this rule has been removed from the prerogatives of the EPPO, indeed together with most of the incisive and intrusive investigative powers previously provided in the regulation (such as, e.g., interceptions).

Thus, according to the last version of the regulation currently available, it looks likely that, even if committed to the fight against financial crimes, the EPPO will not be able to exercise any power to monitor in real-time financial transactions⁴⁶⁵.

4.2. Binding legal framework.

Few are the legal sources which establish explicit obligations to introduce the investigative measure of real-time monitoring of financial transactions.

The first legislative text with this character falls within the COE jurisdiction and is represented by the 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism⁴⁶⁶.

According to its art. 7, each participating State is required to adopt «such legislative and other measures as may be necessary to enable it to monitor, during a specified period, the banking operations that are being carried out through one or more identified accounts».

To achieve this aim, continues the Convention, each party shall also consider to establish «special investigative techniques facilitating the identification and tracing of proceeds and the gathering of evidence related thereto, such as observation, interception of telecommunications, access to computer systems and order to produce specific documents»⁴⁶⁷.

In particular, combining the two provisions, the Convention could provide an adequate legal basis for the development and regulation of systems to access banking data, also in the form of digital information, through the use of electronic surveillance.

⁴⁶⁵ The current version of former art. 26, now 25 of the EPPO regulation reads as follows: «1. At least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least four years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request the following investigation measures:

- a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence;
- b) obtain the production of any relevant object or document either in original or in some other specified form;
- bb) obtain the production of stored computer data, encrypted or decrypted, either in original or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to Article 15(1), second sentence, of the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector;
- c) freeze instrumentalities or proceeds of crime, including freezing of assets, which are expected to be subject to confiscation by the trial Court and where there is reason to believe that the owner, possessor or controller will seek to frustrate the judgement ordering confiscation;
- d) intercept electronic communications to and from the suspected or accused person, on any electronic communication connection that the suspected or accused person is using», cf. Council of the EU, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office - *Report on the State of Play*, Brussels, 22 December 2015, cit.

⁴⁶⁶ CETS 198, Warsaw, 16/05/2005.

⁴⁶⁷ Cf. art. 4 § 2.

The other legal source providing for a similar obligation comes from the First Protocol to the 2000 Convention on Mutual Assistance in Criminal Matters⁴⁶⁸.

The Protocol has been elaborated as a further development of the Convention specifically in the field of banking investigations. Its major aim is to improve mutual assistance in respect of information held by banks, establishing common minimum features in the investigative phase among Member States.

In particular, art. 3 of the Protocol concerns the monitoring of banking transactions, and especially the surveillance over operations that may take place in the future, following the drafting model for controlled deliveries already provided by the 2000 Convention⁴⁶⁹.

The Protocol represents the first attempt to introduce this investigative technique directly at the EU level⁴⁷⁰. According to it, each Member State shall possess a legal framework which allows to «monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request»⁴⁷¹.

As typical for legislations developed in the matter of judicial cooperation, the Protocol obliges Member States to set up the investigating mechanism; nonetheless, they are left free to decide if and under what conditions the same shall be implemented at national level.

A similar approach has been recently followed also by the 2015 Regulation on information accompanying transfers of funds.

The act aims at establishing control mechanisms to check whether the required information on the payer and the payee accompanies transfers of funds, and to help identify suspicious transactions⁴⁷². According to it, Member States shall implement effective procedures «including, where appropriate, ex-post monitoring or real-time monitoring»⁴⁷³.

Notwithstanding all these legal sources, the picture in the EU is not less complicated than in the US when taking into consideration the actual implementation of the illustrated legislative acts.

The 2015 Regulation does not require any further transposition at national level; nevertheless, according to the final provisions, its application has been deferred to June 2017, and thus has not binding effects on Member States yet.

The 2005 COE Convention, on the other side, has not been ratified by all the Members of the Council of Europe, which of course do not have any obligation to do so within an intergovernmental body. Narrowing the analysis to the sole EU Member States, the Convention has been enforced in BE, BG, HR, CY, HU, LV, MT, NL, PL, PT, RO, SK, SI, ES, SE⁴⁷⁴. Most of the other Member States, on the contrary, had signed the Convention, but never ratified it at domestic level.

The picture is more uniform - at least in theory - when it comes to the 2001 Protocol's implementation. According to its final provisions, it shall come into force after its adoption by at least eight Member States, and in particular ninety days after the completion of all the necessary procedures by the eighth State⁴⁷⁵. Compared to the 2000 Convention, the Protocol

⁴⁶⁸ First protocol to the 2000 Convention on Mutual Assistance in Criminal Matters, Council Act of 16 October 2001; 2001/C 326/01 (hereinafter 2001 Protocol).

⁴⁶⁹ Cf. art. 12 of the 2000 Convention on Mutual Assistance.

⁴⁷⁰ Cf. art. 3, Explanatory report to the Protocol, cit.

⁴⁷¹ Cf. art. 3 § 1, 2001 Protocol.

⁴⁷² Cf. recital (22), Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006.

⁴⁷³ Articles 7 § 2; 11 § 2; 22 § 1, Regulation 2015/847.

⁴⁷⁴ Last update 04/06/2016, cf.

http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198/signatures?p_auth=7eEdeclx.

⁴⁷⁵ Art. 13, 2001 Protocol.

has been implemented by more EU Member States, even if not by its entirety. In particular, HR, EE, EL, IE and IT have still not ratified it so far⁴⁷⁶.

In the light of the above, the current situation concerning real-time monitoring of banking transactions in the EU may be summarized as follows.

Most of EU Member States (23) are under the obligation of regulating real-time monitoring, and thus should provide for that measure at domestic level; however, in practice not all countries have done so.

DE, for instance, did ratify the Protocol, but the transposing legislations interpreted art. 3 as not representing a binding obligation to introduce real-time monitoring; thus, it implemented the Protocol but without providing for this measure⁴⁷⁷. A similar conclusion has been drawn also for the 2005 Convention, which DE has just signed in January 2016 and is about to transpose at national level without introducing this investigative technique either⁴⁷⁸.

As far as the other five Member States are concerned: HR did not ratify the 2001 Protocol, but did ratify the 2005 Convention that requires to establish a similar measure; EE did not ratify both the Protocol and the 2005 Convention, but - according to MONEYVAL - it appears to have implemented the measure at domestic level⁴⁷⁹; IE, EL and IT did not ratify any of these legislative texts, but shall be bound at least to the 2015 Regulation when it will come into force.

In the light of the above, it clearly emerges how major issues still remain also in the EU with regard to the procedures to be applied with this investigative measure. Due to its relatively newness, in fact, real-time monitoring results particularly complex and hard to classify, especially when it comes to define its basic elements, starting from the authority in charge, and subsequently passing to the procedures and guarantees to be applied.

5. Some proposals on the introduction of real-time monitoring in the EU domestic legal orders.

Notwithstanding the difficulties illustrated, the formal establishment of some sort of electronic surveillance on financial transactions appears increasingly necessary.

To start with, irrespective of national resistances, the international and EU legal framework is progressively accepting the existence of real-time monitoring as a proper investigative measure at least for certain serious crimes. Indeed, the need to supply law enforcement and prosecutorial agencies with this kind of intrusive powers seems reasonable considering that their impact may be fundamental in achieving adequate results where the use of cyber skills is often joined by organized criminal structures.

Moreover, since late 2014 at least for all the Member States which have ratified the First Protocol to the 2000 Convention, the obligation to implement this measure may now be

⁴⁷⁶ Last update available online at: <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2001090>.

⁴⁷⁷ Cf. Entwurf eines Gesetzes zu dem Protokoll vom 16. Oktober 2001 zu dem Übereinkommen über die Rechtshilfe in Strafsachen zwischen den Mitgliedstaaten der Europäischen Union, BT-Drs. 15/4230, S. 12, in force since 27 July 2005, available online at: <http://dipbt.bundestag.de/doc/btd/15/042/1504230.pdf>.

⁴⁷⁸ Cf. the draft transposing law: Regierungsentwurf eines Gesetzes zum Übereinkommen des Europarats vom 16. Mai 2005 über Geldwäsche sowie Ermittlung, Beschlagnahme und Einziehung von Erträgen aus Straftaten und über die Finanzierung des Terrorismus, S. 49, available online at: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Geldwaescheuebereinkommen.pdf;jsessionid=D3386D989ED8D61DBB7E9D1083A16F20.1_cid289?_blob=publicationFile&v=2.

⁴⁷⁹ MONEYVAL, *The postponement of financial transactions*, cit., p. 37.

enforced also through an infringement procedure carried out by the Commission before the ECJ.

In any case, as the US example clearly shows, the mere fact that there are no legal bases to run these measures does not mean that real-time electronic surveillance is actually not being implemented. On the contrary, it often results in a *de facto* exercise of such powers by authorities without an adequate level of guarantees or properly safeguarded procedures.

Taking all that into consideration, introducing a clear legal framework, able to legitimize but also to limit the discretion of the investigators, conferring the necessary transparency to the use of this investigative measure, appears a reasonable option.

Even following this approach, however, several are the aspects which shall be carefully evaluated, first in general, and then, with the due recalibrations, at national level. However, since the latter would require almost 28 different analyses, this second task falls out of the scope of the present research.

Within the EU legal framework, on the other side, the measure of real-time monitoring of banking transactions will be discussed under the following profiles:

- a) the identification of the fundamental right(s) affected by the use of these investigative measures, in order to provide the necessary criteria to assess the proportionality of the surveillance in the light of the protection of fundamental rights and the need for an efficient prosecution and supervision;
- b) the choice of the authority able to exercise such a power, with special regard to its impartiality and capability to keep the confidentiality of the data obtained and dealing with their sensitiveness;
- c) the procedural rules to be followed when performing real-time monitoring, particularly concerning the subject of the measure, its time limitations, and the existence of exclusionary rules in case of violations of the above.

5.1. The fundamental right(s) affected by real-time monitoring.

Real-time monitoring, together with other non-traditional investigative measures, such as controlled delivery, has since long been labelled as an atypical or special investigative technique.

Accordingly, it has enjoyed quite a peculiar treatment in most of the international and Community legislative texts so far approved, entitling a less binding regime, and leaving a greater margin of appreciation to the Member States.

Indeed, a major critical issue concerning real-time monitoring of banking transactions, and of electronic surveillance in general, is the identification of the fundamental rights which may be affected by the implementation of a continuous gathering of evidence over a certain period of time taking into account the current technological development, and, accordingly, the classification of this measure within a domestic legal system.

The difficulties in this task are multiple, and derive essentially from a twofold profile.

First of all, the status of digital data itself, and, among those, of banking data has not been explicitly defined neither at European, nor, in most cases, at national level. Not even the jurisprudence of the ECtHR and of the ECJ seems to be helpful on the matter, since this subject has not been thoroughly taken up so far⁴⁸⁰.

Also the 2016 Directive on the protection of personal data refers, recently approved, exclusively to a very broad category, understood as «any information relating to an identified

⁴⁸⁰ In this sense, see J. TRICOT, A.N. MARTIN, cit.

or identifiable natural person [...] in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person»⁴⁸¹.

In this sense, banking records can definitely fall under the label of personal data, since they can be used to identify several aspects of a person, such as her economic background, or help in establishing her political opinions or preferences, her activities and agenda⁴⁸².

Nonetheless, no explicit definition of banking data has been made so far; especially taking into account that most of them are increasingly expressed in a digital form. From this vagueness, it derives a high level of uncertainty in determining which are the exact interests endangered in the application of electronic surveillance.

Under a further perspective, most legal orders have established the rights and guarantees of criminal procedure law on parameters belonging to a pre-digital era, and are thus currently struggling to find a way of placing the dissemination of digital technology, and the asserting of the Internet of Things.

Indeed, as acknowledged in the context of the recent reforms in the matter of data protection: «rapid technological developments and globalization have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly [...] Natural persons increasingly make personal information available publicly and globally»⁴⁸³, «technology allows personal data to be processed on an unprecedented scale in order to pursue activities such as the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties».⁴⁸⁴

In the view of this evolution, most provisions regarding the right to privacy provided at national level result capable to protect personal information only with regard to the use of some techniques of interference, which mostly cannot be easily adapted to the new technology and the existence of digital data. On the contrary, as recognized also by the EU legislators «in order to prevent creating a serious risk of circumvention, the protection of natural persons should be technologically neutral»⁴⁸⁵.

When it comes to propose practical solutions, however, different approaches may be observed transversally at legislative, judicial and academic level, especially concerning the identification of the rights involved by surveillance measures, and the subsequent regulation of the latter.

According to some, the best option to classify the necessities deriving from the adoption of information technology (IT) is to use the already-existing legal categories; this approach, of course, requires to stretch the current legal systems in order to adapt them to new needs.

At first glance, this choice presents the undeniable advantage of requiring no substantial changes in domestic legal frameworks, allowing a quicker assimilation of the new contents,

⁴⁸¹ Cf. art. 3 § 1, Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

⁴⁸² Cf. J. TRICOT, A.N. MARTIN, cit.

⁴⁸³ Recital (6), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC;

⁴⁸⁴ Recital (3), Directive 2016/680.

⁴⁸⁵ Id., Recital (18).

which may be realized, at least to a certain extent, through the mere development of the case-law also within civil law systems.

In practice, however, agreeing upon a dividing line, beyond which the categories in force are losing their distinctive features, and above all their capability to efficiently regulate new phenomena without losing effectiveness in managing the existing ones, may reveal a pretty hard task indeed.

Following this approach, for instance, certain jurisprudence identified the fundamental right affected by real-time surveillance in the secrecy of communications⁴⁸⁶.

This interpretation has the notable advantage of extending to this investigative measure the procedures and guarantees provided for wiretapping, which are usually requiring both a judicial authorization, a high level of foreseeability in the statutory regulation and strict requirements concerning their duration and the use of technical tools.

On the other side, however, while some digital contents, such as e-mails, chats or Voice over IP (VoIP) conversations, may easily fall under the category of “communication”, the same cannot be said for all kind of digital data, especially when the information stored in a computer, or in the cloud, has originated exclusively by the interaction of the primary user with the software, without the explicit intervention of any other individual.

Such data cannot be considered communications *strictu sensu*, but their content may nonetheless present a substantial degree of sensitivity, which still needs to be safeguarded at a very high level. In this sense, data concerning banking transactions represent a perfect example of information which can hardly be classified as communicative, but which definitely needs to be protected against unlawful intrusions.

Following a different interpretation, the value possibly endangered by real-time monitoring of data should be identified in the right to a private domicile or home⁴⁸⁷.

Taking into account a broad definition of domicile as a «the physically defined area, where private and family life develops»⁴⁸⁸, characterized by the existence of a sufficient and continuous link with the person involved by the investigations⁴⁸⁹, any intrusion into the personal computer, especially if protected by a password, may be considered as a violation of the negative obligation of the State not to interfere with such a private space.

The problems caused by this approach rely however on two main aspects.

To start with, regulations concerning interference with private domicile generally require them to be lawfully provided and authorized by judicial authorities, but usually do not present a complete regime about their duration or the specific technical tools involved.

Secondly, the possibility to extend the concept of domicile has certain limitations; for instance, it might be hard to fix intangible digital data, stored not in a computer but on the cloud, into the definition of home or of a “physically defined area”.

Accordingly, this approach may end up elaborating irrationally discriminatory interpretations, which tend to recognize different levels of protection depending not as much as on the sensitive content of the information itself, but rather on where the servers are located (if in a private domicile or not), without considering how most of these distinctions have failed under the advent of IT.

⁴⁸⁶ Italian Supreme Court, Decision no. 13884 of 10 March 2016 (*Scurato*) and Decision of 28 April 2016, SEZIONI UNITE (*Scurato*) - to be published.

⁴⁸⁷ Cf. Italian Supreme Court, Decision no. 27100 of 26 May 2015, Rv. 265655; and Decision no. 26795 of 28 March 2006 SEZIONI UNITE (Prisco).

⁴⁸⁸ Cf. *Giacomelli v. Italy*, 2 November 2006, Application no. 59909/00, § 76.

⁴⁸⁹ Cf. *Gillow v. the United Kingdom*, 24 November 1986, Application no. 9063/80, § 46.

In the light of such critical issues, a different point of view started from recognizing that the already existing legal categories cannot properly serve when it comes to regulate such an overwhelming phenomenon as the use of IT, able to affect the rights of the citizens to an extent previously unconceivable.

Following this approach, to adequately balance the use of digital forms of surveillance it is unavoidable to establish new legal rights and categories, adequate to the emerging necessities of a digital globalized context.

That was for instance the interpretation followed by the German Constitutional court, which in 2008, taking into account the increasing role played by computers in everyday life, declared the inadequacy of the Constitutional guarantees provided in the fields of private communications and home⁴⁹⁰. In that case, the court thus created a “new” Constitutional right to the secrecy and the integrity of IT systems (*Grundrecht auf Gewährleistung der Vertraulichkeit und Integrität informationstechnischer Systeme*), to be used as a parameter in evaluating the legitimacy of electronic forms of surveillance.

5.2. A solution in line with the ECHR and the CFREU.

In the light of the pro and cons of the options mentioned above, the last approach appears to be preferable.

Indeed, the definition of a wider right to privacy neither related to private domicile, nor to communications, permits to confer a more adequate protection tailored to other sensitive private interests not just on a case by case approach, depending on whether the one at stake may be led back to one of the pre-existing categories, but rather on a regular basis, as long as the target of the interference is referred to personal information.

On this issue, the case law of the ECtHR has consistently dealt with surveillance measures in the scope of art. 8 of the Convention, which encompasses the protection of several interests, including the right to a home and to the secrecy of correspondence.

The value chosen by the Court to review those measures, however, has been identified in the right to a private life, meant as «the “inner” circle in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle», comprising also «to a certain degree the right to establish and develop relationships with other human beings»⁴⁹¹.

Within this right, the ECtHR has recognized that art. 8 applies also to data protection, since they belong to the personal sphere of each individual, including the right to personal autonomy in establishing details of their identities as individuals⁴⁹². Specifically, according to the case-law of the Strasbourg Court, secret surveillance, including the use of hidden devices, shall be evaluated in the light of the right of private life.

A similar interpretation has been followed also by the European Court of Justice with referral to articles 7 (right of private life) and 8 (protection of personal data) EUCFR, and art. 16(1) TFEU⁴⁹³.

In such a context, risks to these rights «of varying likelihood and severity» may result from the processing of data if that gives rise «to discrimination, identity theft or fraud, financial

⁴⁹⁰ *BVerfG*, 27 February 2008, *BVerfGE* 120, 274 *et seq.*

⁴⁹¹ Cf. *Niemietz v Germany*, 16 December 1992, Application no. 13710/88, § 29.

⁴⁹² Cf. *X v. The Federal Republic of Germany*, Decision of 7 May 1981, Application no 8334/78.

⁴⁹³ Judgment in *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Grand Chamber, 8 April 2014, C-293/12, ECLI:EU:C:2014:238, § 53.

loss, damage to the reputation, loss of confidentiality of data protected by professional secrecy, unauthorised reversal of pseudonymisation or any other significant economic or social disadvantage [...] where personal aspects are evaluated, in particular analysing and predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles [...] or where processing involves a large amount of personal data and affects a large number of data subjects»⁴⁹⁴.

These broad interpretations of the right to personal life and privacy may actually supply the adequate legal bases for an “new” fundamental right, able to extend forms of effective protection also to sensitive private interests that cannot be otherwise categorized in the traditional legal classification of private domicile or communications. These provisions present a substantial advantage compared to the choice of using the latter: their wide formulation, which has been also criticized of being too vague, makes them capable of being applied also to the protection of digital (financial) data without any stretch to their original content. As stated by the ECJ leading case on the matter, *Digital Rights Ireland Ltd*, when it comes «to establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way»⁴⁹⁵.

Indeed, the rights of articles 7 and 8 CFREU and 7 ECHR appear to possess, better than any other formulation created for interception or search purposes, that “technological neutrality” which guarantees their application any time those values are endangered, irrespective of the techniques used.

Following the European Courts’ interpretations, the guarantees provided by those articles may avoid «serious risks of circumvention» caused by the difficulty of classifying digital data under the label of communications, or of determining the exact locations of virtual entities⁴⁹⁶.

In particular, according to art. 8 § 2 ECHR, limitations to the right of private life are allowed only if they are in accordance with the law and are necessary in a democratic society.

The first requirement has been interpreted by the ECtHR in the sense that States must provide some specific rule or regime, publicly foreseeable, which authorizes the interfering act it seeks to justify⁴⁹⁷.

In particular, according to the test developed by the Court in the case *Sunday Times v. The United Kingdom*, the first requirement is satisfied whether the law is adequately accessible and is formulated with precision sufficient to enable citizens to regulate their conducts, especially as far as the scope and the manner of the exercise of discretion conferred to the authorities are concerned⁴⁹⁸.

The second requirement has been interpreted as leaving a certain margin of appreciation by the States⁴⁹⁹; nonetheless, the latter is charged with the burden of proof to demonstrate the pressing social need for the interference.

⁴⁹⁴ Recital (51), Directive 2016/680.

⁴⁹⁵ *Digital Rights Ireland Ltd* § 33; see also see, Judgement in *Österreichischer Rundfunk and Others*, 20 May 2003, , C-465/00, C-138/01 and C-139/01, EU:C:2003:294, § 75.

⁴⁹⁶ Recital (51), Directive 2016/680.

⁴⁹⁷ Cf. *Silver and Others v. The United Kingdom*, 25 March 1983, Application nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 736/75, §§ 85-86;

⁴⁹⁸ *The Sunday Times v. The United Kingdom*, 26 April 1979, Application no. 6538/74, §§ 48-53.

⁴⁹⁹ The margin of appreciation doctrine «refers to the room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the European Convention on Human Rights. However, the term is not found in the text of the Convention itself, nor in the travaux préparatoires,¹ but first appeared in 1958 in the Commission’s report in the case brought by Greece against the United Kingdom over

In order to achieve so, the jurisprudence of the ECtHR, starting from the case *Klass and Others v. Germany*, requested that there had to be adequate and effective safeguards against abuses⁵⁰⁰.

Similar conditions are provided also by art. 52 § 1 EUCFR, as interpreted by the ECJ, according to which interferences with the rights of the Charter are legitimate only if exceptions are provided for by law, as inasmuch as they are strictly necessary and proportionate to the «general interest recognised by the Union or the need to protect the rights and freedoms of others»⁵⁰¹.

The proportionality of the interference, especially when put into place in the course of criminal investigations, requires the intervention of the judicial authority to be assessed, which should provide a prior authorization or, in the absence of the latter, a subsequent counterbalance by the availability of an ex post judicial review⁵⁰².

5.3. The authority in charge for real-time monitoring.

In the light of the above, it clearly appears how the involvement of a judicial authority with jurisdiction on the facts is a necessary requirement to the legitimacy of intrusive measures such as real-time monitoring.

This notwithstanding, currently at national level the panorama concerning the authority in charge for applying the measure has been solved in different ways in the European context, according to the few comparable data on the matter.

Taking into account the available sources, among those Member States that do provide the measure of real-time monitoring within their jurisdiction, a relevant part (AT, FR, PT, RO and the UK⁵⁰³) conferred that power directly to the judicial authorities, while some other countries have opted for choosing the national FIUs (BG, CZ, EE, LV, SI⁵⁰⁴; LU, NL, EI⁵⁰⁵)⁵⁰⁶. In this latter group, thus, the kind of authority in charge for real-time monitoring is strictly related to the adopted type of FIU.

In particular, while for few of these countries such powers appear to be exercised by authorities within the traditional area of criminal justice (EE and EI: law enforcement-type of LUX judicial-type of FIU); in BG, CZ, SI, NL real-time monitoring of financial transactions is conferred to administrative authorities. A choice which, considering the fundamental status of the rights involved by invasive forms of surveillance, may be hardly considered in compliance with the principles of Convention and the Charter.

5.4. Defining the procedural rules.

alleged human rights violations in Cyprus.² Since then it has been adopted in numerous other Commission decisions and in over 700 judgments of the Court», cf., e.g., S. Greer, *The Margin Of Appreciation: Interpretation And Discretion Under The European Convention On Human Rights*, Council of Europe Publishing, July 2000, p.5, available online at: [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf).

⁵⁰⁰ *Klass and Others V. Germany*, 6 September 1978, Application no. 5029/71.

⁵⁰¹ *Digital Rights Ireland Ltd* §§ 38 and 52.

⁵⁰² *Heino v. Finland*, 15 February 2011, Application no. 56720/09, § 45.

⁵⁰³ According to the country analysis provided in K. Ligeti (ed. by), *Toward a prosecutor for the European Union*, cit.

⁵⁰⁴ According to MONEYVAL, *The postponement of financial transactions*, cit., p. 37 *et seq.*

⁵⁰⁵ According to the country analysis provided in K. Ligeti (ed. by), *Toward a prosecutor for the European Union*, cit.

⁵⁰⁶ According to the sources, it is not clear in which form DK, PL, ES, HU, MT provide for real-time monitoring.

Coming to the actual procedures that should assist the performance of real-time monitoring, the need to have a law “sufficiently precise” requires a comprehensive regulation in which spaces for discretion are carefully balanced with due oversight and control⁵⁰⁷.

A similar scheme, in most national legal systems may be found in the wiretapping regulation, or where provided, in the controlled delivery statutes, which are usually restricted with regard to its subjects, and require strict forms of judicial review.

Also in the case-law of the ECtHR, the compatibility of interception law has been linked to the identification of a number of requirements by the relevant law: the categories of people liable to be put under surveillance; the nature of the offences which could give rise to such an order; the duration of the surveillance; the procedures to be followed; and the circumstances in which the information gathered should be destroyed⁵⁰⁸.

These guarantees and safeguards seem adequate also to regulate the interception of digital non-communicative data, such as banking information⁵⁰⁹.

Coming to the definition of the subjects which may be involved by surveillance measures, it appears necessary to extend the possibility of tracking financial records not only to the person affected by the investigation, but also to those subjects which may be related to the latter, or act as front man to financial operations, irrespective of their being natural or legal persons.

However, to avoid that the use of electronic surveillance turns into massive forms of State watching, “fishing expeditions” shall be prohibited and real-time monitoring shall be limited only to specified bank account(s).

That appears to be also in line with the current international state of play on the point; for instance, the need to specify which is the precise subject of the investigations is required by art. 28 § 1(a) of Directive 2014/41, according to which it is possible to issue an EIO for the gathering of evidence in real time over «one or more specified accounts»; similarly, in art. 7 § 2(c) of the 2005 COE Convention, which states that the party should enable the monitoring of «the banking operations that are being carried out through one or more identified accounts».

As far as the offences for which real-time monitoring may be delivered, taking into account the intrusiveness of this form of surveillance, it appears reasonable to limit its only to a narrow range of offences, mostly defined as serious crimes.

In particular, according to the Explanatory Report to the 2001 Protocol, these offences could be determined according to several alternative criteria, such as the punishment threshold established at national level, and in particular, of a penalty of at least four years in the requesting Member State and two years in the requested Member State⁵¹⁰.

Alternatively, serious crimes may be identified through a list, such as the offences found in the Europol Convention⁵¹¹ or those relating to the protection of the PIF Convention⁵¹².

⁵⁰⁷ Cf., e.g., *Kruslin V. France*, 24 April 1990, Application no. 11801/85; *Huvig V. France*, 24 April 1990, Application no. 11105/84.

⁵⁰⁸ *Kennedy V. The United Kingdom*, 18 May 2010, Application no. 26839/05.

⁵⁰⁹ Even if in this sense, the case-law of the ECtHR is still quite scarce, since it referred these requirements to digital data but with clear communicative content, see *Copland V. The United Kingdom*, 3 April 2007, Application no. 62617/00; and *Khan V. The United Kingdom*, 12 May 2000, Application no. 35394/97 (not recognizing such a protection for GPS technology).

⁵¹⁰ Art. 1 § 3, Explanatory report to the Protocol, cit.

⁵¹¹ Cf. Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), Annex 2, available online at: https://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/projects/carpo/output_3_-_special_investigative_means/Europol_Convention.pdf.

In addition, real-time monitoring should be also disposed only for limited amounts of time, to be checked by the judicial authorities at any renewal, and through technical tools the use of which by law enforcement agencies or prosecutors shall be specifically authorized, similarly to what happens for wiretapping regulations.

Lastly, in order to effectively safeguard the fundamental rights affected by the performance of real-time monitoring measures, any regulation dealing with their adoption should provide for strict exclusionary rules in case the procedures set are violated.

Conversely to the ECtHR approach, it seems that the protection of such fundamental rights cannot be left to a case by case appreciation of the harm brought by the violation to the fairness of the trial.

As already existing in several domestic legal orders, only automatic exclusionary rules, which in the specific case shall be able to lead to the destruction of the data unlawfully collected, may serve the purpose of guaranteeing fundamental rights also from indirect circumvention.

That is even more urgent when these forms of surveillance are applied to particularly sensitive data such as financial records, through which it is possible to obtain an extremely high number of personal information protected by fundamental rights.

That of course implies some form of harmonization in the area of criminal procedure; a task which so far, also due to its scarce capability to result effective in compromised solutions, has mostly resulted in failed attempts in the AFSJ, where it has been easier to achieve the free circulation of prisoners rather than rules⁵¹³, but which is increasingly becoming of a crucial importance in the development of the whole European Union.

⁵¹² Cf. Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, available online at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127\(03\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127(03)&from=EN).

⁵¹³ A. KLIP, *European Criminal Law*, cit.

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