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Comparative, European & International Criminal Justice 1

Banking Supervision and Criminal Investigation

Comparing the EU and US Experiences

Giulia Lasagni

Springer

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Contents

Abbreviations

States

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

Other Abbreviations

ABoR	Administrative Board of Review
ACHR	American Convention on Human Rights
AML	Anti-Money Laundering
BCFP	Bureau of Consumer Financial Protection
BHC	Bank Holding Company
BRRD	Banking Recovery and Resolution Directive
BSA	Bank Secrecy Act
BU	Banking Union
CFMA	Commodity Futures Modernization Act
CFREU	Charter of Fundamental Rights of the European Union
CFT	Countering the Financing of Terrorism
CJEU	Court of Justice of the European Union
CONSOB	Commissione Nazionale per le Società e la Borsa
CRA	Community Reinvestment Act
CRD	Capital Requirements Directive
CRR	Capital Requirements Regulation
DOJ	Department of Justice
DGS	Deposit Guarantee Scheme
EBA	European Banking Authority
ECB	European Central Bank
ECHR	European Convention on Human Rights
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's 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
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	Information Technology

JIT	Joint Investigation Teams
JST	Joint Supervisory Team
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 européen de Lutte Antifraude
OTS	Office of Thrift Supervision
SAR	Suspicious Activity Report
SCA	Stored Wire and Electronic Communications and Transactional Records Access Act
SEC	Securities and 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-To-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
Introduction

Financial transactions are a crucial element in the undertaking of criminal investigations, especially (but not exclusively) in their increasingly globalized dimension.

Access to banking records and following the financial paper (or today, rather digital) trail have become imperative operations to effectively combat quite an extensive 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 other forms of serious crimes, such as corruption, tax fraud, obstruction of public procurement or grant procedures, market abuse, human trafficking, or cybercrime. Often carried out in parallel to traditional fact-finding criminal inquiries, financial investigations consists in those techniques which allow to chase the "movement of money during the course of criminal activity" (*i.e.* when the money is received, where it is stored or deposited),[1] and to identify and trace beneficiaries, as well as the material benefit acquired (also through third persons) by the criminal offence.[2]

Dealing today with banking investigations and financial investigative techniques, however, means dealing with much more extended implications than it perhaps entailed only a few decades ago.

Indeed, financial transactions are regularly carried out on a globalized dimension, while the development of financial investigative techniques is still far from being characterized by an adequate level of commonality at transnational level, and rules and regulations are still highly varying from country to country.

Financial investigations, therefore, currently represent a forefront arena—both at the national, and at the international level—where fundamental rights are remarkably and increasingly tested in their capability to keep pace with the development of

[1] FATF (2012), p. 3.

[2] Golobinek (2006), p. 7; AA.VV. (1988); Adinolfi et al. (2006); Flick (1988).

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digital technology, the existence of multi-level systems, and an extended use of administrative punitive powers.[3]

This supranational dimension is even more evident once considering that banking records are today mostly represented by digital data, the treatment of which is often not only lacking common standards, but also deficient within a fair number of national legal systems.[4]

Moving from these assumptions, the developing of banking investigation has ultimately come across an unprecedented degree of debate and discussion at academic, legislative and (progressively) judicial level, whose results are likely to influence criminal law and procedure far beyond the mere field of financial crimes.

Two in particular are the cutting-edge profiles where, in the last few years, traditional banking criminal investigations are increasingly and irretrievably challenged in their national-based, analogous and mono-disciplinary dimension: The conferral to administrative (often supranational) supervisors of severe punitive powers of potentially criminal nature, and the application of intrusive surveillance criminal investigative techniques, like the real-time monitoring of banking records, often in lack of adequate fair trial guarantees.

In a comparative perspective between the EU and the US, this work examines both profiles driven by two leading questions: (a) What is in this field a balance between the need to fight crimes and that of protecting human fundamental rights which can be fairly accepted in a democratic society?, and (b) under this perspective, is the current legal framework in the EU adequate? If not, what can be done about it?

Under the first profile, the notable investigating and above all sanctioning powers applicable by supranational banking regulators has opened a series of critical issues on the independency and accountability of such supervisors in the field of banking investigations, and, especially in Europe, also on the substantial (administrative or criminal) nature of supervisory penalties, due to the autonomous and non-formalistic approach developed for the definition of *matière a coloration pénale* by the European Court of Human Rights and the Court of Justice.[5]

Under the second profile, digital technical development and massive production of data are increasingly leading to integrate legal sources imposing reporting obligations of suspicious activities upon credit institutions,[6] with forms of real-time or

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[3] Bradley (2014), 271 *et seq*.

[4] Cf. Sect. 7.5–7.6.

[5] Which will be analysed in Part II of this work (Chaps. 4, 5, and 6).

[6] Periodical reporting obligations–generally addressed towards relevant supervising administrative regulators, or if the irregularities reasonably show hints of undergoing criminal activity, extended also towards judicial or law-enforcement authorities–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 U.S.C. § 1829b, 1951-1959e) and in the EU (by the AML/CFT Directive, recently approved in its fifth version, see Directive (EU) 2018/843 of 30.05.2018 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing). While the existence of reporting obligations is a firmly established reality in most countries against money laundering, or financing

surveillance techniques more consistent with the non-linear structure of our globalised society (also in its criminal dimensions).

Analysing in which cases, and under which conditions, real-time monitoring of banking records may apply, represents today both a fundamental step for the development of banking criminal investigations against the need to protect fundamental rights like the right to privacy, and a task which cannot be further postponed: Indeed, while legal scholars and international actors are debating about the legitimacy of the use of these highly intrusive surveillance measures, the latter are already applied, with uncertain legal basis, in numerous countries by prosecutors, law-enforcement and—with different but not less worrying implications—several private commercial companies.[7]

To examine such complex, but at the same time crucial topics and trying to answer to the two aforementioned leading questions, this work is structured as follows.

Part I (Chaps. 2 and 3) lays the foundation for the following analysis developed in Part II and III.

Chapter 2 maps the boundaries of the matter under examination, identifying some bedrocks which will be a constant reference in the examination on the compliance of the European Central Bank's investigative and sanctioning powers with fair trial rights, and on the protection of privacy and defence rights in real-time monitoring of banking records. These fundamental issues first concern the very definition of "financial institution", a step especially relevant in an age of service dematerialization, where the assets of financial non-banking credit activities (the so-called "shadow banking") already represents "about half the size of the regulated banking system".[8]

Moreover, in the financial field (but increasingly in other relevant areas too, such as privacy, or environmental protection) applicable legal bases are today often produced by multiple actors, which differ from each other in their origin (independent, governmental) and nature (administrative, judicial, hybrid), and which have different, and though frequently overlapping investigative, regulatory and enforcement powers. These actors compose a legal framework whose complexity shall be taken in due account in any legal analysis on banking investigation. In this sense, a special focus will be put on the efficiency of multi-disciplinary cooperation networks, and the transnational application of the *ne bis in idem* principle.

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of terrorism, the possibility of extending their scope to investigate over other criminally relevant transnational conducts, such as tax frauds or cybercrime, is still highly controversial.

[7] Which will be analysed in Part III of this work (Chaps. 7 and 8).

[8] In 2012 they "accounted for EUR 53 trillion, mainly concentrated in Europe (around EUR 23 trillion) and in the United States (around EUR 19.3 trillion)", cf. 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 (2014); see also Weber et al. (2014), p. 171 *et seq.*

Chapter 3 proposes a recollection of the main actors active in the field of financial and banking investigations at the international level, whose powers are particularly relevant for the development of policies of financial criminal justice in the EU and in the US, such as the Financial Action Task Force, and the Basel Committee on Banking Supervision. This will help tracing the general framework from which most domestic financial regulations derive, and identifying the fundamental parameters that banking oversight mechanisms shall maintain in compliance with.

Part II (Chaps. 4, 5 and 6) analyses the criminally relevant profiles of banking supervision in the EU and in the US. Chapter 4 illustrates the main legal and institutional changes brought in the Eurozone by the Banking Union, with a specific focus on the banking investigating and sanctioning powers conferred since late 2014 to the Single Supervisory Mechanism, as part of the European Central Bank. In particular, it will be analysed the possibility for this Mechanism to impose punitive penalties, and the extent of the applicable procedural rules and safeguards. In a comparative perspective, Chap. 5 delineates the main traits of the US banking supervisory system after the last financial crisis, illustrating relevant competent authorities, as well as their investigative and sanctioning powers.

In Chap. 6, the status, organization and powers of the US and EU supervisory authorities are analysed, first against the Basel Committee's *Core Principles*, with special attention to the rules requiring independence and accountability, as well as effectiveness in cooperation and exchange of information. These profiles indeed result extremely meaningful also under a criminal law perspective, since their violation may already undermine at the very bases the possibility for banking supervisors to comply with fair trial guarantees. The substantive nature of the penalties imposable by the Single Supervisory Mechanism is then analysed in light of the *Engel* case-law, as developed by the Court in Strasbourg and applied by the Court of Justice. Following the assumption that a significant part of those sanctions shall be recognized a punitive nature, the Chapter analyses the fairness of the SSM sanctioning proceedings in light of the fundamental fair trial rights established by the Charter of Fundamental Rights of the European Union and by the European Convention on Human Rights, highlighting potential profiles of structural non-compliance.

Lastly, Part III (Chaps. 7 and 8) examines the theme of banking criminal investigations, and in particular of surveillance or real-time monitoring of banking data.

Chapter 7 deals with the theme of criminal banking investigations, identifying different investigative measures and focusing in particular on real-time monitoring of banking data. In the Chapter, it is argued why establishing a proper regulation on the matter is increasingly necessary, especially in the banking and financial sector, where currently fundamental rights pay for the lack of adequate legal basis. To explain so, a reconstruction of the (scarce) applicable legal basis for this investigative technique will be provided with regard to both the EU and the US legal systems.

Against the composite framework, Chap. 8 concludes the present work, introducing some proposals on the key features that should characterize an EU regulation on banking data surveillance, starting from the identification of the fundamental rights at stake, above all, the right to privacy. Accordingly, basic procedural standards and safeguards are highlighted, that shall apply when such surveillance techniques are implemented (at least) in criminal proceedings, including considerations over which authority should authorize the use of real-time monitoring of banking records.

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Part I
Mapping the Boundaries of an Intricate Playing-Field

Chapter 2
Finding the Way in a Complex Multi-Level Legal Framework

It is not unlikely for a criminal-law jurist who approaches the matter of banking and financial investigation for the first time to report an impression of mild bewilderment.

Indeed, although representing a vital and extremely relevant part of criminal investigations, as shown for instance, by the last financial crisis, several are the profiles in this field which venture beyond the boundaries of traditional criminal law and procedure. Due to the globalization of financial services, dealing with banking investigations today means dealing not only with the rules established in this matter under criminal law, but also under banking, financial and administrative regulation: It is in fact precisely in these sectors that suspicions of a crime or information that often become crucial evidence in criminal proceedings are first identified and collected.

Such an approach becomes then pivotal in those legal contexts, like the EU, where against a broad definition of "criminal matter"[1] complex supervisory and sanctioning powers are into place.[2] This (to date) unavoidable entanglement is further complicated by the fact that this matter is no longer regulated exclusively, or even mostly by national legislation or case-law, but involves the contemporary action of several international and supranational bodies in the definition of the applicable legal basis.

To find the way in this intricate legal labyrinth, it is therefore necessary to start this work mapping the boundaries of the matter under examination, and identifying some bedrocks which will be a constant reference in the following analysis, concerning the compliance of the new European Central Bank's investigative and sanctioning powers with fair trial rights, and the protection of privacy and defence rights in real-time monitoring of banking records.

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[1] See below, Sect. 2.3.

[2] Cf., *e.g.*, Franssen and Ligeti (2017), p. 1 *et seq.*

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In order to do so, the Chapter proceeds as follows: Sect. 2.1 circumscribes the scope of the research, selecting—in the vast panorama of financial operators—those which will be analysed further in the inquiry over the new frontiers of banking investigations. To this aim, clarifications will be provided on the difference existing between financial and credit institutions, and on the increasingly prominent role played by alternative forms of financing, such as e-currency or *Hawala*.

Section 2.2 offers a brief recollection of the state of play concerning criminal liability of legal persons in the EU and in the US. Although not being the main subject of this work, *status* of legal entities—that highly varies according to national rules and legislation—represents a necessary basis to be considered in banking investigations, especially when it comes to define the procedural rights (that should be) recognized to these subjects.

Section 2.3 explains the (by now unavoidable) interaction between administrative and criminal matters, a trend that increasingly requires dealing with administrative forms of investigation and sanctioning, such as banking supervision, also under a criminal law perspective. In this sense, the analysis deals with two general phenomena whose weight in shaping any form of national and international criminal policy (including the definition and attribution of specific financial investigative powers) is increasingly-growing: The often-unpredictable role of cooperation networks, and the persistent failure to find a shared and effective management of the risks deriving from violations of the principle of *ne bis in idem*.

Lastly, Sect. 2.4 presents the methodology and the comparative approach applied in the research, explaining the peculiarities of carrying out a comparative analysis including multi-level legal orders and especially the EU, a system whose potentially federal legal structure is still a work in progress.

2.1 The Definition of "Bank" and "Financial Institution"

A first step to circumscribe the target of this research is to define which are the subjects involved in banking inquiries, beginning with an investigation on the very concepts of "credit institution" (or "bank"), and "financial institution".

These terms, in fact, are given specific technical meanings that differ according to the legal order involved: In the EU and in the US, in particular, the notion of "financial institution" is only partially overlapping. For instance, while in the US the definition includes also public institutions when exercising powers related to a series of listed financial businesses, both at the federal and at local level,[3] a similar provision is not provided for in the EU legislation, which takes into account only the private sector.

In most cases, however, these notions do not enjoy stable boundaries at the domestic level either, where the concepts of "bank" and "financial institution" have notably changed and extended during the last century, not always, as will be

[3] 31 U.S.C. § 5312(2), lett. (W).

described, in a way fully coherent with the risks and the evolution of the financial markets.

These *caveats* are relevant not only for academic reasons, but also—and especially—because they influence the choice on the concrete regulation applicable to a certain legal entity, and thus (among others) the latter's legal obligations, and profiles of administrative and/or criminal liability. The classification of a legal entity as "credit" or "financial" institution is also often decisive to identify under the competence of which public authorities a certain financial operator falls within, and, accordingly, which is the kind and the extent of the investigative and/or supervisory powers that may be exercised against it.

In this sense, starting from a "traditional" situation in which the financial system was mainly identified in banking-networking, and the most popular investigative techniques were represented by search and production orders, it could be observed that most regulations approved in the last decades in financial criminal matter, such as those concerning Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT),[4] transnational fraud,[5] or market abuse,[6] increasingly tend to expand their scope over both financial and credit institutions (in those contexts in which the latter are not included in the first category), to face the increasing dematerialization, globalisation and fragmentation of the financial markets. At the same time, the extent of the subjective scope and of the goal pursued by such regulations often led to conferring (or requiring to confer) to competent authorities identified at the internal level (not necessarily in judicial or law-enforcement bodies) relevant intrusive investigating powers not yet recognized, or not yet clearly classified in national criminal systems, like real-time monitoring (or surveillance) measures.[7]

In the EU, statutory notions of "credit" and "financial institutions" are provided for by Regulation No 575/2013, better known as Capital Requirements Regulation (CRR) recently amended by its second version (CRR II—today only partially entered into force). CRR represents, together with Directive 2013/36/EU (or Fourth Capital Requirement Directive-CRD IV also recently amended in its fifth version, not yet into force),[8] a relevant part of the Single Rulebook, the legislative text

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[4] That is, for instance, the case of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198, Warsaw, 16.05.2005), or of the EU AML directives (see Directive 2018/843, "5th AML Directive").

[5] Directive (EU) 2017/1371 of 5.07.2017 on the fight against fraud to the Union's financial interests by means of criminal law (hereinafter "PIF Directive").

[6] Directive 2014/57/EU of 16.04.2014 on criminal sanctions for market abuse (hereinafter "II Market Abuse Directive"), and Regulation (EU) No 596/2014 of 16.04.2014 on market abuse (hereinafter "Market Abuse Regulation").

[7] Cf. Tricot and Martìn (forthcoming). The analysis of the critical issues concerning real-time monitoring of banking data in the EU and in the US is carried out below in Chaps. 7 and 8.

[8] Regulation (EU) No 575/2013 of 26.06.2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (hereinafter "CRR"), and Directive 2013/36/EU of 26.06.2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (hereinafter "CRD IV"). CRD IV was

standing at the core of the Banking Union project.[9] According to CRR, financial operators are differentiated following the type of pursued financial activities, which, it should be briefly recalled, are regulated in the EU on the basis of two fundamental principles: Mutual recognition of financial services, and the home country principle.

Introduced in 1989 with Directive 89/646/EEC, the so-called Second Banking Directive,[10] mutual recognition in the field of financial activities establishes that a corporation licenced in a certain Member State may use this single authorization throughout the whole Union territory to provide the services now listed in Annex I CRD IV,[11] the exercise of which shall be treated in the same manner as national financial operators by the hosting Member State(s).[12]

Strictly connected to it, is the home country principle, also introduced by the Second Banking Directive. According to it, supervision over financial institutions, banks and branches operating in a Member State different from that of origin, is not allocated following a strict territorial competence criterion, since those subjects are kept under the oversight of the authorities of national origin even when operating abroad.[13]

Against this background, "financial institutions" are described by Article 4(1) (26) CRR as undertakings which have the principal goal of acquiring holdings, or pursuing one or more of *certain* activities subject to mutual recognition, which do *not* include those strictly related to insurance and credit services.[14]

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recently amended by Directive (EU) 2019/878 of 20.05.2019 ("CRD V"), that shall be transposed by 28.12.2020. CRR will be substituted by CRR II (Regulation (EU) 2019/876 of 20.05.2019) from 28.06.2021, although a few provisions enter into force earlier. Those already into force and relevant for the present work will be highlighted in the following analysis.

[9] The impact of the Banking Union, with special regard to the creation of new transnational supervisory (and sanctioning) powers is further analysed in Chap. 4, especially Sects. 4.1 and 4.3. Highlighting the relevance of such a harmonizing effort, Tröger (2012–2013), p. 208 *et seq*.

[10] Cf. Annex 7, Second Council Directive 89/646/EEC of 15.12.1989 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.

[11] Cf. Annex I, CRD IV, *List of Activities Subject to Mutual Recognition*: *1. Taking deposits and other repayable funds. 2. Lending including […] 3. Financial leasing. 4. Payment services […] 5. Issuing and administering other means of payment […] 6. Guarantees and commitments. 7. Trading for own account or for account of customers […] 8. Participation in securities issues […] 9. Advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings. 10. Money broking. 11. Portfolio management and advice. 12. Safekeeping and administration of securities. 13. Credit reference services. 14. Safe custody services. 15. Issuing electronic money.*

[12] For the concept of "EU passporting" see also Haentjens and De Gioia-Carabellese (2015), p. 9. Tröger (2012–2013), p. 203 *et seq.*; Montedoro, Supino (2018), p. 86 *et seq*.

[13] Cf. Article 13, Second Council Directive 89/646/EEC, and Article 3, First Council Directive 77/780/EEC of 12.12.1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.

[14] And precisely those listed "in points 2 to 12 and point 15 of Annex I" CRD IV. Cf. also Article 1, First Council Directive. According to CRR II (in this part entered into force since 27.06.2019) also "other than a pure industrial holding company".

From that it derives, that in the EU "banks"—identified *stricto sensu* as those undertakings the business of which is to take deposits or other repayable funds from the public, and to grant credits for their own account[15]—are not included in the category of "financial institutions". Similarly, insurance undertakings, insurance holding companies and mixed-activity insurance holding companies, that belong and are active in the financial market, are not considered "financial institutions" either.[16]

On the contrary, a much broader definition of "financial institution" may be found in the US Code, which provides for a copious list of operators under that label, applying a functional approach. In particular, 31 U.S.C. § 5312 encompasses not only credit institutions (listed as: Insured, commercial and investment banks; and agencies or branches of a foreign bank in the United States), but also investment firms (listed as: Broker or dealer registered with the Securities and Exchange Commission; broker or dealer in securities or commodities; and investment company), as well as insurance companies.[17] 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 Service-all further *lato sensu* financial operators, which are not explicitly considered by CRR, are also included in the number under US federal law.[18] The list is then completed by a broad safeguard clause, which affirms that any business or agency engaging in any activity which the US Secretary of the Treasury determines, by regulation, to be 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 within the definition of "financial institution".[19]

In light of the above, it is apparent that the same financial operator, including some key actors like banks or insurance companies, may be differently classified in the EU and in the US, and therefore differently regulated, depending on which is the applicable legal framework. This situation, that on one side certainly appears compatible with the principles of state sovereignty and national jurisdiction, results however much less straightforward once considering that many, if not most, financial operators are today active in a global (and not just national) financial market, and that most of financial transactions are nowadays dematerialized, so that identifying a specific territorial legal competence is a task much more demanding than it was in the past.

Against this difference of approaches in the EU and in the US, moreover, currently it is not possible to find strictly-speaking legal criteria that clearly point to which interpretation should prevail. The most authoritative attempt in this direction has been provided for by the Financial Action Task Force (FATF), which, considering

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[15] Cf. Article 4(1)(1) and (3) CRR, not modified by CRR II.

[16] Cf. Article 4(1)(5) and (27, lett. h-j) CRR.

[17] 31 U.S.C. § 5312(2), letters (A),(B),(D),(G),(H),(I),(M).

[18] Idem, letters (N),(Q),(S),(T),(U),(V),(X).

[19] Idem, letters (Y) and (Z).

the increasing globalized context where financial operators are performing and following a functional approach, linked the financial character of the institutions to the pursuing of certain listed activities.[20] According to the definition established in the FATF *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation,* "financial institution" means any natural or legal person who conducts as a business for, or on behalf of a customer, one or more services including: Acceptance of deposits and other repayable funds from the public; lending; financial leasing; money or value transfer services; issuing and managing means of payment (including electronic money); financial guarantees and commitments; trading in money market instruments, foreign exchange, exchange, interest rate and index instruments, transferable securities, and commodity futures trading; participation in securities issues and the provision of related financial services; individual and collective portfolio management; safekeeping and administration of cash or liquid securities, or otherwise investing, administering or managing funds or money on behalf of other persons; underwriting and placement of life insurance and other investment related insurance, and money and currency changing.[21]

Thus, conversely to CRR, the FATF explicitly contemplates corporations such as banks and insurance companies in the category of "financial institutions". Its *Standards*, however, as it will be further discussed, do not possess legal binding force, and thus their value is limited to that of influential, but not directly enforceable guidelines.[22]

However, taking into account that the difference between "credit" and "financial" activities is in practice much more blurring than it appears on paper, adopting the broader FAFT (and US) approach to "financial institution" appears preferable for the purpose of this work.

This choice reflects the position, shared by the author, of those who acknowledge the necessity, and the urgency of extending oversight mechanisms and investigative techniques beyond the traditional boundaries of financial regulations, which was originally developed for a less crowded panorama of economic operators with perhaps a clearer allocation of tasks, and activities.

Indeed, both in the EU and in the US, regulations concerning financial operators drastically changed over the last century, especially as far as the range of permitted activities in relation to the level of risk-management pursued by national authorities is concerned. Since public control in the field of financial transactions has always been strictly connected to the pace of the financial markets, the weight and the extent of financial legislation have frequently been modified to patching the national or international systems after systemic or occasional crises.

In this sense, following the Great Depression of 1929–1930, in the US and in most of Europe financial institutions, and especially credit institutions were strongly incentivized to specialize in their services, to delimit their risk exposure in the financial market, and better safeguard depositors. With time, however, this specialization

[20] The role played by the FATF will be illustrated in Sect. 3.2.

[21] Cf. definition of "Financial Institutions" in FATF (2012), p. 117–118.

[22] Cf. also Sect. 3.2.

greatly failed under a deregulation phenomenon that occurred in almost all Western countries, and which substantially freed banks from the control of their supervisors in relevant fields of their activities. Nowadays, under the model of "universal bank",[23] credit institutions are generally allowed to trade in financial products, whilst previously this activity was restricted to other financial operators, such as securities firms and insurance companies.[24]

In the US, in particular, the prohibition of banks to engage in proprietary trading was eliminated starting from the 1999 repeal of the Glass-Steagall Act.[25] This reform also allowed banks, securities firms and insurance companies to cooperate, and exempted investment banks holding companies from direct federal regulations.[26] 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 services; 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 consequences.[27]

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

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[23] This model reduced the relevance on distinguishing the type of activities exercised by banks, which previously were the bases for identifying 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. Garner (2014), p. 173; Ferran (2012), p. 39 *et seq*; Bradley (2014), p. 286 *et seq*.

[24] Although also before the lifting of the ban similar results were often achieved establishing financial groups composed by corporations of different nature and sector of activities.

[25] Glas-Steagall Act of 1933, also known as the Banking Act, P.L. 73–66.

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

[27] 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 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 (2017). 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): JP Morgan Chase, Bank of America, Citigroup, Deutsche Bank, HSBC, Bank of China, Barclays, BNP Paribas […] Goldman Sachs […] Morgan Stanley […], Royal Bank of Scotland, Santander, Société Générale […], Unicredit Group. 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, 24.04.2013, SWD(2013) 156 final, p. 56 *et seq*. http://ec.europa.eu/internal_market/economic_analysis/docs/efsir/130425_efsir-2012_en.pdf. Accessed 17 July 2018. Cf. Black (2010), p. 6. Reporting how this concept could be set aside in light of the Holder banking investigation's policy, Vervaele (2017), p. 167; *contra* Rakoff (2014).

to mutual recognition that banks may exercise within the whole territory of the Union.[28]

Unfortunately, a link between this trend and the burst of the last financial crisis appears far from been casual. Indeed, as pointed out by several studies, over the past 20 years the more typical case of banking crises "has been one in which banks in various countries have faced capital requirements set too low based upon the overall riskiness of their activities". Policy towards financial liberalization—blindly carried out in an environment in which banks are inadequately capitalized and bank regulation and supervision are weak—has been meaningfully defined as "a recipe for disaster".[29]

This de-regulation trend persisted during the last century until, starting from 2009 to 2010, some changes appeared under the repercussions of the last financial crisis. In the aftermath of the economic collapse, indeed, several were the authors who pointed out how the phrase the "privatisation of gains and the socialisation of losses" has come to epitomise the crisis, also due to the model of universal banking and Too-Big-Too-Fail credit institutions.[30] The financial crisis indeed revealed all the limits of a banking system in which credit institutions are «global in life, but national in death».[31] In the US, the most tangible sign in this sense is expressed by the Congress' approval of the Dodd-Frank Act, and especially by the so-called Volcker Rule, which re-established some restraints on the possibility for banks and other large financial institutions to engage in proprietary trading and investments in hedge funds, although without seriously affecting the endurance of the system of universal banking.[32]

This profile was specifically tackled in the European Union by the Liikanen Group, promoted by the European Commission to study the reforms necessary to the banking system. In 2012, a report from the Group clearly asserted the urgency to revise the paradigm of universal bank, to reduce the exercise of high-risk operations undertaken by banks active in the deposit services. In this sense, the Group

[28] 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. 12.03.1936, no 375 "legge bancaria"), begun with the law, 30.07.1990, no 218 ("legge Amato") and was completed with the issuing of the new banking code in 1993 (d.lgs. 1.09.1993, no 385, "Testo Unico delle leggi in materia bancaria e creditizia–T.U.B."). Recently, the Parliamentary Committee on banking investigations issued a final report in which several proposals concerning also the banking system have been included, among which the recommendation to pursue a separation of investment and commercial banks at the European level, cf. Senato della Repubblica, Legislatura 17a, Commissione parlamentare di inchiesta sul sistema bancario e finanziario, Resoconto sommario n. 47, 30 January 2018, at 9.5, no. 21, http://www.parlamento.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=17&id=01064008&part=doc_dC-sedetit_a1&parse=no#_Toc505072310. Accessed 18 July 2018.

[29] Cf., *e.g.*, Barth et al. (2004), pp. 43–45.

[30] Black (2010), p. 3 *et seq*.

[31] King (2009), p. 36; Black (2010), p. 33 *et seq*.; Bradley (2014), p. 280.

[32] 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. For some critical considerations on the external jurisdiction contained in this rule, and in the Dodd-Frank Act, see Vervaele (2017), pp. 185–187.

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 […] 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”.[33]

This notwithstanding, as in the US, the model of universal banking was not really deserted in the EU either, where the reforms rather focused on the creation of a centralized supervisory model under the launch of the Banking Union.[34]

Another reason to adopt a broader notion of “financial institution” is that it seems to better account for the considerable number of “unconventional” subjects which have entered the financial market–subjects that are often able to offer lower prices and higher velocity in transactions compared to “traditional” financial operators, thanks to alternative payment channels.

Indeed, while financial institutions (in its broader, but traditional meaning) and above all banks, are bound by legal obligations, and exposed to investigative powers derived from various sources of administrative and criminal law, many are the entities that in practice perform financial operations which are let slip from a public oversight proportionate to their increasing weight in the day-by-day management of financial transactions.

This is the case, for instance, of e-currency providers and crowdfunding platforms, that provide some credit services without being proper credit institutions,[35] or informal money-transfer systems deriving from specific geographic regions or ethnic communities, which mostly spread worldwide through migration flows. Among the latter, the most notorious certainly is the *Hawala*, a network extensively operating since many centuries in South Asia, and now particularly common in the Middle East and in Africa. In the *Hawala* model, 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 accounts.[36]

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[33] Cf. Liikanen (2012)(chaired by), p. 100 *et seq*.

[34] The impact of the Banking Union is further analysed in Chap. 4, especially Sects. 4.1 and 4.3.

[35] A proposal to regulate equity crowdfunding was issued by the Commission, cf. Proposal for a Regulation of The European Parliament and of The Council on European Crowdfunding Service Providers (ECSP) for Business, Brussels, 8.3.2018 COM(2018) 113 final, see *e.g*., p. 10.

[36] 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, other-

Of course, opting for *Hawala* and Other Similar Service Providers (HOSSPs),[37] as well as for other "alternative" financial operators, such as bit-coin payment system platforms,[38] represents an absolutely legitimate choice in light of fundamental principles, such as the freedom to conduct a business, and the protection of privacy, recognised in most domestic legal orders as well as by the Charter of Fundamental Rights of the European Union (CFREU),[39] the European Convention on Human Rights (ECHR),[40] and the American Convention on Human Rights (ACHR).[41] Likewise, the need of expatriate workers to transfer personal remittances to their countries of origin provides a perfectly legitimate explanation for the creation of financial systems within ethnical communities in different countries. *Hawala* may even be considered essential, to support the financial development of areas in which access to "traditional" banking services is limited, or boast little confidence for geographical, cultural and historical reasons.

These "alternative" financial systems, however, are characterized by particularly relevant features: A pronounced fragmentation of providers; the use of form of payments (such as cash or value) that usually leave few or no paper (or rather digital) trail[42]; and a general absence of public supervision.[43] As a consequence, operators,

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wise 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 Badr (1978). For a comparative analysis on the impact of HOSSPs, see also FATF (2013).

[37] "HOSSPs, for the purpose of the typology, are defined as money transmitters, particularly with ties to specific geographic regions or ethnic communities, which arrange for transfer and receipt of funds or equivalent value and settle through trade, cash, and net settlement over a long period of time", see FATF (2013), p. 9.

[38] For an overview on the bit-coins, see, *e.g.*, EBA (2014); Bryans (2014), p. 441 *et seq.*; Christopher (2014), p. 1 *et seq.*; Marian (2015), p. 53 *et seq.*; Ajello (2015), pp. 435–461; Malone (2014); Brito et al. (2015); Tapscott and Tapscott (2017); Zou (2014); Stokes (2012); Pflaum and Hateley (2014); Kleiman (2013); Gruber (2013).

[39] Cf. Articles 16 and 7, Charter of Fundamental Rights of The European Union (CFREU), OJ C 326, 26.10.2012, pp. 391–407.

[40] Cf. Article 8 Convention for the Protection of Human Rights and Fundamental Freedoms (better known as European Convention on Human Rights-ECHR), CETS 005, Roma, 04.11.1950, and Article 1, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 009, Paris, 20.03.1952.

[41] Cf. Articles 21 and 11, American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22.11.1969, and entered into force in 18.07.1978 (signed but never ratified by the US).

[42] Analysing the digital dimension of banking data in real-time monitoring Sect. 8.1.

[43] Notwithstanding the international support for the development and financing of supervisory practices, cf. Special Recommendation VI and its interpretative note, in FATF (2001).

The Recommendation has been transposed at EU level by Directive 2007/64/EC of 13.11.2007 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, 20.10.2004 COM(2004) 700 final, p. 7.

customers, and transactions performed through these channels are not easily identifiable. Unsurprisingly then, "alternative" financial operators may also result very attractive means for realizing low-risk illicit transactions, sometimes involving serious crimes such as transnational tax fraud, money laundering, and terrorist financing.[44]

Facing the extreme difficulties in establishing an effective form of oversight (if any) above HOSSPs, some countries opted for an explicit prohibition of such systems; a choice which though revealed itself to be of little or any success in reducing their use in daily transactions, as it is unpractical to enforce a ban when a target is virtually undetectable.[45] Also countries where HOSSPs are formally legal, however, have a particularly hard time in officially identifying, licensing or regulating these systems, not last due to the difficulties in gathering substantive data over these phenomena. In the US, forms of alternative remittance are under the combined supervision of several federal agencies: The Financial Crimes Enforcement Network (FinCEN), the Homeland Security Investigations (HSI) and the FBI.[46] In the EU, the oversight on HOSSPs relies mainly at the national level, in the coordination among Financial Intelligence Units,[47] and in the occasional establishment of Joint Investigative Teams.[48]

The intrinsic transnational dimension of HOSSPs and e-commerce, as well as their virtual and instantaneous character however, often require a level of cooperation among competent authorities which is still far from being achieved due to lack of political will, training, or resources—circumstances that frequently make already

[44] On the possible use of HOSSPs for illicit purposes, see *e.g.* FATF (2013), p. 27 *et seq.*; FATF (2015, 2017); European Parliament (2011), p. 42; Roth et al. (2004), p. 68.

[45] Such as in India, or Pakistan. "Among the 33 surveyed countries, 18 countries treat *hawala* and other similar service providers as illegal while 15 countries consider them legal if registered or licensed. Interestingly, most developed countries allow licensing or registration of HOSSPs, while developing countries do not. Within the developed countries respondents, only six out of 17 countries define *hawala* and other similar service providers as "illegal" and the remaining eleven have legalised *hawala* and other similar activity if service providers are either registered or licensed. On the other hand, 12 out of 16 developing countries respondents define *hawala* and other similar activity as "illegal" and only 4 countries allow them to operate legally if licensed or registered (See Table 3.1). One of the reasons put forward by developing countries", cf. FATF (2013), p. 45; see also pp. 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".

[46] HSI, Hawalas, in The Cornerstone Report, Volume VII, 2, Summer 2010, pp. 1–2. https://www.ice.gov/doclib/news/library/reports/cornerstone/cornerstone7-2.pdf. Accessed 18 July 2018.

[47] The FinCEN represents the US Financial Intelligence Unit; cf. Sect. 3.3.

[48] Also the approval of the EU Directive on Payment Services (PSD) represents an important step towards a comprehensive registration of the transmitters, taking into account the risk-profile of the providers, cf. Directive (EU) 2015/2366 of 25.11.2015 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.

critical for most legal orders to realize effective supervision over "traditional" financial transactions and institutions.[49]

For this reason, and also considering the heterogeneity characterizing the category of "alternative" financial operators (if even it would be possible to gather them all under a single label), this work focuses mainly on "traditional" financial institutions. Among those, banks will be especially taken into account, as the most relevant developments regarding criminal investigations in the financial matter of the last few years—namely the establishment of transnational investigative and sanctioning powers,[50] and the surveillance on banking (and personal) records[51]—had precisely seen credit institutions as their main targets.

Keeping in mind the existence and the impact of "alternative" financial institutions, however, remains necessary to provide the essential perspective that no analysis on banking investigations should ever forget: As much as establishing effective rules and procedures applicable to "traditional" financial institutions already appears a goal difficult to achieve, that represents just a small step in the fight against financial (or other forms of) crimes; a step which still leaves a huge bulk of the iceberg to be dealt with.

2.2 Criminal Liability of Legal Persons: A Brief Overview

Although not representing the main subject of this work, dealing with financial institutions in criminal investigations also requires to briefly take into account the debate over the possibility for a collective entity to be held responsible for criminal offences.[52]

In the US, this option 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 cases.[53] Since then, and regardless of several and often severe critics,[54] criminal liability of legal persons or organizations, mainly corporations, has become an established feature in the US judicial system.[55]

[49] Cf. FATF (2013), p. 68.

[50] Descripting these powers Chap. 4 (analysed in light of fair trial rights, cf. Chap. 6).

[51] Analysed in Chaps. 7 (state of play) and 8 (proposals for a possible way forward).

[52] Presenting though critical profiles originated by the need to adapt rules of criminal procedure to legal persons as defendants, such as: the identification of the liable subjects within the legal person; the nature of legal corporate liability; 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 itself. See Beale (2014), pp. 27–54; Lupária (2010), p. 801; Cerqua et al. (2014); Zagaris (2017), pp. 19–56; Cappel (2017), pp. 57–78; Renzetti (2017).

[53] 212 U.S. 481 (1909).

[54] See Khanna (1996), Moore (2010), Coffee (1981), Robinson (2003) and Hamdami and Klement (2008).

[55] Also in the Model Penal Code adopted by some States, in fact, the principle of corporation's

The theoretical possibility to enforce such a liability, however, does not mean *per se* that in practice criminal convictions for corporations are frequently pursued. Indeed, the decision to charge a corporation is particularly delicate, especially when considering the consequences that sanctions might have on shareholders and employees. In the US, this awareness—substantially increased after the notorious *Arthur Anderson LLP* case in the wake of Enron's collapse just a few years before the breaking out of the last financial crisis[56]—led to a drastic slowdown in targeting corporations and to a shift towards the liability first of senior corporate executives and then of even lower-level employees instead.[57]

This phenomenon however, did not cause organizations criminal liability to be evicted from the American legal system, but merely operated a swing in the goals pursued through it. Rather than a direct incriminating mechanism, presently corporate criminal liability remains appreciated in the US as a valuable prosecutorial tool apt to force a corporation to adopt internal measures, and opt for form of pre-trial resolution, such as deferred prosecution or non-prosecution agreements.[58]

In Europe, the situation over criminal responsibility for legal persons looks more fragmented.[59] While the EU has strongly promoted the implementation of forms of liability towards organizations committing or facilitating the commission of crimes,[60] it also left—as typical in the Area of Freedom, Security and Justice—full

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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 Strader (2011), p. 20 *et seq.*

[56] *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.*, U.S. Sentencing Commission (2016), Organisational Sentencing Practice-Table 51, reported also (in its 2012 version) by Beale (2014), p. 22.

For opposite comment to the impact of such a practice related to the financial crisis, see Rakoff (2014) and Uhlmann (2013).

[57] Who nowadays are reported to be increasingly charged and convicted, see Brickey (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". Giving reason of the shifting towards lower-level employees Rakoff (2014) and Garrett (2014).

[58] That was the case for instance of relevant financial institutions, such as Merrill Lynch & Co, and Monsanto, see Beale (2014), p. 24, citing Garrett (2007). On Deferred Prosecution Agreements see, *e.g.,* Cunningham (2014), Kaal and Lacine (2014) and Ruggiero (2015). On the extent of prosecutorial powers with regard to compliance programs, see Zagaris (2017), p. 57 *et seq*.

[59] Beale and Safwat (2004), pp. 97–98.

[60] Cf. Articles 5–6, Directive 2011/36/EU of 5.04.2011 on preventing and combating trafficking in human beings and protecting its victims; Article 12, Directive 2011/92/EU of 13.12.2011 on the assessment of the effects of certain public and private projects on the environment; Recital (18) and Article 8, Market Abuse Directive; Article 30, *lett. j*), Market Abuse Regulation; Article 6, Directive 2014/62/EU of 15.05.2014 on the protection of the euro and other currencies against counterfeiting by criminal law; Article 17, Directive (EU) 2017/541 of 15.03.2017 on combating terrorism;