Towards a reshaping of punitive law in the EU?
On the coherence and efficiency of the sanctioning rules in the area of bank prudential supervision

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ABSTRACT:

Conceived as an urgent response to the financial crisis, the European Banking Union (EBU) can be considered as a milestone of the whole European integration procedure. Amongst other innovations, the EBU legal framework and, especially, the Single Supervision Mechanism (SSM) include a highly complex enforcement system, where supervisory, investigatory and sanctioning powers are shared between centralised and national authorities. Despite an ostensible normative coherence and a potential efficiency in deterring supervised banks from breaching prudential regulations, a thorough study of this enforcement system reveals more general and deeper coherence problems of the punitive aspects of European law. As a potential response to such problems, a dogmatic systematisation of the fundamental principles of European law related to punishment, as derived from the EU treaties and the ECtHR case law, is suggested.

INTRODUCTION:

Conceived and established as an urgent response to the banking system crisis, the European Banking Union (EBU) can be considered as a milestone of the whole European integration procedure. Amongst other innovations, the EBU legal framework and, especially, the Single Supervision Mechanism (SSM) include a highly complex enforcement system, where supervisory, investigatory and sanctioning powers are shared between centralised and national authorities. The division of tasks is based on a subsidiarity and proportionality logic. This paper intends to examine whether the final result is internally (with regard to the EBU legal framework itself) and externally (with regard to general rules and principles of European law) coherent (I), as well as to which extent it can be efficient in achieving its presumed objectives. It will be shown that potential problems of the new sanctioning system don’t stem that much from the centralisation of banking supervision itself but rather from the lack of clarity and systematisation of fundamental principles of European law associated with punishment (II). It will be suggested that, in order to avoid normative conflicts and arbitrary decision-making, a dogmatic systematisation of the fundamental principles and meta-

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rules of European law related to punishment (criminal and non-criminal), as derived from the EU treaties and the ECtHR case law, is probably necessary (III).

I. Is the adopted sanctioning system coherent?

Taking into account the pressure caused by the financial crisis, the rapidity of the legislative procedure, the complexity of the political context and, in consequence, the “sophisticated legal gymnastics” that have been needed in order to achieve the final result, the sanctioning rules of the SSM legal framework could be considered, from a strictly normative and logical point of view, impressively coherent. However, if one goes beyond a purely rules-based examination and enters into a more general principle-based approach, this coherence is put into question, especially due to complexity of the sanctioning system and the – often contradictory – principles attached to this system (EU law + national law; administrative law + criminal law; combination of different procedural principles, etc.).

a. An ostensible coherence

More precisely, under the SSM legal framework, stricto sensu supervisory, investigatory and sanctioning powers are shared between European and national authorities. The main criteria for the division of prerogatives are the “significant” or “non-significant” character of the supervised entities, the legal personality of the addressees of the measures and sanctions (natural or legal persons) and the legal characterisation of the misconduct (administrative or criminal).

Although this hybrid solution can be subject to criticisms from different sides – since it can be considered over-centralising by the defendants of national sovereignty and over-relying on national rules and procedures by the partisans of more federalist approaches – centralising at the EU level the control of systemically important entities, and leaving the control of “less significant” entities and natural persons to national authorities seems, at least from a realistic point of view, legally, politically and economically coherent.

Legally, since, despite its innovative aspects, the adopted sanctioning regime is entirely in line with previous EU administrative punitive law, as this has been shaped in the fields of the protection of the financial interests of the EU (PIF), in environmental law or, especially, in competition law.

Politically, since, apart from the general reluctance of many Member States towards further loss of national sovereignty in the field of criminal law, most Member States are also reluctant to opt for criminal sanctions in the field of banking supervision, especially as the liability of legal persons is concerned. Unifying administrative sanctions without parallel harmonisation of criminal sanctions was probably, at least realistically speaking, the only way to go.

Economically, since the centralisation of sanctions is based on an efficiency and subsidiarity rationale, where centralised sanctions are, at least in theory, only provided for misconducts that entail systemic risks for the European banking system as a whole, while sanctions for systemically less important breaches are still left to the Member States.

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b. Complexity as a limit of coherence

Despite this ostensible coherence, the SSM legal framework is chaotically complex; both ratio materiae, and ratio loci. Regulations, directives, secondary EU legislation, national law, rules concerning the Eurozone, rules concerning the whole EU, procedural rules largely relying on national law, administrative law, private law, criminal law rules, etc., form a particularly intricate normative puzzle. This complexity not only makes the production of adequate legal solutions more difficult, but even puts into question the coherence itself of the legal framework, since contradictory principles can lead to normative conflicts that can only be solved by arbitrary decision-making processes.

As far as the punitive aspects of the SSM framework are concerned, the main conflicts that may arise are related to the interactions between administrative punitive and stricto sensu criminal law. Interactions between administrative penalties and criminal law within the SSM can take two forms: intersystemic and intrasystemic. The first kind of interactions concerns potential overlaps between administrative and criminal sanctions, which can be applied alternatively or cumulatively for the same facts. The second kind refers to cases where applicable administrative sanctions can be assimilated, due to their purpose, their nature and their gravity, to criminal ones, according to the relevant case-law of the ECtHR and the CJEU. Although these interactions are not necessarily problematic, conflicts can arise, since administrative and criminal enforcement, not only follow different rationales – a difference which is far from clear – but they are also subject to different fundamental principles.

More precisely, intersystemic interactions between administrative and criminal enforcement mechanisms can refer to the normative effects that either administrative law has on criminal law, or vice-versa. In the first case, due to the principle of legality, the normative effects of administrative law on criminal law ought to be fairly limited. Criminally punishable conduct has to be defined entirely under criminal law norms. Of course, administrative law provisions – such as those contained, for example, in the CRR\(^5\) – can affect a judgement – for example, on the cognitive aspects of the mens rea – within a criminal trial. However, soft law provisions – such as those developed, for example, by the Basel Committee on Banking Supervision – could have similar normativity with regard to criminal law. The inverse case is more complex, since criminal law can be used, according to the CRD IV,\(^6\) either as a cumulative or as an alternative means of enforcement for breaches of European prudential regulations. Furthermore, despite various references to


criminal law found in the CRD IV, in the SSMFR,7 in Reg. 2532/98 – but not in the SSMR9 –, the margin of appreciation left to the Member States to use criminal law for such breaches remains in some cases quite unclear. Even more unclear is the hierarchical priority existing – or not existing – between the two types of sanctioning systems (centralised/administrative – national/criminal) in case of conflict. The difficulty and the complexity of establishing such a hierarchical priority are not only due to the complexity of the relevant general principles (precedence of EU law, state sovereignty in criminal matters, ‘ultima ratio’, proportionality, ne bis in idem) but they also stem from the specific texts themselves.

Apart from intersystemic interactions, interactions between criminal and administrative law also appear within the same administrative punitive system, due to the autonomous definition of criminal charge developed by the ECtHR and followed by the CJEU.10 As is well known, the ECtHR has constructed over the years an autonomous notion of “criminal charge”, in order for the procedural safeguards laid down in Article 6 of the ECHR to be applied independently of the “criminal” or “administrative” label given by national law to serious punishment. In order to define which administrative sanctions should be assimilated to criminal ones – at least to the extent that the right to a fair trial is guaranteed in both cases – the ECtHR has adopted and constantly followed a three-stage approach based on (a) the legal classification of the offence under national law, (b) the ratio legis of the offence and (c) the severity of the sanction (hereinafter the “Engel criteria”). Despite its structural and functional differences with traditional criminal law11 – and notwithstanding the fact that the EU has not yet acceded to the ECHR –, EU administrative punitive law is, at least to some extent, subject to the restraints imposed by the ECtHR case law. This can not only be deduced from the text of the EU treaties,12 but has also been confirmed by the CJEU case law.13 The question is to what extent “administrative pecuniary penalties”, “fines” or even “periodic penalty payments” provided for by the SSM legal framework fulfil these criteria.14

II. Will the adopted model be efficient?

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10 ECtHR Engel v. the Netherlands, 8 June 1976, Series A, No 22, cons. 82-83; Oztürk v. Germany, 21 February 1984, Series A, No 22, cons. 53; Benham v. the United Kingdom, 10 June 1996, application No 19380/92, cons. 56; Bendenoun v. France, 24 February 1994, Series A, No 284, cons. 47; Jussila v. Finland, 23 November 2006, application No 73053/01, cons. 43; Grande Stevens and others v. Italy, 4 March 2014, application No 73053/01, cons. 94 et seq.
12 Preamble and Art. 52(3) of the Charter of Fundamental Rights of the European Union (2000/C 364/01); Art. 6(3) TEU.
13 ECJ, Spector Photo Group NV, Chris Van Raemdonck v Commissie voor het Bank, Financie- en Assurantiewezen, (Case C-45/08), 42 et seq.; criminal proceedings against Łukasz Marcin Bonda (Case C-489/10), 57 et seq.; Åklagen v Hans Åkerberg Fransson (Case C-617/10 REC), 35.
14 See also, R. D’AMBROSIO, “Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings”, Banca d’Italia Quaderni di Ricerca Giuridica della Consulenza Legale, No 74 – December 2013, 16 et seq.
As it has already been mentioned, the basic rationale behind the construction of the EBU and the SSM has been “efficiency”. Although the EBU is one of the most significant steps after the Lisbon Treaty towards European unification, it should be reminded that it didn’t result from a broad political consensus in favour of a more federalised Europe, but as a necessary crisis-management tool. In Recital 87, SSMR stipulates that “since the objectives of this Regulation, namely setting up an efficient and effective framework for the exercise of specific supervisory tasks over credit institutions by a Union institution, and ensuring the consistent application of the single rulebook to credit institutions, cannot be sufficiently achieved at the Member State level and can therefore, by reason of the pan-Union structure of the banking market and the impact of failures of credit institutions on other Member States, be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives”. Although it is too early to evaluate the new system on the basis of an already acquired experience and impossible to predict its fate because of several chaotic parameters related to it, it is legitimate to ask oneself if the aforementioned complexity could act as an obstacle to the system’s efficiency.

Nevertheless, in order to answer this question, the concept of efficiency itself needs some further clarification. What does it mean for a legal mechanism, for an enforcement model, for a punitive system, etc., to be efficient? In traditional law and economics approaches of punitive law (either tort law or criminal law),15 efficiency is generally understood as achieving a maximum deterrent effect of punishment with minimum cost. Besides, this approach is, to a certain extent, in line with liberal-utilitarian thought (Bentham, Beccaria, etc.) that has shaped modern criminal law since its beginnings. However, evaluating legal rules on the sole basis of their “efficiency” disregards the fact that punitive law has many objectives, often contradictory. Punitive law has both a “sword” and a “shield” function, protecting both individual or collective legal goods from unjustified offences and the rights of the accused/responsible persons from unjust punishment or treatment; it is meant – at least in a liberal context – both to protect liberty and to ensure a certain degree of fairness, etc. Thus, apart from being quite often “logically flawed or reliant on untenable assumptions”,16 efficiency-based arguments isolate axiologically some of the pursued objectives of punishment, and evaluate overall efficiency on the basis of these, arbitrarily chosen objectives. Furthermore, quite often, mathematical models used to support these arguments, just “launder” the political nature of the final assumptions into “hard-science” proven results.

In such a relativized perspective, in order to evaluate the potential efficiency of the SSM sanctioning rules, one has first to answer the following questions: Efficiency towards what objectives? Economic efficiency or efficiency in attributing justice? Efficiency in protecting which legal goods? Short-term or long-term efficiency? Furthermore, even if these questions are satisfied, it is not easy to evaluate or, even more, to predict efficiency. Even if we decide that the objective of the SSM is solely to protect the safety and soundness of the EU banking system by deterring prudential regulation breaches, without taking into account its overall effects to the EU legal system, it is not easy to decide, for example, whether a recourse to criminal law would be more or less efficient than a recourse to administrative punitive law, since, historically, both criminalisation

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and decriminalisation of banking irregularities has been chosen and justified on the basis of efficiency. It is even more complicated to answer if rule-of-law-based normativist approaches can be more or less efficient than more decisionist ones.

Certainly, the centralisation of supervision of a more and more transnational banking system is at least a necessary – although not sufficient – condition for achieving a more efficient supervision of banks, in deterring banks from breaching prudential regulations and eventually in avoiding, to a certain extent, further damage to the European banking system, which could result either directly from irresponsible conduct or indirectly from a lack of trust to the banking system.

Nevertheless, gathering legislative, executive and judicial powers in one single, appointed authority (in the case of the SSM, the ECB); leaving to this single authority an incredible marge of appreciation to choose between a very large span of sanctions, the optimal one for a very large number of breaches; specifying that provided sanctions – no matter how draconian they are – are of administrative nature, in order to ensure that they can be applied without the obstacle of substantive principles or procedural safeguards (therefore, asking Member States to choose between violating EU law or ECHR law), not only threatens the democratic governance of the system, but can also undermine its potential efficiency, both in the short-term (supervisory decisions contested before national or European courts) and in the long-term (lack of democratic legitimation and of public trust to the governance system).

III. Towards an autonomised system of “EU punitive law”?

As shown above, although the sanctioning system of the SSM seems to be well-tailored to the needs of prudential supervision itself, its complexity, as well as its potential conflicts with general principles of law, might undermine its overall efficiency as a long-term crisis-prevention tool.

Of course, this is only a hypothesis. According to the way competent administrative, judicial or even legislative authorities will handle the – necessary – reduction of this complexity, problems could be avoided or fixed without any need of radical systemic modifications. In other words, impending conflicts could be casuistically resolved by European – or even by national – jurisdictions, thus leading to an automatic reshaping of the EU punitive system.

Nevertheless, due to the dogmatic tradition that characterises the legal systems – and especially the criminal justice systems – of the large majority of the Eurozone Member-States, it is quite questionable if such a readjustment of fundamental legal principles could happen in such a smooth and automatic way. A discussion on the topicality, the nature, the scope and the function of several fundamental legal principles seems necessary, in order to reconcile the respect of these principles with post-crisis regulatory needs. Besides, it should be reminded that bank prudential supervision is neither the first nor the only field where such questions arise. The discussion has already appeared especially in the fields of “PIF offences” (related to the protection of the financial interests of the EU), of environmental law and of competition law. In all these fields, administrative punitive provisions at the European level coexist, in somehow different but still similar ways, with national criminal law provisions, which, even when harmonised, are applied following different substantive or procedural general rules. Since, as explained above, interactions between criminal and administrative punitive law make a clear distinction between the two spheres impossible, while the principles governing criminal and administrative justice systems are clearly separated, it will be probably needed, for the sake of normative coherence and economy of the system, to create a
unified normative system of EU punitive law, following a common system of hierarchically graduated principles.

Although it is neither possible nor desirable to fully predict the structure and the scope of such a system, the central concepts behind it have been expressed several times, in different variations, both in legal and criminological literature,\textsuperscript{17} as well as, more implicitly, in the aforementioned jurisprudence of the ECtHR. The general idea is that normative closure between administrative and criminal justice systems is, in several cases, largely artificial (punishment is punishment; as symbolic interactionists have pointed out since the 60s, crime is a label attached to some offences, according to policy needs and not necessarily according to their gravity)\textsuperscript{18} and this, at least as far as bank prudential regulations are concerned, can obstruct both the efficiency of the financial regulatory system itself (in cases where unjustified punishment or investigatory procedures create disproportionate damage to a supervised entity or, indirectly, to the financial system as a whole) and the efficiency of the legal system in attributing justice (where serious misconduct remains unsanctioned). In order for such dysfunctions to be avoided, a dogmatic systematisation of EU punitive law, similar to the one known in many national criminal justice systems, could prove beneficial.

This systematisation should lead to a coherent corpus of EU meta-rules and principles with regard to punishment – either this punishment is labelled as criminal or administrative – which would ensure internal (with regard to the Treaties and the Charter of fundamental rights) and external (with regard to the ECtHR jurisprudence and – to a possible extent – to national constitutional law) coherence of the punitive norms with general principles related mainly to human rights protection. Of course, this doesn’t mean that within such a punitive system, every sanctioning procedure should be subject to the same principles. On the contrary, a graduated gravity of the conduct should correspond not only to a graduated gravity of the sanctions – which is more or less already the case, at least in theory – but also to a graduated gravity of the principles governing the sanctioning conditions and procedure. [This is in a sense also already the case (criminal justice and administrative/civil justice principles); however, escalation of principles, at least except for some recent ECtHR case-law and some traditional intra-criminal law separations in national legal systems (for example different procedures for felonies or misdemeanours), which are not reflected in EU law, is only based on a twofold distinction between criminal and non-criminal sanctions].

It should be noted that this idea for a harmonised interpretation and systematisation of punitive law rules should not be understood as a project implying a unification – even a partial one – of criminal law in the EU, putting a complete end to the sovereignty principle in criminal matters. It is just suggested that, until now, punitive law in the EU has been developed as a “common language” without a “common grammar”,\textsuperscript{19} and that this procedure is reaching its limits as far as normative complexity and coherence are concerned. What is suggested here is a systematisation of


European principles – including EU and CoE law – related to or affecting punitive law. These principles already exist, none of them is innovative. However, it is not clear in which cases and to which extent they should be applied. The SSM legal framework gives a very good example of why a further systematisation is needed. Although principles such as *ne bis in idem*, principle of culpability, principle of certainty of criminal law, as well as procedural safeguards related to the application of different kinds of penalties are recognised as fundamental principles of European law, both at the EU and the CoE levels, it is not clear to which of the penalties provided for by the SSM legal framework and to which extent these principles are applicable, especially because it is not clear to which extent these penalties are criminal or non-criminal. In some cases, such as the periodic penalty payments, even the punitive character of the penalties is put into question.

That being said, even if a consensus on the need of this kind of systematisation will someday be achieved – which is far from evident –, the question is how, by whom, through which procedures, etc. this systematisation will take place. Although many ideas could be expressed, history is usually following in these matters its own paths. If we take as a typical example the systematisation of criminal law in national legal orders, we shall see that in some countries this systematisation has been firstly the work of jurisprudence (for example, the UK), in some countries it has been the work of the legislator followed by legal doctrine (for example, France), in some other countries it has been firstly the work of doctrine followed by the legislator (for example, Germany). No matter “whether the chicken or the egg comes first”, systematisation of legal principles cannot derive from only one, primary or secondary, legal source. That being said, since we are talking in an academic environment and since it is highly improbable that EU institutions or the CJEU will proceed in the near future in a holistic dogmatic retreatment of punitive law, the essential role legal doctrine will have to play has to be underlined. Indeed, contrary to the role penal dogma has historically played, as an autonomous epistemological paradigm, in the evolution of national criminal justice systems, EU law doctrine remains usually confined to a descriptive analysis of CJEU case-law, abstaining from deontological assumptions and holistic normative analysis. A doctrinal reconstruction of penal dogma at the EU level, reducing normative complexity – without sacrificing democracy\(^{20}\) – by regrouping under a common graduated principle system (based on the EU Treaties, the ECHR and the national constitutional traditions) administrative-punitive and criminal law, could be considered as the biggest challenge for contemporary European criminal law scholars. Such a theoretical enterprise will not be easy for a certain number of factual, legal and political reasons. However, if succeeded, it would not only offer a more rational, equal and transparent application of law, but it would also enhance, the whole legal system’s manageability and efficiency.\(^{21}\) The sanctioning system of the SSM is of course nothing more but a small fraction of the whole picture. However, its importance and its complexity, as well as the potential legal complications it might lead to, could act as catalysts to accelerate more general discussions on which form European punitive law could take throughout the 21\(^{st}\) century.
