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Editorial

"Does the 'financial crisis' open new criminalizing perspectives?" This was the opening question of a speech given by *Klaus Lüderssen* on "Financial Market's Functionality and Economic Criminal Law" at an International Congress on "Security and Criminal Law", held at Modena in March, 2009[1]. *Lüderssen* was inspired by the proposals made to the press by the former FRG Chancellor, *Helmut Schmidt,* advocating the enactment of many new criminal offences, covering external balance sheet operations, operations on financial derivatives and titles not admitted in the stock exchange, and the short selling and financial investments in tax havens or in countries lacking a proper surveillance on financial markets[2].

Three years later, the answer to the provocative question posed by *Lüderssen* —being one of the critical voices which more authoritatively and decisively contest the present trends towards the expansion of criminal law— appears to be necessarily affirmative, in view of what has actually happened so far within both the national scene of the single European states and the supranational background of the European Union. The most striking example at national level can be seen in the case of Iceland —outside the European Union—, where the former prime minister was charged with the consequences of the inadequate political management of the financial crisis that upset the country.

As for the European Union, the connection between the devastating crisis of the financial markets and criminal policy is particularly highlighted by the recent proposal for a Directive from the European Parliament and the Council on criminal sanctions for insider dealing and market abuse, published on October 20 2011[3].

Special attention must be paid to the words of the Vice-President of the European Commission and Commissioner for Justice *Viviane Reding*, who made reference to the European financial crisis and to the demands of (criminal) intervention based on it while introducing and giving reasons for the proposal: "In these times of crisis, it is essential that citizens regain confidence in our markets. This is why, as a complement to effective supervision of the markets, the EC proposes to strengthen the enforcement of EU rules against insider trading and market manipulation by means of criminal law. Criminal behaviour should have no place in Europe's financial markets!" Regarding the member states, the Commissioner for the Internal Market, *Michel Barnier,* stated that "sanctions for market abuse today are too divergent and lack the necessary deterrent effect. By imposing criminal sanctions for serious market abuse throughout the EU we send a clear message to deter potential offenders – if you commit insider dealing or market manipulation you face jail and a criminal record. These proposals will heighten market integrity, promote investor confidence and level the playing field in the internal market"[4]. On the other hand, in a report presented on 25th February,2009, the High-Level Group on Financial Supervision in the EU has asserted that "a sound and prudential conduct of business framework for the financial sector must rest on strong supervisory and sanctioning regimes", requiring "equal, strong and deterrent sanction regimes against all financial crimes – sanctions which should be enforced effectively"[5].

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[1] *K. Lüderssen,* 'Funktionsfähigkeit der Finanzmärkte und Wirtschaftsstrafrecht – Eröffnet die Finanzkrise neue kriminalisierende Perspektiven?', in M. Donini / M. Pavarini (eds.), Sicurezza e diritto penale (Bologna, 2010).

[2] *H. Schmidt,* 'Wie entkommen wir der Depression?', Die Zeit (15th January, 2009).

[3] Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation [COM (2011) 654]

[4] The statements of the Commissioners Reding and Barnier are drawn from a press release given by the European Commission, available at http://europa.eu/newsroom/press-releases/index_en.htm, namely 'European Commission seeks criminal sanctions for insider dealing and market manipulation to improve deterrence and market integrity' (October 20, 2011) .

[5] The report is available on-line at http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf

These authoritative stances from within the European Commission mark a significant turning point on the EU criminal policy on financial markets that deserves to be highlighted for several reasons.

For the first time, the emphasis of the European legislature on financial markets has moved to criminal sanctions, twenty-three years after the first initiative against insider dealing (Dir. 89/592/EEC), which contained a mere and generic mention to "proportionate, dissuasive and effective" sanctions —one of the first times in which this wording was used, a few months after the ECJ decision on the Greek Maize scandal case—, and nine years after the following Directive on market abuse (Dir. 2003/6/EC), which imposed the obligation of introducing administrative sanctions protecting the financial markets on the states and let them freely decide whether to adopt criminal sanctions or not. The Proposal said that criminal sanctions express a "social disapproval of a qualitatively different nature compared to administrative sanctions or compensation mechanisms under civil law. Criminal convictions for market abuse offenses, which often result in widespread media coverage, help to improve deterrence", while regarding the current situation, the Proposal notices that "the sanctions currently in place to fight market abuse offenses are lacking impact and are insufficiently dissuasive", hence the Proposal for the establishment of "minimum rules on criminal offenses and on criminal sanctions for market abuse".

However, the manner of intervention outlined by the proposals currently under discussion is not exclusively of a criminal nature. On the contrary, it represents a different manner of integrating sanctions of a criminal and administrative nature: the Proposal for a Directive on criminal sanctions is accompanied by a Proposal for a Regulation on administrative control and administrative sanctions[6], always keeping in mind the natural role of criminal law to be used as a last resort (*ultima ratio* principle).

A partial correction can be made to the premises of the Proposal about the present situation of the national laws by taking into consideration that both the current framework for the protection from market abuse and the achieved level of harmonization between the different provisions from the member states are to be deemed considerable from the historical perspective, in view of the fact that criminal and administrative provisions on insider trading and market manipulation were completely inexistent in Europe before the Directive in 1989, with partial exceptions in Great Britain and France. On the contrary, the adoption of the Directive in 1989 coordinating regulations on insider dealing brought about a type of "Euro-crime" of insider trading throughout the European states, a relatively homogenous offence in its legal definition and characterized in the majority of cases by the use of the criminal punishment. The more articulated Directive in 2003 on market abuse — which contains a reference to the obligation of each member state to introduce an administrative sanction — had the effect of creating a strong wave of new criminalization of market abuse all over Europe, which was fostered by the social alarm felt by the imminent economic crisis and the financial scandals.

Therefore, the achieved harmonization of the provisions against market abuse —predominantly criminal offences — in different EU member states is already at a reasonable level, even if the harmonization initiatives adopted at the European level *never* made reference to *criminal* sanctions. Quite the opposite, these non penal Directives had a greater effect on the *harmonization of criminal provisions* compared to that achieved in others areas, such as those regarding environmental protection (2008/99/EC, 2009/123/EC), by the application of strictly penal Directives!

However, *sanctions* provided by the market abuse national laws appear to be *completely unharmonized*. There is a progressive and widening gap within the range of sanctions in both administrative and criminal sanctions, as seen in the recent and accurate comparative study conducted by CESR[7]. In Italy, for example, the administrative sanction for market abuse is 75.000.000 EUR — or, alternatively, ten times the profit —, in Finland 10.000 EUR and in Lithuania 1.450 EUR: the vast and impressive difference speaks for itself and lacks rational justification. Criminal provisions are also enormously divergent from each other, ranging from a maximum of 2 years (Belgium) to 12 years (Italy) or 15 years (Latvia) of imprisonment.

It is therefore urgent to achieve a *rational harmonization of the nature and the measure of the sanctions and of the definition of both criminal and administrative offences*. It is necessary to arrive at a harmonization compromise, on the basis of Article 83.2 TFUE, between an unsubstantial and useless criminal law and an excessive severity of

[6] Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) [COM (2011) 651 final].

[7] Committee of European Securities Regulators (CESR), Executive Summary to the Report on Administrative Measures and Sanctions as well as the Criminal Sanctions available in Member States under the Market Abuse Directive (MAD), 2008.

the (criminal and administrative) sanctions, given that a comparative analysis of the laws of the Member States on market abuse shows clear examples of both extremes. The expansion and increase in severity of criminal law is not per se a sufficient answer and might even be a counterproductive solution in terms of effectiveness.
Likewise, the present grave crisis of the European currency and the national debts make it necessary to think through the principles and criteria for the legitimation of criminal law in the complicated area of economics and financial markets. It is a known truth that the imposition of any criminal sanction needs a higher level of legitimation compared to any other intervention of the public powers, and this is particularly relevant in the present moment and in relation to this topic. In fact, the idea that financial markets escape the regulation of the national and supranational public institutions, deemed as representative of the popular sovereignty, and that they depend to a great extent on the evaluations of the rating agencies, has dangerously spread throughout European public opinion over the last months[8].
Consequently, any future decision about the use of criminal law to regulate financial markets must by necessity be, in form and content, democratically legitimated, rationally founded and respectful of both the demands for a greater protection of the EU citizens and EU institutions on one side and of the fundamental principles of criminal law on the other, according to the framework scheduled by the Stockholm Programme[9], the Communication of the Commission of 20th 2011[10] and, in particular, the European Parliament resolution of 22nd May, 2012[11]. It is precisely because we live in hard times of economic crisis and uncertainty regarding the future of the Union that we cannot afford to approach financial markets with a symbolic and populist use of criminal law. We must indeed —proceeding from the ticklish issue of financial markets— emphasize the necessity of a rational criminal policy based on fundamental principles, according to the guidelines provided by the Manifesto on European Criminal Policy[12].
In this context, the Commission has recently decided to set up an "Expert Group on EU Criminal Policy"[13], which is seen as a positive sign to join forces in an open dialogue between the European institutions and the academics and lawyers, always keeping in mind the technical quality, the coherence and the contents of European criminal policy. This is the point of view to which the European Criminal Law Review adheres, representing an open and pluralistic forum regarding the future of European criminal law.
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[8] "Perhaps the most troubling aspect of Europe's current malaise is the replacement of democratic commitments by financial dictates – from leaders of the European Union and the European Central Bank, and indirectly from credit-rating agencies, whose judgments have been notoriously unsound" [*A. Sen*, 'The Crisis of European Democracy', New York Times (22 May 2012)].

[9] The Stockholm Programme – An open and secure Europe serving and protecting citizen [2010/C 115/01].

[10] Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law [COM (2011) 573]. See our editorial in EuCLR 2/2011 to know more about the light and shade of this relevant document.

[11] European Parliament resolution of 22 May 2012 on an EU approach to criminal law [(2010)2310 (INI)].

[12] 'The Manifesto on European Criminal Policy in 2011' in EuCLR 1/2011 86-113.

[13] Commission Decision of 21 February 2012 on setting up the expert group on EU criminal policy [2012/C 53/05].